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THE ROLE OF THE EUROPEAN UNION IN ENSURING RESPECT
FOR INTERNATIONAL HUMANITARIAN LAW

SEPTEMBER 2011

SUPERVISOR:
DR. SHANE DARCY
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## Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<tr>
<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>CMLR</td>
<td>Common Market Law Review</td>
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<td>CUP</td>
<td>Cambridge University Press</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<tr>
<td>ENP</td>
<td>European Neighbourhood Policy</td>
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<td>EU</td>
<td>European Union</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILM</td>
<td>International Law Materials</td>
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<tr>
<td>IRRC</td>
<td>International Review of the Red Cross</td>
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<tr>
<td>JCMS</td>
<td>Journal of Common Market Studies</td>
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<tr>
<td>JCSL</td>
<td>Journal of Conflict and Security Law</td>
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<tr>
<td>JICJ</td>
<td>Journal of International Criminal Justice</td>
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<tr>
<td>MEPP</td>
<td>Middle-East Peace Process</td>
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<td>OJ C</td>
<td>Official Journal of the European Union (Information and Notices)</td>
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<td>OJ L</td>
<td>Official Journal of the European Union (Legislation)</td>
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<tr>
<td>OUP</td>
<td>Oxford University Press</td>
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<tr>
<td>SC</td>
<td>Security Council</td>
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<td>TIM</td>
<td>Temporary International Mechanism</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>YBIHL</td>
<td>Yearbook of International Humanitarian Law</td>
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Introduction

International humanitarian law seeks to regulate the use of force and limit the suffering of individuals during armed conflicts.¹ The relevance of these rules has never abated, although continually under question is their adequacy in the face of contemporary conflicts and the efficacy of existing enforcement mechanisms. The rules of international humanitarian law are violated by the parties to almost every armed conflict.² That is not to say that the system is obsolete, however; it has been affirmed that despite such widespread disregard, the ‘protective provisions of international humanitarian law prevented or reduced great suffering in many cases’,³ and so the project of promotion and enforcement may serve to improve those statistics.

International humanitarian law shares a critical weakness with international law generally – the lack of a central enforcement body and the resulting lack of effective implementation.⁴ This thesis focuses on the promotion of compliance with and the enforcement of international humanitarian law, in recognition that these areas generally receive insufficient attention relative to the scope of existing legal scholarship on more conceptual and substantive issues in this domain.

In the past half century many advancements in the capacity and influence of regional actors in the promotion and enforcement of international law have been witnessed.⁵ Regional actors have particularly been involved in various ways in an increasing number of armed conflicts, and they have been recognised as important actors with a potentially significant role to play in the preservation of international

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¹ For a concise overview of the development of international humanitarian law see ‘Foreword by Dr. Jacob Kellenberger’ in Jean-Marie Henckaerts and Louise Doswald-Beck (eds) Customary International Humanitarian Law, Volume I: Rules (CUP 2005). All websites in this section were last accessed 20 May 2011, unless otherwise indicated.
³ Ibid 675: ‘One of the peculiarities of international law is that its legal rules are not enforced through a central body. In this respect it differs fundamentally from domestic law, and herein lies its weakness which is often deplored’.
peace and order.⁶ The European Union (EU) in particular has increasing influence as an international actor.

This research examines whether and in what ways the EU is contributing to furthering the aims of international humanitarian law and increasing its implementation and effectiveness through its policies and initiatives of promotion and enforcement. The study also explores the role that EU Member States play in this respect, particularly with regard to enforcement of the law, for example through supporting the exercise of universal jurisdiction. Compliance theory is used to analyse the efforts of the EU to increase respect for the law by both third states and non-state actors. The implementation of the EU Guidelines on Promoting Compliance with International Humanitarian Law is also assessed, and the effectiveness of the various measures invoked is considered. Promotion in this context includes encouraging the ratification and implementation of international humanitarian law instruments, encouraging compliance with those instruments, promoting compliance with customary international humanitarian law, and promoting mechanisms of accountability. Enforcement includes any action taken by the EU or its Member States once violations of the law have occurred, for example the imposition of sanctions or the initiation of prosecutions.

This introduction provides an overall context for the study by providing an overview of the role of international organisations in international law, identifying the unique position of the EU; the role of the EU at international fora, with a particular focus on the United Nations; and by providing an overview of the EU and its external policy on human rights, in order to differentiate the EU’s approach on this matter from that of international humanitarian law. The evolving relationship between the EU and international humanitarian law and the role of the EU therein are also discussed, and the introduction then delineates current scholarship in the area and explains the structure and methodology of the dissertation.⁷

⁶ See Morrison (n 5) 55.
A. The Role of International Organisations in International Law

International organisations evolved subsequent to the formation of a system of independent and sovereign territories which created a need to cooperate on an international level, in relation to matters of mutual interest. \(^8\) International organisations can contribute to the development of international law, and can cooperate and function across a wide range of domains, facilitating the ‘relatively rapid creation of new rules, new patterns of conduct and new compliance mechanisms’. \(^9\) International organisations are now considered crucial to the international system, and Shaw has observed that ‘if there is one paramount characteristic of modern international law, it is the development and reach of international institutions, whether universal or global, regional or subregional’. \(^10\) International legal personality can be attributed to and enjoyed by these organisations, subject to their fulfilment of the following criteria:

1. a permanent association of states, with lawful objects, equipped with organs;
2. a distinction, in terms of legal powers and purposes, between the organization and its member states;
3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states. \(^11\)

This last characteristic is considered indispensible by the International Law Commission, whereby an international organisation is defined as that ‘established by a treaty or other instrument governed by international law and possessing its own international legal personality’. \(^12\) The International Court of Justice (ICJ) confirmed the legal personality of the United Nations in 1949, affirming that as an ‘international person’, it is ‘a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims’. \(^13\) Despite their potential legal personality, which confers both rights and duties, international organisations retain a status distinct from that of states in international law. Owing to the principle of speciality, any rights and duties

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\(^9\) Ibid 1284. On the varying roles played by international organisations in terms of law-making, see also Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 691-693.
\(^10\) Shaw (n 8) 1284.
\(^11\) Brownlie (n 9) 677.
conferred by legal personality are limited and the organisations are thus ‘invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them’.14 While the scope of their powers and capacity may be limited, their very existence is owed to the willingness of member states to accept in turn certain limitations on powers and liberties inherent in their own sovereignty.15

Two broad distinctions can be drawn between various types of international organisations.16 The first is the distinction between universal and non-universal organisations. The United Nations is, of course, the prime example of a universal international organisation, having an open and near-universal membership,17 a wide range of functions, and an ‘extensive field of activity and interest’.18 Regional organisations are examples of the non-universal grouping, having limited membership and a more limited range of functions, activities and interests.19 The second distinction that can be drawn is between private international organisations, which would include international non-governmental organisations, and public international organisations, which are generally created by treaty and predominantly consist of states in their membership.20 Public international organisations, which include regional organisations such as the European Union, can be defined through the following characteristics: establishment of an international agreement among states; possession of a constitution-like instrument; possession of organs distinct from the members; and establishment under and in conformity with international law.21

International organisations, including regional organisations, have contributed significantly to peace, security and stability in international relations, and their goals and values ‘are of vital significance for all states and humanity as such. Clearly interdependence is increasingly being acknowledged and accepted as a practical

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16 For further classifications commonly applied see Amerasinghe (n 15) 9.
17 Non-member states and entities with permission to participate as observers in the General Assembly include the Holy See, and the Permanent Observer Mission of Palestine to the United Nations. Kosovo has also yet to gain full membership.
18 Shaw (n 8) 56.
19 See Shaw (n 8) 1296.
20 Amerasinghe (n 15) 9.
21 Ibid 10.
reality’. Many issues are of international concern, and thus require an international response, which can be achieved most effectively through international, and increasingly through regional, organisations:

People and their governments now look far beyond national frontiers and feel a common responsibility for the major problems of the world and for lesser problems that may subsist within smaller groups of states. Many of those problems have overflowed national boundaries, or called for attention beyond national limits, become international and demanded regulation and treatment in a wide sphere, with the consequence that governments have sought increasingly to deal with them through international organizations.23

While the United Nations may play the principal role in this respect, its Charter also recognises the capacity and legitimacy of the involvement of regional organisations in the maintenance of international peace and security:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.24

The charter also allows for the Security Council to utilise regional arrangements for enforcement action under its authority, but proscribes any such action outside the authorisation of the Security Council.25

Certain regional organisations in fact predate the United Nations, for example the Organisation of American States and the Arab League, and it is significant that while regionalism eventually became most institutionally developed in Europe, it has been recognised that the ‘seeds of American regionalism were originally planted with defence against external [European] aggression in mind’.26 The proliferation of regional organisations since the adoption of the United Nations Charter has been attributed to a number of causes, three of which in particular are generally perceived as having been most influential: 1) the onset of the Cold War, motivating the development of regional alliances for collective defence against external threats; 2)
decolonisation, resulting in the creation of numerous newly independent states which resulted in non-aligned groupings separate from the Eastern and Western blocs; and 3) globalisation, which has encouraged regional alliances in order for clusters of states to prosper economically.\textsuperscript{28}

While collective defence has been an important incentive behind the creation of many regional organisations, it represents only one form of inter-state cooperation. Cooperation among the member states of any regional organisation can take a number of other forms, such as economic and political integration, and technological and cultural cooperation and exchange.\textsuperscript{29} Although mutual defence was a consideration during the early stages of European integration,\textsuperscript{30} economic and political integration were the core aims of the European Economic Community, which, along with the European Coal and Steel Community and the European Atomic Energy Community, later formed the European Union, with a broad basis of cooperation and integration throughout the organisation.\textsuperscript{31}

The European Union has come to be considered unique or \textit{sui generis} as a regional organisation. This is due in part to its supranational character, which makes it stand out in the ‘family’ of international organisations.\textsuperscript{32} Federations have a similar character, although federal states do not enjoy the status of sovereign entities, while EU Member States retain that privilege.\textsuperscript{33} While economic integration is a key driver, the members of the EU also strive towards the same aim as the United Nations: the maintenance of peace and security. In this respect, a broad understanding of peace is necessary to appreciate the range of both internal and external domains that the EU engages in:

\begin{quote}
Bearing in mind that peace is not merely the absence of war and that interdependence and cooperation to foster human rights, social and economic development, disarmament, protection of the environment and ecosystems and the improvement of the quality of life for all are indispensible elements for the establishment of peaceful societies...
\end{quote}

The European Union was primarily established to create a system of exclusive economic and trade preferences for its members and not primarily to follow or

\begin{itemize}
\item[$^{28}$] Shaw (n 8) 1287.
\item[$^{29}$] Brown (n 27) 237.
\item[$^{30}$] Ibid 245.
\item[$^{31}$] Shaw (n 8) 1288.
\item[$^{32}$] Magdalena Ličková, ‘European Exceptionalism in International Law’ (2008) 19(3) \textit{EJIL} 463.
\item[$^{33}$] Ibid 464.
\item[$^{34}$] Preamble, UNGA Res 46/14, UN Doc A/RES/46/14 (31 October 1991).
\end{itemize}
promote certain ethical ideals or common values. An interest in establishing wider common political aims and foreign policy did not enter the European order until much later than the establishment of the original European communities. Among the motivations which led to closer economic ties between the states was the prevention of future conflict between European states, the protection of the economies and states of Europe, and a contribution to the maintenance of world peace. 35 This is evident from the preamble of the Treaty establishing the European Coal and Steel Community of 1951. The preamble sets out the principal beliefs of the six states involved in the creation of the European Community:

Considering that world peace may be safeguarded only by creative efforts equal to the dangers which menace it;
Convinced that the contribution which an organized and vital Europe can bring to civilization is indispensable to the maintenance of peaceful relations;
Conscious of the fact that Europe can be built only by concrete actions which create a real solidarity and by the establishment of common bases for economic development;
Desirous of assisting through the expansion of their basic production in raising the standard of living and in furthering the works of peace;
Resolved to substitute for historic rivalries a fusion of their essential interests;
to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts;
and to lay the bases of institutions capable of giving direction to their future common destiny... 36

Thus it is clear that from the founding instrument of the European Community that the maintenance of world peace was an aim, that an organized Europe had a crucial role to play in fostering peaceful relations, both internally and externally, and that such an organised community was dependant on internal solidarity. The states also resolved to create institutions capable of guiding a ‘common destiny’. All of these considerations remain relevant to the modern European Union, but in the early phase of the organisation the practical links that developed were purely economic and bore no explicit relation to the maintenance of peace and security or the promotion of human rights or international humanitarian law, either within the European Community or in the international sphere.

The EU has developed considerably in scope and size since its economic beginnings over half a century ago and now represents a rapidly evolving economic

36 Preamble, Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951).
and political entity, which has developed common positions and coordination on a range of issues, related to both internal organisation and policy and external relations. It has grown from a group of six founding members to a powerful organisation of twenty seven diverse Member States, representing the majority of countries in territorial Europe.

The EU has been characterised as an ‘economic giant, a political dwarf and a military worm’, indicating the widely disparate levels of potential external influence. There have been many definitions of the role of the EU in international relations, relating to its economic, civilian and normative power, and recently attention has also been focused on the ethical power of Europe. It can be straightforward to determine what the EU declares that it is, or declares that it does, and more difficult to ascertain what the EU is, and what it actually does in terms of consistent practice. Forsberg has attempted to clarify debates on the topic by saying that when speaking in normative terms, it is desirable to indicate not only what kinds of norms are meant by ‘the normative’, but also whether normative refers to: identity, interests, behaviour, adopted means of influence, or achievements of the EU. Normativity in this context includes interests, means of influence, and behaviour to a certain extent. From Manners’ perspective, normative power ‘can be seen on a par with “ideological power” or “power over opinion”’, and he has simplified the concept of normativity with the phrase ‘the ability to shape conceptions of “normal”’. In this respect, the concern is whether the EU can use its global clout to spread the conception of compliance with international humanitarian law as being ‘normal’ and of violations as aberrations that will not be tolerated. Describing a power as normative

40 Manners defined normative power as power of example by arguing that the ‘most important factor shaping the international role of the EU is not what it does or what it says but what it is’, see Manners as cited in Tuomas Forsberg, ‘Normative Power Europe (Once More): A Conceptual Clarification and Empirical Analysis’ (Paper Prepared for the Annual Convention of the International Studies Association, New York February 2009) <http://www.allacademic.com/meta/p_641280_index.html>.
41 Forsberg (n 40) 1.
distinguishes it in terms of its interests – which are not always strategic or selfish, but may stem from other concerns.\textsuperscript{43}

International organisations are not ‘merely the repository of state practices or the delegated agents of states’.\textsuperscript{44} Their role as international actors and the level of their potential influence on international law-making and on compliance with international law should not be underestimated. The practices and actions of organisations such as the EU are significant and have ‘normative consequences beyond those that are explicitly delegated to them. [International organisations] are new lawmaking actors in their own right and their normative impact cannot be reduced to those of their member states’.\textsuperscript{45} The mechanisms of normative power most relevant in this context are persuasion and the invocation of norms which are already binding on third parties.\textsuperscript{46} The following sections discuss in particular the influence of the EU in international fora in relation to international law, and the exercise of the EU’s normative power through its external policy on international human rights law and international humanitarian law.

\textbf{B. The European Union as an Actor in International Fora}

The European Union both ‘shapes and is shaped by international society’.\textsuperscript{47} It is generally recognised that the EU has transformed from being merely an international organisation to being a ‘player within international organisations’,\textsuperscript{48} and the increasing scope and level of influence of the EU on the international landscape is incontrovertible. The organisation is widely understood to have an ‘extremely felicitous influence’ internationally and to represent a ‘magnetic force in world politics’.\textsuperscript{49} States on the periphery of the EU have been drawn towards it, rather than driven away.\textsuperscript{50} The EU is more than its Member States, and it is endowed through its

\footnotesize
\textsuperscript{43} See Forsberg (n 40) 11.
\textsuperscript{45} Ibid.
\textsuperscript{46} See Forsberg (n 40) 16, for a discussion of the four different mechanisms of normative power. Forsberg cites Manners in stating that ‘in its most general form normative power relies more on persuasion, argument and shaming than on illegitimate force to shape world politics’.
\textsuperscript{48} Ibid 5.
\textsuperscript{50} Ibid.
sui generis or unique character with certain advantages: ‘it offers a model to others, is generally not regarded as threatening in the traditional way that sovereign states often are, and its normative foundation is the product and development of the dominant liberal international order’.\footnote{Steve Marsh and Hans Mackenstein, \textit{The International Relations of the European Union} (Pearson 2005) 70.} The ambition of the EU to become a global actor has been attributed to two factors, one external and one internal. The external factor is the international expectation of the EU’s increasing action, and the internal is connected to the ‘increasing advantages accruing to the member states of acting collectively in an era of globalisation’.\footnote{Ibid.}

The external relations of the EU differ ‘enormously in type, scope and participation. They can be bilateral or multilateral, issue-specific or broad-ranging, and short-term or open-ended’.\footnote{Ibid 62.} The EU can and does act multilaterally, bilaterally, and very occasionally unilaterally.\footnote{Jørgensen (n 47) 12.} There is a strong preference for multilateralism, owing to the fact that this can facilitate the dispersal of norms, promote the ‘EU integration model as an example to other regions of how to develop prosperity and to overcome regional conflicts and instability’, and can be more straightforward to coordinate than a ‘multitude of bilateral relationships’.\footnote{Marsh and Mackenstein (n 51) 62.} Bilaterally, the EU engages in strategic partnerships with major powers such as the United States and China, along with multiple engagements with other third states under various policies. In terms of unilateral action, examples are sparse as of yet, but Karl Zemanek has ominously advised caution in assuming the durability of this approach, as United States practice has been ‘characterized by an increasingly assertive policy towards the outside world and a penchant for unilateral action – features which the European Union might try one day to emulate’.\footnote{Karl Zemanek as cited in Nigel D White, ‘The Ties that Bind: the EU, the UN and International Law’ (2006) 37 \textit{Netherlands YB Intl L} 57, 105.} For the foreseeable future, however, the preference is likely to remain multilateral and bilateral approaches for the most part.

The Treaty on European Union sets the agenda for the organisation’s action on the international scene. The action of the EU should 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.\textsuperscript{57}

As Piet Eeckhout has discerned it is somewhat of a ‘great ambition to project these values to remote corners of the globe’.\textsuperscript{58} Knud Erik Jørgensen has also interpreted certain images the EU projects of being a ‘frontrunner’ or a ‘leading player’ internationally as indicating the possibility that a ‘politics of aggrandizement is emerging’.\textsuperscript{59} The paradox inherent in the fact that the continent which once extended its control to vast swathes of the world through imperialism is now becoming increasingly influential as a normative global actor has also not been lost on many international studies scholars, and it is worth considering whether it may come to represent ‘a new form of European symbolic and institutional dominance’.\textsuperscript{60} EU Member States’ colonial legacies do indeed provide certain linkages and advantages,\textsuperscript{61} but they can also complicate diplomacy and efforts towards coordinated positions on matters of international law.

Another common way of signalling the significance of the EU as a global actor is to assert that it has a notable international ‘presence’.\textsuperscript{62} It is, in fact, much more than merely an actor or a ‘presence’ in the international arena: it is also a process, ‘a set of complex institutions, roles and rules which structure the activities of the EU itself and those of other internationally significant groupings with which it comes into contact’,\textsuperscript{63} and as such it is not static but rather a constantly evolving set of dynamics, interacting with other processes that are also in flux. As an international organisation it has many different agendas, is involved in a number of arenas, has formed many evolving relationships with other various actors, both state and non-state, and functions on multiple political and diplomatic levels.\textsuperscript{64} Considering this complex multiplicity it is unsurprising that divisions arise:

\textsuperscript{57} Consolidated Version of the Treaty on European Union, [2010] OJ C83/13, art 21(1).
\textsuperscript{59} Jørgensen (n 47) 4-5.
\textsuperscript{60} Rosecrance (n 49) 22.
\textsuperscript{61} See Marsh and Mackenstein (n 51) 53.
\textsuperscript{64} Ibid 252-256.
Divisions within the executive branch are pronounced, not least because the executive branch in Europe is bifurcated or more. That is, apart from the EU institutions characterized by their internal divisions, the European Union currently has 27 ministries of foreign affairs, 27 ministries of defence and 27 prime ministers/heads of state.\(^{65}\)

It is these divergences that cause many to wonder who is speaking when the EU is represented in international organisations.\(^ {66}\) Jørgensen has questioned whether the European Union is a collective of states, a union, or both of these, and concludes that it holds the potential to be all of these.\(^ {67}\) Notwithstanding these challenges, consensus is often reached on certain objectives and Member States appreciate the ‘incentives for common policy-making, not least the imperatives of interdependence’, and they are also aware of the advantages of acting as a bloc and thus potentially carrying more weight, while simultaneously seeking to ‘retain national prerogatives in foreign policy’.\(^ {68}\)

Two factors can be highlighted in explaining the extent of EU influence in international organisations despite the difficulties mentioned above: firstly, EU Member States often form a considerable portion of the membership of such organisations; and secondly, the EU’s financial contribution to many international organisations is significant.\(^ {69}\) The EU can influence third countries individually through its external action, but it can also influence countries through its action in other international organisations. The Member States are bound to coordinate their action in such instances, as provided by the Treaty on European Union:

> Member States shall coordinate their action in international organizations and at international conferences. They shall uphold the common positions in such forums.  
> In international organizations and at international conferences where not all the Member States participate, those which do take part shall uphold the common positions.\(^ {70}\)

Additionally, in such organisations or conferences where not all Member States are involved, those involved should keep all EU countries informed of any issues of common interest, and any Member States which are involved in the United Nations Security Council should similarly keep the remaining countries of the EU informed.

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\(^{65}\) Jørgensen (n 47) 11.  
\(^{66}\) Ibid.  
\(^{67}\) Ibid 15.  
\(^{68}\) KE Smith (n 62) 105.  
\(^{69}\) Jørgensen (n 47) 6.  
and ought also to, ‘in the execution of their functions, defend the positions and the interests of the Union’.  

There are a wide range of international organisations in which the EU holds considerable sway; however the UN shall be emphasised here as it is the main arena in which the EU’s policies and actions relating to the promotion of international law and specifically international humanitarian law become most relevant. The United Nations and the European Union are in some ways heavily interdependent, having similar aims and a similar emphasis on multilateral solutions to global issues, and it has been argued that ‘[i]ntellectually and conceptually, the European Union and the United Nations are built on the same foundations. If this ground becomes shaky, both structures are in danger’. Other scholars have echoed this sentiment in stating that the relationship between the EU and international organisations is important for the future of both the EU and those organisations. The significance of this has been recognised by EU High Representative Catherine Ashton, who has signalled a commitment to continued and close cooperation, and noted that regional organisations are ‘building blocks for global governance, with a dual responsibility – first, a responsibility to enhance security, development and human rights in their own region, and second, to support UN efforts to promote these goals around the world’. 

Strengthening the United Nations has been a declared priority of the EU since the adoption of the European Security Strategy in 2003. The commitment of the EU to multilateralism, with the United Nations ‘at its core, is a central element of external action’. The EU’s strong commitment is ‘rooted in the conviction that to respond successfully to global crises, challenges and threats, the international community needs an efficient multilateral system, founded on universal rights and values’. Some would even argue that the increasing clout of regional organisations at the UN, 

71 Ibid art 34(2).
73 See, e.g., Jørgensen (n 47) 1-2.
77 Ibid.
and particularly the EU, is excessive, and is injurious to the interests and preferences of individual and smaller groupings of states.\textsuperscript{78}

The EU is not a member of the United Nations, but all EU Member States are members of the UN, and some are founding members of the United Nations.\textsuperscript{79} An information office was originally held by the European Commission in New York. A delegation to the United Nations was formed when the European Economic Community was granted permanent observer status in 1974,\textsuperscript{80} making the EU the first non-state entity to be granted such status. Given the fact that the EU is the largest financial contributor to the United Nations system, among other factors, it is unsurprising that this observer status was upgraded in 2011 to what has been referred to as ‘super-observer’ status,\textsuperscript{81} after ‘overcoming objections from small states that they could see their influence eroded’.\textsuperscript{82} The move, which entitles the EU to enhanced status at the General Assembly, could set a precedent which other regional organisations, such as the African Union and the Arab League, could try to follow.\textsuperscript{83} The change means that the Member States plus the EU representative will become the notorious 27-plus-1: essentially having 28 representatives at the UN, similar to its 28 memberships in other organisations such as the World Trade Organisation and the Food and Agriculture Organisation.\textsuperscript{84}

Influence between the EU and United Nations can flow in both directions – while the EU seeks to influence outcomes at the United Nations according to its interests and preferences, the United Nations and other international organisations also influence processes and policies within the EU.\textsuperscript{85} The EU is also influenced internally, not only by its Member States but also by interest and lobby groups, with Brussels acting as a ‘magnet’ for such groups who seek to further their agendas on the

\textsuperscript{78} See, e.g., ‘Why UN Acted over Libya and Ivory Coast – but not Syria’ (15 May 2011) [http://www.bbc.co.uk/news/world-africa-13389470].
\textsuperscript{80} UNGA Res 3208 (XXIX), Status of the European Economic Community in the General Assembly, 29\textsuperscript{th} Session of the General Assembly, 2266\textsuperscript{th} Plenary Meeting (11 October 1974).
\textsuperscript{82} ‘EU Wins Super-Observer Status at UN’ (03 May 2011) [http://www.eubusiness.com/news-eu/un-diplomacy.9rm].
\textsuperscript{83} Ibid.
\textsuperscript{84} See Jørgensen (n 47) 6.
\textsuperscript{85} See Jørgensen (n 47) 8.
international plane through the EU.\textsuperscript{86} There are also two parts to be played by the EU, in that it is both an actor and an arena for the representation of its Member States’ interests: this has been identified as the ‘split personality’ of the EU.\textsuperscript{87} This obstacle to cohesion may be addressed to an extent with the enhanced status of the EU at the General Assembly, an upgrade offered partly in recognition of the reforms ushered in by the Lisbon Treaty. The United Nations is also both an actor and an arena, and is further comprised of multiple political arenas. The degree of cohesion in the EU’s action at the United Nations and the extent of its influence, therefore, may depend on the particular engagement under consideration, and also the timing of the involvement: the degree of EU ambition at the United Nations ‘varies over time and by issue area, and the coordination that we observe on any one topic or in any one forum may differ markedly from that we perceive elsewhere’.\textsuperscript{88}

Examples of strong EU coordination at the UN are related to security in Africa, the Kyoto protocol, the Rome Statute of the International Criminal Court, support for UN human rights machinery, and endorsement of the Responsibility to Protect doctrine.\textsuperscript{89} Examples of deep divisions often include discord over the Iraq war, and levels of engagement with the Security Council and the general United Nations reform processes.\textsuperscript{90} A significant level of support is provided by the EU in particular for operational activities of the UN in countries experiencing armed conflict, through peacekeeping and other means, and the EU demonstrates a clear ‘preference for basing security in international law’.\textsuperscript{91} Franziska Brantner and Richard Gowan have recognised a confluence of interest in the emphasis placed by the EU on international law at the UN, viewing it as evidence both of a ‘progressive desire for a rules-based world order and a conservative goal of preserving power through the structures of the UN at a time of change’.\textsuperscript{92} This converging of interests with a positive normative outcome may particularly be true with respect to the European Union’s promotion of compliance with international humanitarian law, which in addition contains the motivation of maintaining security in regions of interest to the European Union.

\textsuperscript{86} Marsh and Mackenstein (n 51) 53.
\textsuperscript{87} Brantner and Gowan (n 72) 37, citing Jørgensen and Laatikainen, ‘The EU @ the UN: Multilateralism in a new key?’ (Paper prepared for the International Studies Association Annual Convention, San Diego, 22–25 March 2006).
\textsuperscript{88} See Brantner and Gowan (n 72) 37-38.
\textsuperscript{89} See, in general, Brantner and Gowan (n 72).
\textsuperscript{90} Ibid.
\textsuperscript{91} Ibid 38-39.
\textsuperscript{92} Ibid 39.
Instruments of external policy have helped the EU to protect and promote its interests and values in its dealings with third countries. Military capability has also been created, for example, to support civil instruments of crisis management, and the Lisbon treaty introduced the position of a High Representative for Foreign Affairs and Security Policy, in order to ‘enhance the scope and effectiveness of the EU’s external action’. The objectives of the EU in its external relations include making a contribution to:

 peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Human rights in particular have made a distinct development on the external relations of the EU. Human rights ‘steadily gained in importance’ from the 1960s, but it was not until the 1990s that the process began to accelerate considerably. The ‘dynamic development’ that transpired involved both the external promotion of human rights and internal constitutionalisation. The internal changes eventually culminated with the entry into force of the Lisbon Treaty, giving the Charter of Fundamental Rights legally binding effect, and paving the way for EU ratification of the European Convention on Human Rights.

The EU, in order to pursue the promotion of human rights externally, adopts and implements both binding and non-binding instruments relating to the various fields, in addition to other measures. An example of the former would be the so-called human rights clause in agreements, a clause stipulating that human rights are an essential element in the relations between the parties, which, since the 1990s has

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97 Groussot and Pech have noted that, more than merely offering the option of accession, the Treaty on European Union in fact requires the EU to take action – see Xavier Groussot and Laurent Pech, ‘Fundamental Rights Protection in the European Union post Lisbon’ (2010) European Issue 173 Fondation Robert Schuman 2.
‘more or less systematically’\textsuperscript{98} been inserted into all agreements on trade and cooperation with third countries and regions. An example of the most comprehensive of these is the Cotonou Agreement, an agreement governing trade and aid with countries in Africa, the Caribbean and the Pacific (ACP countries). Violations of human rights in these and other third countries can potentially lead to the suspension of trade concessions and the reduction or suspension of aid programmes.\textsuperscript{99} Examples of non-binding human rights policy instruments include the EU human rights guidelines on: the death penalty; torture and inhuman treatment; human rights dialogues with third countries; children and armed conflict; human rights defenders; protection of the rights of the child; violence against women and girls; and finally, the guidelines on international humanitarian law, which constitute the starting point for this study.\textsuperscript{100} The guidelines indicate priorities for the EU in its internal and external action, and guide external human rights policy.\textsuperscript{101}

Other measures used by the EU to promote human rights are: political dialogues, election observation, funding of the European Initiative for Democracy and Human Rights, and the imposition of sanctions for human rights violations. EU dialogues with third countries can be either general political dialogues that may have a human rights element, or human rights-specific dialogues. Human rights have been given ‘prominence’ in political dialogues with all third countries, throughout the EU’s development assistance programmes and in all multilateral engagements.\textsuperscript{102} Specific human rights dialogues have been maintained, for example, with China, Russia and Iran.\textsuperscript{103} Democracy promotion is linked with human rights promotion in the deployment of election observation missions, which in 2010 operated in a number of African countries such as Burundi, Côte d’Ivoire, and Sudan.\textsuperscript{104}


\textsuperscript{101} Ibid.


abolition of the death penalty, and combating torture and discrimination.\textsuperscript{105} The initiative also supports joint efforts between the EU and other organisations such as the United Nations, the International Committee of the Red Cross (ICRC), the Council of Europe and the Organisation for Security and Cooperation in Europe, in the promotion of human rights.\textsuperscript{106} Sanctions have been imposed by the EU in response to serious human rights breaches, for example, in Burma and Zimbabwe.\textsuperscript{107}

EU promotion of human rights, both internally and externally, is considerably more developed, mainstreamed and sophisticated than its promotion of international humanitarian law, which is unsurprising considering the development of the former since the 1960s. Another major difference is that human rights is often perceived as coming from within, or even being inherent to, the EU legal order,\textsuperscript{108} whereas international humanitarian law comes from without, in the form of norms legally binding on Member States through international conventions, international protocols, and customary international law. Also, unlike the field of human rights, where annual reports are published by the European Commission, outlining progress in areas such as initiatives in non-EU countries, EU action in international fora, and detailed country-specific assessments and dialogues, there is no dedicated reporting system for monitoring the promotion of international humanitarian law or the implementation of the EU Guidelines on Promoting Compliance with International Humanitarian Law, although admittedly some information about compliance with international humanitarian law is subsumed into the annual human rights reports. While the sharp distinction between the application of international human rights and international humanitarian law is fading in relation to contemporary conflicts, and such evolution may admittedly have progressive implications for the protection of civilians, the danger remains that if the EU’s external policy on promotion of the latter is subsumed into its policy on the former, insufficient attention may be paid to specific violations of international humanitarian law, and the specific modes of accountability that may be attached to such violations.\textsuperscript{109}

\begin{footnotes}
\item[106] Ibid.
\item[107] Ibid.
\item[108] See, e.g., von Bogdandy (n 95); Lerch and Schwellnus (n 96); and Tawhida Ahmed and Israel de Jesus Butler, ‘The European Union and Human Rights: An International Law Perspective’ (2006) 17(4) \textit{EJIL} 771.
\item[109] Different modes of promoting compliance and enforcement are discussed in Chapter 1.
\end{footnotes}
D. The Emerging Relationship between the European Union and International Humanitarian Law

When did international humanitarian law come into the ‘orbit’ of the European Union?\(^{110}\) It has been observed that the integration of international humanitarian law into the sphere of the EU has been incremental, similar to the development of the EU itself.\(^{111}\) The conflicts in the former Yugoslavia have been identified as a defining moment in terms of the EU’s invocation of international humanitarian law.\(^{112}\) In 1987, the European Community (EC) representative mentioned international humanitarian law in relation to only one of the many conflict situations under review before the Third Committee of the UN General Assembly, whereas little over a decade later, in 1999, the Finnish representative to the UN General Assembly, speaking on behalf of the EU, referred explicitly to international humanitarian law in relation to eleven of the conflicts under review.\(^{113}\) Around this time, however, the EU was criticized for treating this body of law as a subset of human rights law and not giving it the prominent place it deserves; for being more consistent in terms of urging respect for international humanitarian law in relation to international rather than non-international armed conflicts; and for scant reference in EU practice to international humanitarian law as a discrete field of international law.\(^{114}\)

In the past decade, the EU has adopted and revised policy specifically relating to international humanitarian law, no longer treating it as a subset of human rights but rather as a separate set of norms to be considered alongside human rights, and increasingly issues statements concerning humanitarian norms in relation to non-international armed conflicts. The EU is no longer limited to ‘declaratory practice’\(^{115}\) in relation to the field of international humanitarian law but also engages in civilian and military operations during armed conflicts, has become involved with training

\(^{110}\) Schütze has used this term when questioning the relationship between the European legal order and international treaties to which it is not a party, and states that such treaties ‘may overlap with the competences of the Community and thus come into the “orbit” of the Community legal order’: see Schütze (n 79) 12.


\(^{113}\) Desgagné (n 112).

\(^{114}\) Ibid 455, 459-60, 477.

\(^{115}\) Ibid 457.
third party armed forces, and in one instance has set up an international fact-finding mission to investigate violations.\textsuperscript{116} The practice of the EU in relation to international humanitarian law has become more engaged and applied and this appears likely to increase, although certain inconsistencies remain.

One of the most recent additions to the European Union’s collection of policy instruments relates to the promotion of international humanitarian law. The Guidelines on Promoting Compliance with International Humanitarian Law are one of the first instruments to relate in particular to the objective of contributing to the observance of and the development of international law. International humanitarian law has become increasingly relevant within the scope of EU activities through a number of channels, and so it became necessary for the EU to develop a common stance on this body of law.\textsuperscript{117} The external promotion of international humanitarian law is crucial because the world has become increasingly interdependent in recent years, and it is not possible to rely solely on the parties to a conflict for adherence to the principles laid out in international humanitarian law, without considerable external guidance and encouragement to comply with the rules and regulations, and without genuine risk of censure or sanction in the case of their violation. The EU is playing a growing role in this area of promotion and enforcement.

Conflicts, whether international or non-international, can have widespread implications for regional and international peace and security. The rise of phenomena such as humanitarian intervention and in more recent times the doctrine of the Responsibility to Protect\textsuperscript{118} demonstrate the increasing tendency towards third party influence and intervention in armed conflicts and situations of mass atrocities, for the protection of civilians.\textsuperscript{119} It has been recognised that ‘serious and continuing violations of human rights and international humanitarian law by a [state] are no longer considered its internal affair ... the community of states can intervene through

\textsuperscript{116} These examples are discussed in detail in Chapter 3.

\textsuperscript{117} The various points of entry for issues of international humanitarian law into the EU legal order is outlined under the heading, ‘A Role for the European Union in the Promotion and Enforcement of International Humanitarian Law?’ in the following section.

\textsuperscript{118} These shall be dealt with in this context in Chapter 3.

\textsuperscript{119} For general discussion on the increasing tendency for multilateral intervention in armed conflicts for the protection of civilians, see Jeremy Sarkin, ‘The Role of the United Nations, the African Union and Africa’s Sub-Regional Organizations in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect’ (2009) 53(1) \textit{J African L} 1-33; Gareth Evans, \textit{The Responsibility to Protect: Ending Mass Atrocity Once and For All} (Brookings Institution Press 2008); Simon Chesterman, \textit{Just War or Just Peace? Humanitarian Intervention and International Law} (OUP 2001); Rob McRae and Don Hubert (eds), \textit{Human Security and the New Diplomacy: Protecting People, Promoting Peace} (McGill-Queen’s University Press 2001).
its co-operative organs’. As an example of such a cooperative organ and as a prominent regional organisation, the EU is increasingly expected to contribute positively in terms of the promotion of certain values, both by citizens of the Member States, and by the international community. The European Commission has acknowledged this in a report addressing the role of the EU in international affairs, stating that citizens of the EU ‘expect the Union to use its substantial international influence to protect and promote their interests and there is an expectation among our international partners for Europe to assume its global responsibilities’. The Commission highlights the importance of effective utilisation of EU external policy assets, and notes that the EU can achieve greater sway by acting collectively.

It is now impossible to ignore the EU as an actor on the international plane. As Frank Hoffmeister has affirmed, the EU ‘has become well established as a global actor’, and therefore the key is to ensure that when it acts, it acts in conformity with its core values, and in accordance with its stated principles and objectives.

In terms of the applicable obligations of international humanitarian law, the EU Member States themselves have all ratified the 1949 Geneva Conventions and Additional Protocols I and II, while a majority of EU countries have ratified Additional Protocol III. The EU is not party to the Geneva Conventions, although as a discrete actor itself, it may be bound under certain circumstances by customary international law, or may be affected under the rules of state responsibility. In any case, the EU can represent the collective obligations and values of the Member States where appropriate.

Many scholars have debated whether the EU has a normative role to play in the protection of human rights. This study will question whether a similar role could be developed in terms of international humanitarian law, with respect to the promotion of compliance and enforcement. It could be that the EU in this context uses ‘soft power’, or diplomacy, through what is sometimes referred to as ‘soft law’, for example the guidelines, to achieve greater compliance with existing legal

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120 Fleck (n 2) 685.
121 Report: Europe in the World (n 93) para 2.
122 Ibid.
124 Ibid 55. A discussion of any independent obligations the EU may have under international humanitarian law or customary international humanitarian law is provided in Chapter 2.
125 See, for example, Manners (2008) (n 39); Lerch and Schwellnus (n 96); Richard Youngs, ‘Normative Dynamics and Strategic Interests in the EU’s External Identity’ (2004) 42(2) JCMS 415; Philip Alston (ed), *The EU and Human Rights* (OUP 1999).
commitments. It is hard to see that economic factors will be used as a carrot in this area, (as is the case, for example, in terms of promoting human rights in accession countries), but could possibly be used as a stick, in terms of restricted trade agreements, arms controls, and sanctions. One certainty is that the European Union has the potential to heavily influence normative development in this area, considering the impact its voice can have internationally. As Navanethem Pillay has expressed, ‘[w]hen the EU speaks, people listen. When the UN speaks on human rights issues, people also listen, and when we are in tune we can be an important force for change’. 126 It has also been observed that as the EU enters new and evolving spheres of activity, it has ‘occasionally seemed to reach the limits of its capacity to lay claim to the new territory on which it finds itself’. 127 It is thus instructive to examine whether that danger may present itself in this instance. It may be too early yet to conclude whether the EU, once described as an ‘unidentified political object’, 128 is a normative actor in terms of international humanitarian law, but it is important to consider whether the EU could or should become a normative actor in the realm of international humanitarian law.

E. A Role for the European Union in the Promotion and Enforcement of International Humanitarian Law?

The EU in its external capacity is acting increasingly within the realm of international humanitarian law, although the focus is relatively recent within the EU overall. Article 2 of the Treaty on European Union states that the European Union ‘is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States’. 129 The question arises then as to how international humanitarian law has become relevant to the operations of the European Union. One point of entry for international humanitarian law into the concerns of the EU is a connection between the protection of human rights in

127 M Smith (n 63) 260.
128 Jacques Delors, former President of the European Commission, famously described the EU in this manner when discussing the future of the EU in 2001: Presentation by Jacques Delors, ‘Where is the European Union heading?’ (Series of Conferences in the United States, 26 March - 4 April 2001). Copy on file with author.
situations of armed conflict, and a desire to ensure that the parties respect the laws of armed conflict in addition. In its approach to such issues, the EU’s statements requesting compliance with international humanitarian law are often couched in a human rights framework, or combined with requests for compliance with human rights norms, along with other humanitarian aims.\textsuperscript{130}

Another point of entry for international humanitarian law is in the emphasis on the promotion of the rule of law. The rule of law is one of the key objectives of the EU. The EU claims that it will pursue common policies and actions, one of the aims being to ‘consolidate and support democracy, the rule of law, human rights and the principles of international law’.\textsuperscript{131} The European Security Strategy also addresses the rule of law objective, in stating that the ‘development of a stronger international society, well functioning international institutions and a rule-based international order’ are key EU priorities.\textsuperscript{132} Examples of external action of the EU relating to this objective include the rule of law mission for Iraq (EUJUST LEX), and the rule of law mission to Georgia (EUJUST THEMIS), and it has been stated that ‘[r]ule of law issues are increasingly integrated into the EU’s ESDP missions’.\textsuperscript{133} The adoption of the Guidelines on Promoting Compliance with International Humanitarian Law and actions taken to implement those Guidelines are in line with this objective, as promotion of the rule of law in a situation of armed conflict includes promotion of international humanitarian law.\textsuperscript{134}

In addition to promoting compliance with the rules of international humanitarian law once a situation of armed conflict is recognised, the EU also focuses on conflict prevention and crisis management, in an attempt to avoid the escalation of conflict. The European Commissioner Ferrero Waldner has cited Kofi Annan in stating that there is a need to ‘move from the culture of reaction to the culture of

\textsuperscript{130} For an exploration of the tendency to somewhat merge the two see Desgagné (n 112).
\textsuperscript{131} Consolidated Version of the Treaty on European Union [2010]OJ C83/13 art 2(b) [emphasis added].
\textsuperscript{133} Statement by Patrícia Galvão Teles on behalf of the European Union, United Nations 62\textsuperscript{nd} Session of the General Assembly, 6\textsuperscript{th} Committee, Agenda Item 86, Rule of law at the national and international levels, A/C.6/62/SR.14 (25 October 2007). For an overview and appraisal of the missions generally see Tom Hadden (ed), \textit{A Responsibility to Assist: Human Rights Policy and Practice in European Union Crisis Management Operations} (Hart 2009).
\textsuperscript{134} See Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) [2009] OJ C303/12.
prevention’. These efforts are significant in that they may also contribute to the prevention of violations of international humanitarian law. Other action that has been referred to as undertaken in this context includes dialogues relating to ensuring continued respect for the rule of law in the context of counterterrorism, and the promotion of international criminal justice. As a staunch supporter of the International Criminal Court, the EU also contributes to an attempt at ensuring that there is no impunity for war crimes.

Another example of activities relevant to the promotion of international humanitarian law is the adoption in 2003 of the ‘Guidelines on Children and Armed Conflict’ as part of the human rights policy framework of the EU. These guidelines are an attempt by the EU to strengthen its efforts to stop the use of child soldiers, and to protect child rights during situations of armed conflict through ending impunity for violations of such rights. The EU also aims through these guidelines to influence state and non-state actors to adhere to human rights and international humanitarian law.

Very often, calls to respect international humanitarian law are made by the EU specifically in connection with the provision of humanitarian aid, or in connection with other humanitarian issues, such as the provision and protection of humanitarian corridors. The European Union also speaks out on other generalised humanitarian

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136 Statement by Patricia Galvão Teles (n 133).
139 The EU is an important actor in the provision of humanitarian aid, supplying 40% of official aid internationally, see Jan Zielonka, ‘Europe as a global actor: empire by example?’ (2008) 84(3) Intl Affairs 474. For a discussion of the EU’s provision of aid in this respect, see Helen Versluys, ‘European Union Humanitarian Aid: Lifesaver or Political Tool?’ in Jan Orbie (ed), Europe’s Global Role: External Policies of the European Union (Ashgate 2009).
issues, such as the targeting of humanitarian aid workers, and what it calls pressure on the humanitarian space.

Whatever leverage the EU may have in terms of influencing the level of compliance with international humanitarian law in third countries, it is vital that it speaks with a coherent and strong voice, and is coordinated in this respect in terms of its external action. Effectiveness will be increased if there is one message coming from the EU – there is strength in numbers. As Marise Cremona has noted, whether ‘the EU does indeed develop a distinctive voice, and whether that voice can make an effective contribution to the international legal order is the key challenge to the Union’s external relations policy’. The EU has the potential to be greater than the sum of its parts, in terms of influencing the degree of compliance in third countries. It has been recognised that unsatisfactory ‘co-ordination between different actors and policies means that the EU loses potential leverage internationally, both politically and economically’. Is this true when it comes to the promotion of international humanitarian law? This may well become the case, especially if international humanitarian law awareness is not adequately mainstreamed throughout the activities of the EU. The implementation of some of the amendments ushered in by the Lisbon treaty may enhance the coherence of the EU when it comes to its external action.

There is cause for optimism, but these changes, along with the changes proposed by the Commission in 2006 to improve coherence in external action may not make a visible impact for a number of years. Only then might it be said that Europe punches its weight in terms of impact and influence, especially in the field of international humanitarian law promotion and enforcement.

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143 Cremona (n 93) 9. On the role of EU law in promoting coherence in the external action of the EU, see Christophe Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’, in Cremona (n 93).
144 Report: Europe in the World (n 93) para 4.
145 An example is the creation of the position of High Representative of the Union for Foreign Affairs and Security Policy, a post first filled by Baroness Catherine Ashton.
146 See Report: Europe in the World (n 93) para 5.
F. Current Scholarship and the Methodology and Structure of this Study

There is much excellent scholarship on the external relations and foreign policy of the European Union in general, but the majority of it is not addressed to the specific topic of this study. As the relationship between the EU and international humanitarian law is quite recent, scholarship in the area is relatively insubstantial. To the extent that this relationship is addressed it has been ‘more scattered and compartmentalized than comprehensive, systematic and integrated’, to borrow phrasing from Jørgensen on the EU’s relationship with international organisations. Some authors have discussed how international humanitarian law tends to be merged with human rights in the public statements of the EU. Richard Desgagné, for example, wrote about this relationship in 2001, examining the different circumstances whereby the EU would invoke international humanitarian law when issuing statements on various conflicts. Desgagné also explored the potentially active role of the EU in certain areas, such as humanitarian assistance, individual accountability, and the arms trade. Desgagné accurately defined the contours of the relationship and the potential strengths of the EU prior to the adoption of the guidelines, and concluded that the EU treated international humanitarian law as a subset of human rights law, a trend that has not entirely diminished.

Other scholars have concentrated on the international humanitarian law aspects of the EU in relation to its Common Foreign and Security Policy, and in relation to peacekeeping missions. Tristan Ferraro, for example, wrote in 2002 about the place of international humanitarian law in the EU’s Common Foreign and Security Policy. Ferraro traced the increasing importance and visibility of the international humanitarian law dimension in the foreign policy of the European Union. Ferraro highlighted the EU’s role in disseminating and promoting respect for the Geneva Conventions and Additional Protocols, and also discussed whether the EU has a role to play in the development of the relevant rules.

147 See, for example, Orbie (n 139); Stephan Keukeleire and Jennifer MacNaughtan, The Foreign Policy of the European Union (Palgrave Macmillan 2008); Zaki Laïdi, EU Foreign Policy in a Globalized World: Normative Power and Social Preferences (Routledge 2008); Piet Eeckhout, External Relations of the European Union: Legal and Constitutional Foundations (OUP 2004).
148 Jørgensen (n 47) 2.
149 Desgagné (n 112).
International humanitarian law has also been considered in relation to the so-called ‘Petersberg’ tasks. These tasks include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, and tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. Gert-Jan van Hegelsom questioned the role of the law in the performance of these tasks in 2001. Frederik Naert continued this line of investigation in his extensive and in-depth work on the international law applicable to the conduct of European Security and Defence Policy operations, in particular the law of armed conflict. Valentina Falco has also examined the relevance of humanitarian law to EU military operations. Falco has noted the significance of the guidelines in terms of assessing the approach of the EU to the *jus in bello*, but notes that they are not directly applicable to the actions of the EU or its Member States, in terms of their implementation of international humanitarian law. The approach of the EU towards this body of law has also entered the picture in relation to the fight against terrorism, and the definition of an armed conflict. Hoffmeister has linked the guidelines to developments in this area in interesting ways.

While literature on the EU and human rights abounds, analysis of the EU’s external relations from an international humanitarian law perspective is only emerging in the scholarship. This study aims to provide the first critical and in-depth appraisal of both the current implementation of the guidelines and of the potential of the EU to be a leading actor in this field. As there is general acceptance that in certain areas of international law it can be difficult to avoid discussions of international politics, in looking at EU external relations it can be difficult to avoid occasional forays into matters of foreign policy, international relations, and international politics. So while

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151 The ‘Petersberg’ tasks were originally set out in the Petersberg Declaration of the Western European Union Council of Ministers (Bonn, 19 June 1992).
the perspective is primarily from international law, the study is also enriched by an occasionally more interdisciplinary approach.

The EU is a rapidly evolving entity and it is likely that internal personnel of the EU may be aware of impending developments in this area in advance of researchers seeking to investigate the reality of the changing dynamics within the institution. As is widely appreciated by scholars in this area, part of the ‘fascination’ of undertaking research on the European Union is the ‘sense of firing at a constantly moving target, and nowhere is this more obviously true than in the external relations field’. While the factual situations, policies and institutional and inter-state dynamics on the international plane undoubtedly develop and transform at a rapid pace, similar and consistent patterns emerge in the overall approach of the EU to the promotion of international law in general, and international humanitarian law in particular. One of the challenges, for example, facing the EU that persists despite considerable institutional reform is the issue of ‘translating its presence into effective action’ on the international plane. This and other patterns are illustrated through the exploration and analysis of practice of the EU and its members throughout the study.

External perceptions and expectations of the EU are also considered throughout, as they are important and may affect the degree of influence and leverage that can be brought to bear on the parties to an armed conflict, and may also have an impact upon deterrence. This is in part related to the aphorism whereby justice must not only be done, but must also be seen to be done. If the EU is to be effective in promoting compliance with international humanitarian law and ensuring adequate enforcement of the law, it must be seen to be undertaking these roles effectively, which will in turn enhance its credibility in this sphere, and potentially increase its level of influence and engagement with the actors involved. The credibility of the EU would undoubtedly be damaged if EU Member States were not respecting and ensuring respect for international humanitarian law, while simultaneously calling on third states and non-state actors to do so. Concern has been expressed over the conduct of the forces of certain EU Member States involved in conflicts in Iraq and Afghanistan, in particular. Issues can also arise in this respect when EU Member States are engaged in arms transfers to actors who systematically violate international

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158 Marsh and Mackenstein (n 49) 54.
humanitarian law. The particular expectation of EU action in any situation can also be crucial, as it ‘reflects and to an extent determines how other international actors relate to the EU … it also partially determines EU credibility, especially if expectation is allowed or even encouraged to outstrip capabilities’. 159

In terms of maximising the potential of the EU as an actor in this area, it is important to focus on the relative strengths of the EU particularly in terms of protecting civilians affected by armed conflict. Recent initiatives have discussed ways of improving EU capacity in terms of political dialogue and mediation efforts as tools of conflict prevention and conflict resolution.160 While not explicitly within the realm of international humanitarian law, conflict resolution mechanisms can be vital alongside efforts to promote compliance with humanitarian rules in terms of minimising the overall harm to civilians during armed conflicts. It is commendable that the EU is also taking a strong stance on accountability for violations of international humanitarian law, as expressed for example in a recent statement to the United Nations Security Council:

Violations of international humanitarian law and human rights law must have consequences for the perpetrators. All measures, including strengthened national legislation, should be used to prevent violence and to bring perpetrators of serious violations to justice.161

The study asks whether an appropriate level of action will be seen to match this strong statement of purpose. Monica Gariup has examined the dichotomy between discourse and action in this respect, and notes the recurrent theme of Christopher Hill’s ‘capability-expectations gap’ in relation to literature dealing with the Common Foreign and Security Policy of the EU. Gariup has noted that the legitimate EU ‘speakers’ have demonstrated their awareness of this ‘quandary’ in their speeches. A memorable example is Romano Prodi’s statement that ‘[t]he greatest threat to popular support for Europe is to continue multiplying unfulfilled promises. We have to close the gap between rhetoric and reality in Europe’.162 This study seeks to assess whether

159 Ibid 71.
the guidelines on international humanitarian law will come to represent another unfulfilled promise, or alternatively, will help to seal rather than expand the ‘capability-expectations gap’.\textsuperscript{163} It also explores whether through continued monitoring and encouragement of compliance with international humanitarian law in third countries the EU can begin to close the gap between rhetoric and reality. Jørgensen has discussed some common and potential pitfalls he has discerned in attempts to evaluate EU foreign policy and to categorise any particular example as a ‘success’ or as a ‘failure’, without due regard for the relativity of those terms from different perspectives.\textsuperscript{164} As Jørgensen elucidates, ‘strategic vision can have a powerful impact on analysis’.\textsuperscript{165} This appears to be a valid criticism of a certain methodology, and thus in the interests of transparency the ‘strategic vision’ of this study is improved compliance with and increased accountability for violations of international humanitarian law in conflicts around the world.

This research will fill the gap in the literature by focusing on the ways and the extent to which the European Union and its Member States promote both compliance with and enforcement of international humanitarian law by third countries. The approach of this study is to first assess the general obligation of EU Member States to ensure respect for international humanitarian law, and then to assess the current practice of promotion and enforcement. This study ascertains the potential for the EU to develop a distinctive and persuasive capacity to promote compliance with and enforcement of international humanitarian law.

The starting point for this study in chapter one is an exploration of existing compliance theory in international law in general and in international humanitarian law specifically. The advantages of the various theories are outlined, and their relevance to the EU’s external action is discussed. This is followed by an exploration of the European Union Guidelines on Promoting Compliance with International Humanitarian Law, issued in 2005 and updated in 2009. While not constituting binding law, these guidelines represent the position of the EU in relation to promoting international humanitarian law externally, and reflect the existing obligation of EU Member States to ensure respect for the Geneva Conventions. The chapter outlines the


\textsuperscript{165} Ibid 91.
background to the adoption of the guidelines and their content and structure. Specific options that have been made available to the EU through the guidelines are then mentioned, following which the positive potential and pitfalls of the guidelines are considered.

EU Member States can act collectively through the institutions of the EU and through its foreign policy to fulfil their legally binding obligation to ensure respect for the Geneva Conventions. The second chapter thus deals with the obligation of EU Member States to ensure respect for the Geneva Conventions under common Article 1 of the conventions. The evolution of the duty to ensure respect as provided for in common Article 1\textsuperscript{166} and the current agreed interpretation of its scope is assessed in this chapter, for the purposes of evaluating the nature of the obligation of EU Member States. Aside from tracking the evolution of the scope of the duty to ensure respect for the Geneva Conventions, and the relevant influences on that evolution, such as the influence of the human rights debate, the ICRC, and the approach of the ICJ, the chapter discusses concepts such as \textit{erga omnes} obligations and state responsibility and their connection to the duty to ensure respect.

The third chapter explores current practice in terms of the means of promoting international humanitarian law, and also explores the potential for further action. The chapter delves into the practice of the EU in relation to the following: promotion of implementation of international humanitarian law instruments; dissemination and training; the link between the provision of humanitarian aid and the promotion of international humanitarian law; the link between counterterrorism and international humanitarian law; opportunities for criticism, persuasion and diplomacy; the imposition of restrictive measures; support for fact finding missions; the regulation of weapons proliferation; and support for the responsibility to protect doctrine. The various channels of influence and intervention open to the EU that could affect compliance with international humanitarian law on the ground are investigated in this chapter, through both general discussions and through illustrations of particular situations and examples of implementation of the guidelines.

Chapter four looks at the necessity of international and regional cooperation in the investigation and prosecution of war crimes and crimes against humanity committed during an armed conflict. The chapter takes a broad view of the duty of the

\textsuperscript{166} The text of common Article 1 is as follows: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’. 

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EU to support international criminal justice in general, including the exercise of universal jurisdiction at the domestic level when necessary. The support of the European Union for the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, including their completion strategies and residual mechanisms are discussed. The chapter then examines the EU’s promotion of the statute and the work of the International Criminal Court. It explores the unique position of EU Member States in identifying suspects, and in terms of having the capacity and resources to prosecute individuals for serious violations of international humanitarian law amounting to international crimes, under the principle of universal jurisdiction. This chapter explores the extent to which accountability for serious violations of international humanitarian law is supported in practice by the EU.

The fifth chapter takes the stated objectives and policy of the EU in terms of promoting international humanitarian law, and applies it to a case study: exploring the EU reaction to violations of the law committed in Gaza during ‘Operation Cast Lead’ in 2008/2009. It compares the rhetoric espoused with concrete action taken. This chapter questions whether the EU can be politically neutral enough, and provide a coherent response to increasing violations of international humanitarian law in an even handed manner, or whether political and even more so economic considerations will often hold sway and prevail over the other aims of the EU, including promotion of and adherence to international law. The situation relating to the EU’s influence in the Middle East in general is one of the areas where the EU’s ‘potential effectiveness remains undermined by some major flaws’. These flaws have been cited as including the lack of ‘instruments to provide hard security guarantees to actors in the region or to stop an escalation of violence’, combined with a lack of trust between the parties concerned and the EU, which has resulted in a ‘legitimacy deficit’ that prevents the EU from being an effective partner in negotiations between the parties. The problem may not be what type of power the EU wields in this particular region, but whether the EU wields any power at all in the Middle East, be it military, normative or otherwise. This case study is useful in exposing the weaknesses of the EU in terms of a coherent foreign policy, and in relation to its legitimacy as a

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167 Keukeleire and MacNaughtan (n 147) 287.
168 Ibid.
169 Ibid 288.
persuasive voice for the promotion of international humanitarian law. It also addresses
the issues dealt with in chapter three on practice in the context of one specific
situation.

A number of recurring questions are raised throughout this study: to what
extent do EU Member States fulfil their duty to ‘ensure respect’ for international
humanitarian law? Are effective and sufficient efforts underway to increase and
sustain implementation of the EU guidelines? Will the changes brought about by the
Lisbon treaty enhance coherence in the EU’s external action? Is the merging of
international humanitarian law with other domains such as human rights, human
security and humanitarianism problematic or beneficial in terms of the protection of
civilians? What could the EU do as an institution to improve the enforcement of
international humanitarian law internally and in its relations with third states? This
study seeks to explore these questions and to provide answers and avenues for
progression of the promotion and enforcement of international humanitarian law by
the European Union and its Member States.
Chapter 1: Compliance with and Enforcement of International Law: European Union Guidelines on Promoting Compliance with International Humanitarian Law

1.1 Introduction

This chapter is structured in two parts. The first part deals with compliance and enforcement of international law and international humanitarian law. It begins by addressing compliance in international law generally. Compliance is firstly defined and its importance in relation to international law set out. Four broad theoretical approaches to compliance are then outlined, to situate contemporary compliance theory in relation to this study. Options for enforcing international law, including both individual and collective enforcement, and the role of courts and tribunals, are also addressed at the end of this section. The theories discussed are then considered in the context of international humanitarian law, and some compliance theories that have been developed specifically for this framework are mentioned. This is followed by an exploration of the opportunities and obstacles surrounding compliance and enforcement of international humanitarian law in particular. The characteristics of this body of law are considered, and the advantages and disadvantages in terms of compliance are discussed.

The second part of the chapter then discusses the European Union Guidelines on Promoting Compliance with International Humanitarian Law. As the starting point for the study, the background and content of the guidelines is explored, as is the purpose and potential of the guidelines in terms of improving compliance with international humanitarian law on the international level. The section contains an overview of the assistance the guidelines provide in terms of setting standards and common goals for the European Union and its Member States. The section firstly explores the background to the adoption of the guidelines and their content and structure. The specific options made available through the guidelines to the European Union and its Member States are then outlined and discussed, following which the positive potential and also the limitations of the guidelines are considered.
Compliance with and Enforcement of International Law

1.2.1 Compliance with and Enforcement of International Law

Compliance is often defined as a ‘state of conformity or identity between an actor’s behavior and a specified rule’. This tendency to view compliance merely as ‘correspondence of behaviour with legal rules’, has, however, been criticised. Benedict Kingsbury has highlighted that ‘even if we knew how far state behaviour conformed with international norms, we would not necessarily have an account of the causal relations of law and behaviour’. Kingsbury has explained that any objective ‘observation of the conformity between behavior and a particular rule says little about the impact of the rule on behavior’. It is the causality, rather than the conformity, that is under scrutiny in many empirical studies of compliance, and many theoretical explorations of compliance also endeavour to determine the scope and nature of the causality rather than focusing exclusively on the level of conformity with a particular rule or set of rules. This distinction is vital for the present study, because it is the degree and nature of European Union influence on compliance, rather than merely the levels of compliance alone, which is under examination.

Compliance is related to the concepts of effectiveness and implementation, but they are not indistinguishable. Andrew Guzman acknowledges that while the level of compliance with a rule may be easily determined, whether the rule or the law in question has been effective may be more difficult to determine, ‘in the sense of affecting the conduct of states’. The focus of interest in this study is not to question the effectiveness of the rules under consideration, but rather the effectiveness of measures taken to encourage compliance with those rules, acknowledging the complex task involved in assigning causality to one factor or indeed one actor over a myriad of others. In terms of implementation of the law, a state may have successfully adopted implementing legislation in line with its international obligations, but may still not be in full compliance with all of its relevant obligations. Compliance extends beyond implementation to whether states ‘actually abide by their procedural and

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1 Kal Raustiala and Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’ in Walter Carlsnaes, Thomas Risse, and Beth A Simmons (eds), Handbook of International Relations (Sage 2002) 539. All websites in this chapter were last accessed 5 May 2011, unless otherwise indicated.
3 Ibid 348.
5 Raustiala and Slaughter (n 1) 539.
substantive international obligations, regardless of what the “black letter” of their domestic laws formally indicate’. This study avoids looking systematically at either the implementation or effectiveness of a set of rules, which would necessitate an entirely different approach, but rather concentrates on levels of compliance, and at efforts to encourage or increase such compliance with a particular body of law. This exploration, however, is not entirely distinct from the prevailing preoccupation of compliance theory in relation to causality, considering that ‘studying why states comply with international law and studying how outside actors can induce compliance are two sides of one coin’.9

Discussions on compliance commonly refer to Louis Henkin’s seminal assertion, ‘possibly the most famous line in international legal scholarship’,10 that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’.11 This statement answers the question of whether nations behave, but not how or why they do so. Interrogating the reasons behind compliance has since gained in significance and has become the focus of much attention in the literature: ‘today the question of why international norms secure compliance seems to be as popular as more traditional descriptions of how nations behave and, at least to some, is a more relevant line of inquiry than “outdated” debates over whether nations behave’.12 Why is this question so fundamental in relation to international law? Markus Burgstaller has convincingly asserted the importance of the ‘compliance question’, noting that the:

failure to deal with the question of compliance is troubling because compliance is one of the most central questions in international law. Indeed, the very absence of an explanation for why states and other subjects of international law in some cases obey international law and do not do so in other cases threatens to undermine the foundations of the international legal system. In case international law matters, it has to influence in some way or other the actors’ behavior. Without an understanding of the connection of law and behavior, an explanation for the very function of the international legal system is missing. We therefore remain ill-equipped to predict or explain the real impact of the over 50,000 international agreements now in force.13

Different scholars have grouped the divergent theories of compliance around various themes. Joost Pauwelyn, for example, has identified six broad categories of rationalisations of why

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8 Ibid [emphasis added].
9 Markus Burgstaller, Theories of Compliance with International Law (Martinus Nijhoff 2005) 192.
10 Guzman (n 6) 22.
12 Alvarez (n 7) 303[emphasis in original].
13 Burgstaller (n 9) 2.
and when states comply with international law.\textsuperscript{14} These are: self-interest; reputation; legitimacy; internalisation; bureaucratic networks; and personal psychology. All of these approaches shed significant insight on the vexing question of why states comply with international rules, and each has its own strengths and weakness. No one approach independently, however, provides a comprehensive and coherent account of state compliance with international law,\textsuperscript{15} and therefore it is worth briefly exploring the more persuasive contemporary theories on compliance. The first four as noted above shall be explored, due to their being the most pervasive and influential of the six mentioned.\textsuperscript{16}

Self-interest is the first broad category. Scholars taking this approach contend that states obey international law only when it is in their interest to do so. This approach is often considered as rationalistic and instrumentalist, viewing international rules ‘as instruments whereby states seek to attain their interests in wealth, power, and the like’\textsuperscript{17}. Compliance with international law is considered through this lens in a cost-benefit type analysis, whereby any rule followed by states ‘is the result of an instrumental and calculated assessment of the net benefits of compliance versus noncompliance, with an instrumental attitude toward social structures and other people’.\textsuperscript{18} Harold Koh considers scholars such as Robert Keohane, Duncan Snidal, and Oran Young to belong to this general tradition of rationalism, where ‘nations employ cooperative strategies to pursue a complex, multifaceted long-run national interest, in which compliance with negotiated legal norms serves as a winning long-term strategy in a reiterated “prisoner’s dilemma” game’.\textsuperscript{19} Goldsmith and Posner have written one of the most noted works in the area of state-centred rational choice theory. In \textit{The Limits of International Law}, they argue that international law ‘emerges from states acting rationally to maximize their interests, given their perceptions of the interest of other states and the


\textsuperscript{15} As noted by Guzman (n 6) 9. Guzman has attempted to postulate a comprehensive and coherent theory to explain how international law works, favouring rational choice theory. While for Guzman, the ‘puzzle of how international law gets sovereign states to alter their behavior’ motivates his book (Guzman (n 6) 8), the ‘puzzle’ of how the EU can get both states and non-state actors to modify their behaviour motivates the present study.

\textsuperscript{16} For the remaining two theories, related to bureaucratic networks and personal psychology, see respectively, Anne-Marie Slaughter, \textit{A New World Order} (Princeton University Press 2004); and William Bradford, ‘In the Minds of Men: A Theory of Compliance with the Laws of War’ (2004) 36 \textit{Arizona State LJ} 1,243, both as cited by Pauwelyn (n 14) 2.


\textsuperscript{18} Burgstaller (n 9) 87.

\textsuperscript{19} Koh (n 17) 2632.
The work, while an important contribution to a rationalistic understanding of compliance, offers a cynical view of compliance in international law, has been subject to its fair share of criticism, and is certainly ‘not an uplifting read for most international lawyers, who are trained to think international law makes an important difference and generally believe more international law is better’. Nonetheless, this approach is worth bearing in mind, both in terms of the motivations behind third countries, and non-state actors, improving their compliance with international law either to increase or protect favourable relations with the European Union, and also in terms of the European Union’s particular interest and intensive engagement with certain conflicts and countries over others.

The second category worth considering in the current context centres around reputation. Reputation is one of Guzman’s so-called ‘Three Rs of Compliance’: reputation, reciprocity and retaliation, all of which ‘allow international legal arrangements to bolster international cooperation’. This theory explores the ways in which states comply with international law in line with their desire to maintain good standing or reputation in the international community, how states can be perceived as reliable in terms of their commitments, and thus how cooperation with other states and international organisations is facilitated. States may or may not have a particular preference for a good reputation, but may rather be ‘concerned with maintaining good standing within the international community only to the extent that changing one’s standing or reputation affects payoffs’. The concept of ‘reputational sanctions’ has also emerged from this approach, referring to the ‘cost imposed on a state when its reputation is damaged’. The cost of losing a good reputation or good standing for a state can be explained as follows:

When a state makes a compliance decision (i.e., when it chooses to comply or violate) it sends a signal about its willingness to honor its international legal obligations. Other states use the information in this decision to adjust their own behavior. A state that tends to comply with its obligations will develop a good reputation for compliance, while a state that often violates obligations will have a bad reputation. A good reputation is valuable because it makes

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22 Guzman (n 6) 9.
23 Ibid 33-34.
24 Ibid 35.
25 Ibid 33.
promises more credible and, therefore, makes future cooperation both easier and less costly.\textsuperscript{26}

The incentive of safeguarding a good reputation, and the costs associated with losing that reputation, are associated with the costs involved in the remaining ‘Two Rs’ of Guzman’s compliance theory. Reciprocity is invoked where other states ‘terminate their own compliance’ in response to a violation, and retaliation occurs when third parties punish a state that does not comply with its obligations. Each of the ‘Three Rs’ of compliance ‘can increase the costs of violation and, therefore, promote cooperation’.\textsuperscript{27} Burgstaller also allies himself with this second rational choice theory approach:

states comply with international norms mainly because of the impact that non-compliance will have on their reputation, their interests, or their position within the international system. Put differently, international law matters in particular because states are concerned about the reputational (and direct) sanctions that may result from its violation. Put in economic terms, reputational (and direct) sanctions can alter the equilibrium.\textsuperscript{28}

The notion of reputational considerations affecting the choices states and non-state actors make in relation to compliance with international law is relevant to this study. States who seek trade or other preferential arrangements with the European Union, including ultimately membership in some cases, will be concerned to protect their standing with the European Union and its Member States. Non-state actors involved in certain armed conflicts may also wish to protect their reputation in this way, for example to gain recognition as a legitimate party to negotiations or for increased access to humanitarian aid delivered by the European Union, to name a few among many potential incentives. The European Union itself also seeks to protect and enhance its identity as a normative power that encourages compliance with international law in its relations with third countries and in its external action.

The third category referred to above relates to legitimacy. It has been asserted that in the international realm, ‘rules usually are not enforced yet they are mostly obeyed’.\textsuperscript{29} This observation does not tally neatly with the theories of those ‘who pride themselves on their hard-nosed realism’.\textsuperscript{30} The approach explicitly questions why ‘powerful nations obey

\begin{footnotesize}
\textsuperscript{26} Ibid 33.  
\textsuperscript{27} Ibid 211.  
\textsuperscript{28} Burgstaller (n 9) 195. Downs and Jones have provided a critique of reputation theory. They have argued that: ‘in everyday life, differentiated historical experience often results in individuals and organizations being assigned what are effectively multiple reputations that operate to limit the reputational consequences of a given incident’; see George W Downs and Michael A Jones, ‘Reputation, Compliance and International Law’ (2002) 31(1) JL Studies 95, 96-97.  
\textsuperscript{29} Thomas Franck, The Power of Legitimacy among Nations (OUP 1990) 3.  
\textsuperscript{30} Ibid 4.
\end{footnotesize}
powerless rules’, and finds the answer in the legitimacy of those rules. The theory investigates the extent to which powerful states follow certain rules because ‘they perceive the rules and its institutional penumbra to have a high degree of legitimacy’. Thomas Franck in particular has argued that certain rules have a considerable degree of ‘compliance-pull’, the level of which is affected by the degree of perceived legitimacy: ‘legitimacy is assigned the role of an independent variable, one which controls the extent to which a rule is perceived to exert a powerful pull toward compliance on those to whom it is addressed’. Legitimacy can be gauged through four indicators: determinacy, symbolic validation, coherence and adherence. While this theory has attracted some criticism for relying on what has been deemed by some as circular logic, it is also a useful theory in terms of considering a state or non-state actor’s perception of a particular set of rules in international law, and to what degree that perception may affect compliance. The European Union may also promote certain international rules or sets of rules over others, and this factor may influence its action on the international scene.

Internalisation is the fourth broad category to be briefly addressed here. The transnational legal process finds itself centre stage in this theory: the concern here is the ‘complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems’. Koh’s approach to internalisation has been labelled as an ‘obedience theory’ of compliance with international law. Koh through his theory of obedience attempts to illustrate the ‘evolutionary process whereby repeated compliance gradually becomes habitual obedience’. In his view ‘this overlooked process of interaction, interpretation, and internalization of international norms into domestic legal systems is pivotal to understanding why nations “obey” international law, rather than merely conform their behavior to it when convenient’. Two weaknesses of this theory have been identified by various scholars. Firstly, Koh argues that ‘the effectiveness of internalization depends primarily on the characteristics of the rule in question, not on domestic attributes of the state in question’, and in so doing ‘downplays a potentially major

31 Ibid 3.
32 Ibid 25.
33 Ibid 25.
34 Ibid 49, see chapters 4-11 for examination of these terms in relation to the concept of legitimacy.
35 The circularity is identified as follows: ‘Legitimacy determines compliance pull, but compliance pull is also the measure of legitimacy’: see Raustiala and Slaughter (n 1) 541.
36 Koh (n 17) 2602 [emphasis in original]. For a discussion of the transnational legal process, see also Harold Hongju Koh, ‘Transnational Legal Process’ (1996) 75 Nebraska L Rev 181.
37 Raustiala and Slaughter (n 1) 544.
38 Koh (n 17) 2603.
39 Ibid.
explanatory variable'. Secondly, while internalisation may explain compliance, there are no responses or explanations for non-compliance embedded in the theory. The value in this theory lies, however, in its exploration of obedience and internalisation, as in focusing on these concepts it ‘taps into the widespread belief that compliance with legal rules is qualitatively different than compliance with other sorts of rules or standards and cannot be captured through rational choice or strategic analysis’. Internalisation is certainly relevant in the present context, whereby arguably the rules of international humanitarian law, or at least the basic principles of proportionality, distinction and military necessity, can be said to have been internalised to a reasonable degree, both in the case of European Union Member States, and in the case of many of the third countries surveyed herein, and perhaps to a certain degree also in relation to non-state actors, although this may be more difficult to discern.

The four categories or theories of compliance discussed above, while not exhaustive in any way in terms of exploring the theoretical landscape, are some of the most relevant theories to the present study; however a few other concepts deserve a mention in this context. The first is the theory of managerialism. This approach has been championed by Abram and Antonia Chayes, and essentially develops from the premise that ‘states have a propensity to comply’ with their international obligations. The managerial theory claims that any instances of non-compliance are not intentional and due to a calculated reasoning on the part of states, but rather are:

- generally inadvertent. They result from state incapacity or serious resource constraints; from interpretively contestable treaty provisions, meaning that the commitment itself is ambiguous; or from unavoidable or unanticipated time lags between commitment and performance. For these reasons the managerial model has been dubbed the ‘no-fault’ theory of compliance.

Managerial theory may suit the mechanisms of international human rights law quite well, and indeed the managerial style of governance is quite close to the general approach of the European Union in its external relations, gradually encouraging compliance in a non-confrontational way. The European Union expresses a certain preference for managerialism over forms of coercion, and the rationale for this choice has been explained as follows:

- Within the EU, there are widespread doubts that negative measures will work. Strengthening economic and political links with the country concerned could

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40 Raustiala and Slaughter (n 1) 544, citing Keohane (1998).
41 Ibid 544.
42 Ibid 544.
44 Raustiala and Slaughter (n 1) 543.
be more effective, thus engendering a process of internal change ... This is a dilemma between strategies of ‘asphyxiation’ (blocking economic flows inhibits or halts bad behaviour) and ‘oxygen’ (economic activity leads to positive political consequences). The EU is also better at engagement because it has the appropriate policy instruments, including trade, cooperation, or association agreements; aid; soft loans; institutionalised dialogue; and the promise of EU membership (for European states). The conditional use of these instruments, as incentives, can give the EU considerable influence over the domestic and foreign policies of non-EU countries.45

Another approach that should be briefly mentioned is liberal theory. Liberalism links democratic norms with compliance, and ‘opens the black box of the state and considers the role of substate actors’.46 The behaviour of states is more fully understood by ‘disaggregating the State into various relevant components’, and ‘analzying the actions and interactions of these components by reference to representative and regulative functions and to aggregations of individual and group preferences, interests and values of officials in the specific roles they play’.47 This disaggregated state can also be located within an ‘increasingly dense matrix of transnational interactions involving (components of) other States, inter-governmental institutions, corporation, and a whole range of cross-border groups and networks that are slowly evolving into a transnational civil society’.48 The notion of a disaggregated actor and a complex matrix of interactions at various levels is certainly useful for considering the European Union, being that there are both horizontal and vertical divisions which inform all of the relevant processes including its external relations. These considerations may also be applicable to parties to an armed conflict, given that a range of actors, both domestically and internationally, may influence compliance with the law in a given context. Liberalism is also associated with the assumption of increased compliance in liberal democratic states, and increased likelihood of unbroken peace, but as has been cogently argued, these assumptions can only be taken so far:

Whether or not liberal democracies have or have not failed to make war on each other as some assert, no one denies that democracies, even in their all too brief existence in the sweep of human history, have waged brutal internal wars and wars by proxy. The alleged connection between ‘liberal’ states (variously and not always consistently defined) and ‘effective’ international organization and compliance remains to be demonstrated.49

47 Kingsbury (n 2) 356-357.
48 Ibid 357.
49 Alvarez (n 7) 314.
While not a theory per se, another consideration has been raised in relation to compliance with international law. This is the difference between *ex ante* and *ex post* means for improving compliance with international obligations. This distinction has a certain utility in examining the strategies of the European Union in promoting compliance with international law, and in considering possible alternatives to the prevailing, while not exclusive, preference for *ex post* means. In debates surrounding compliance it has been observed that ‘[a]ssistance and deterrence - carrots and sticks - dominate. Relatively less explored have been prevention and *ex ante* controls. Prevention refers to the construction of barriers to non-compliance as a part of a regime's solution structure’.  

Regime theory and design may be more familiar to international relations scholars and political scientists, nonetheless the impact of regime design in the international legal system, and its concordant influence on the choices and means available for promoting compliance, is worth bearing in mind in terms of both developing new regimes, and adapting existing regimes to maximise compliance. Prevention defined as a barrier or obstruction to non-compliance is:

part of a broader class of *ex ante* strategies. Most compliance strategies are *ex post* strategies, relying on the delivery or threat of a sanction in the event of breach. An *ex ante* process promotes compliance by changing internal decision processes or preventing non-compliance. *Ex ante* control strategies have been explored in domestic politics; they could be usefully extended to studies of international compliance.  

The European Union in certain areas, mostly internal, is developing means of preventing non-compliance, particularly with regard to Member States and European Union law. It has been observed that:

Tangible inducements or the threat of punishment by particular states are no longer the only tools that make other states obey. Today, gun boat diplomacy sometimes gives way to other forms of hegemonic international law ... IO regimes are changing what states see as being in their interests. To the extent that this is the case, compliance with IO-derived law may be internalized to such an extent that the use of sticks and carrots is no longer necessary.

In the external relations of the EU, however, it can be argued that *ex post* strategies prevail, particularly within the realm of international humanitarian law.

The European Union itself is often mentioned in discussions of compliance theory as a model of success, however unique that model may be. Guzman has captured both the

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50 Raustiala and Slaughter (n 1) 552.
notable success, and the difficulty in replicating such success, in terms of cooperation and compliance:

The evolution of Europe is a remarkable story of states cooperating in an anarchic world. Ironically, the dramatic success of the EU makes it a problematic model for cooperation among states ... Because European states successfully delegated authority to European institutions ... the consent of all EU members is not required to establish rules governing their conduct. This causes the EU to take on some characteristics we normally think of as belonging to states, including its own laws, regulations, and courts. Furthermore, the EU represents such a deep level of integration that matters of compliance and defection take on a different character. State decisions are informed by the fact that they are engaged in the grand project of building Europe. To the extent a new Europe offers all states significant benefits, there is a greater incentive to accept individual arrangements that are costly.\(^{53}\)

It has been noted that the likelihood of reproducing this evolution with such uniquely established supranational features in other international regimes is low.\(^{54}\) The European Court of Justice has been touted for fostering an exceptionally high level of compliance with its judgements over time, managing to ‘insulate itself from direct political interference’, with the resulting situation that the governments of EU Member States ‘could not ignore or reject ECJ decisions without countering their own courts and thus opening themselves to flouting the rule of law domestically’.\(^{55}\) Tallberg has attributed the success of compliance within the EU to its combination of both compliance and enforcement mechanisms, which create a ‘management-enforcement ladder’, defined as ‘a twinning of cooperative and coercive measures that, step by step, improve states’ capacity and incentives for compliance’.\(^{56}\) There are four stages in this ladder of compliance:

1. preventive capacity building and rule clarification that reduce the risk of violations due to incapacity or inadvertence;
2. forms of monitoring that enhance the transparency of state behavior and expose violators;
3. a legal system that permits cases to be brought against non-compliant states and that further clarifies existing rules; and
4. deterrent sanctions as a final measure ...\(^{57}\)

In the external sphere, unfortunately not all of these means are available to promote compliance. The incentives involved in potential accession to the EU, however, appear to be especially powerful for motivating compliance and cooperation. The willingness, in particular

\(^{53}\) Guzman (n 6) 14.
\(^{55}\) Raustiala and Slaughter (n 1) 541, citing Burley and Mattli 1993.
\(^{56}\) Tallberg (n 54) 632.
\(^{57}\) Ibid 632-633.
of certain countries in Eastern and Central Europe, to ‘bear remarkable burdens’ in their attempts to accede to the European Union has been said to reveal ‘both rational calculations about security and economic benefits and constructivist yearnings for political validation of a particular social and historic identity’.58

The foregoing discussion has focused on the available and perceived means to promote and improve compliance with international law, but has not delved much into what is sometimes referred to as coercive measures, or enforcement of international law. In domestic legal systems, enforcement ‘strictly denotes all those measures and procedures, mostly taken by public authorities, calculated to impel compliance, by forcible and other coercive means, with the law. Consequently there exists a clear-cut distinction between those measures and procedures, that is sanctions, on the one hand, and, on the other hand, forcible acts which, since they do not amount to an authorized institutional reaction to a wrong, are unlawful’. 59 Traditionally, in the international system, such public or central authorities did not exist, and therefore no such distinction was possible.60 The prohibition of the use of force under the United Nations Charter resulted in two trends emerging in the international system to enforce the law: peaceful countermeasures and sanctions.61

Firstly, in responding to a breach of international law, an injured state can choose to suspend or ‘disregard an international obligation owed to the delinquent’ state.62 Countermeasures must not themselves be in breach of international law. Cassese refers in this context to legal acts of retortion, which would embrace ‘any retaliatory acts by which a State responds, by an unfriendly act not amounting to a violation of international law, to either (a) a breach of international law or (b) an unfriendly act’ by another state.63 Retortion could include suspending or breaking off diplomatic relations, non-recognition of acts of the offending state, withholding economic assistance, reducing trade or denying economic benefits.64 It seems that many of these options would be open to the European Union if it chose to enforce international law in this manner, however, as mentioned above, the dominant approach is closer to a managerial one than that of enforcement.

58 Raustiala and Slaughter (n 1) 548, citing Checkel, 2000.
60 Ibid.
61 Ibid 301-302.
63 Ibid 310, in relation to reprisals see 299-302.
64 Ibid 310.
The second trend that has emerged in relation to the enforcement of international law is the threat or the imposition of sanctions. Indeed there is a ‘growing tendency towards the adoption of “sanctions” by international organizations, particularly as a reaction to serious and large-scale breaches of international law’. The distinction between the former trend and this one is that, while countermeasures and retortion are the responses of individual states to breaches, sanctions are usually collective acts ‘undertaken within an institutional framework’. Although sanctions can often be perceived as an ineffective means of enforcement, two valuable purposes have been identified:

First, they may act as the catalysing factor uniting a group of States opposed to the alleged misbehaviour of another State: by taking sanctions the collective bodies intend to rally States behind their censorious attitude. Second, they may be a symbol of public exposure and condemnation of the States allegedly misbehaving.

Sanctions, or indeed the threat of sanctions, have the potential to ‘dramatize and articulate the condemnation’ of certain conduct of states and non-state actors, and can also effectively ‘delegitimize’ such actors within the international community, by their collective nature.

National, regional and international courts and tribunals also contribute to the enforcement of international law. National courts can enforce rules of international human rights law, international criminal law, and international humanitarian law, among others, dependent upon the levels of domestic implementation of international agreements, among a range of other factors affecting jurisdiction. Regional courts have become particularly effective in enforcing international human rights law, but in terms of international humanitarian law enforcement, and even potentially in precluding the need for such enforcement through deterrence, international courts and tribunals are at the fore, including the International Criminal Court (ICC):

Today, the ICC has asserted itself as the competent international institution to address criminal responsibility for war crimes and crimes against humanity. Indeed, the ICC seems to have more impact on the ground in some instances than the Security Council – for obvious reasons: rebel fighters are rarely concerned about economic sanctions directed against the state or a targeted travel ban. They do worry, however, that they may be personally subjected to worldwide criminal prosecution for their crimes.

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65 Ibid 302.
66 Ibid 302.
67 Ibid 312.
68 Ibid 312.
It has been noted that the prospect of ‘real’ enforcement of international law before an independent court such as the International Criminal Court, has the potential to be an ‘even greater incentive to act according to international humanitarian law than threats of sanctions from the world’s premier political and security body’.70

The study of compliance and enforcement mechanisms remains core to understanding the legitimacy of international law and its capacity to regulate the world order. Scholars of both international law and international relations have a ‘joint agenda’71 in continuing to embark upon compliance research, answering questions and developing new ones. Compliance may never be solved ultimately, but it is an ongoing investigation of an increasingly complex system:

The post-Cold War era has seen international law, transnational actors, decisional fora, and modes of regulation mutate into fascinating hybrid forms. International law now comprises a complex blend of customary, positive, declarative, and ‘soft’ law, which seeks not simply to ratify existing practice, but to elevate it. As sovereignty has declined in importance, global decision-making functions are now executed by a complex rugby scrum of nation-states, intergovernmental organizations, regional compacts, nongovernmental organizations, and informal regimes and networks.72

International law is often decried for severe shortcomings in terms of compliance and enforcement. It has been labelled the ‘dysfunctional system of a dysfunctional society’.73 In terms of the legitimacy of international law, it has been argued that laws ‘that are not enforced across the board lose legitimacy as those instances in which they are enforced are seen to be marred by political considerations’.74 Regional organisations can contribute to compliance and enforcement in international law, and they may indeed have a ‘significant role to play in the preservation of international peace and order’.75 The various obstacles and advantages of different modes of compliance and enforcement in practice shall be discussed in context in the following three chapters, while appraising the attempts of the European Union to promote compliance with and enforcement of international humanitarian law. The

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70 Ibid.
71 Raustiala and Slaughter (n 1) 553.
72 Koh (n 17) 2630-2631.
73 Allott, while discussing the proceedings before the ICJ regarding the NATO bombing of Kosovo, recognises that there is a ‘tragi-comic contrast between the dreadful events in Yugoslavia and the ritualised legalism and the quaint anachronism of the proceedings in the Hague. Once again, the reality of international society has overwhelmed the capacity of international law to respond coherently and convincingly to that reality’, Philip Allott, ‘Kosovo and the Responsibility of Power’ (2005) 13 Leiden J Intl L 85.
following section will explore the distinctive means of compliance and enforcement of international humanitarian law in particular.

1.2.2 Compliance with and Enforcement of International Humanitarian Law

‘In its present state, this branch of law is a science which explains to kings how far they can violate justice without damaging their own interests.’

‘States do not make decisions; people do.’

Unlike international human rights law, which is continuously expanding in scope and establishes a vision ‘for a future community of the governed endowed with increasingly substantial claims against those in power’, international humanitarian law is not intended as visionary or aspirational, but rather ‘assumes the tragic and destructive backdrop of war and is thus modest in its ambition’. This is not a criticism of the law, but on the contrary a reality which emphasises its value, practicality and pragmatism in the international system. International humanitarian law governs supposedly temporary situations of armed conflict, and does not anticipate long-term relationships between the parties involved. The law therefore ‘does not provide the grounds for a good society or interactions based on trust and due process. Rather, this is a set of rules that restricts the military forces while they fight, while recognizing that they will fight, and that people (even those not involved in the fighting) will die in the process’. International humanitarian law provides a minimal and fundamental level of protection for civilians, prisoners of war, and all those hors de combat, and the most basic principles of the law are intended to be readily understood both by the armed forces and those under their control:

A civilian who is made aware of the basic (and rather minimal) obligations of the armed forces of an enemy State for her protection clearly understands the purpose of IHL: to ensure that in the very worst imaginable context, she is guaranteed a basic level of protection—not to be directly targeted if she does not participate in hostilities, not to be tortured if she is detained, to have access to basic lifesaving, humanitarian relief, etc.

79 Ibid 364.
80 Ibid 364 [emphasis in original].
81 Ibid 363.
An optimistic outsider could assume that such basic humanitarian principles, especially if universally legally binding, would be adhered to for the most part. However, it is well-known that violations of the law occur in almost every, if not every, armed conflict, and it has been asserted that of all the ‘spheres of international regulation, war seems to be the most challenging in terms of securing compliance with restraints’. Accordingly, it is logical that of all the ‘topics in international humanitarian law, arguably none is of more importance than securing compliance with the law’s provisions and enforcing the law’. For the system to be effective, it is crucial not only to examine, interpret and elaborate on the rules themselves, but also to investigate levels of compliance and enforcement and means for improving both:

Given that armed conflict by its very nature occasions violence, destruction and death, all too often to innocent people, there is little point in having an elaborate system of detailed rules for the conduct of hostilities and the protection of victims in war if there is no corresponding effective system for securing compliance and enforcing those rules. It is all very well having a doctrine of individual criminal responsibility for violations of humanitarian law but criminal proceedings by definition may be brought only after the crime has been committed and the damage done.

Violations of the law could be prevented if there was a comprehensive understanding of how compliance in the sphere operates. Unfortunately, both empirical and theoretical investigations of compliance in the field of international humanitarian law are scarce, despite the fact that ‘considerable ink has been spilled’ over the motivations of states with respect to their resort to armed conflict. Asking why states do or do not comply with international humanitarian law is crucial, as it can be argued that ‘if the law of war is to maintain its legitimacy it must reflect actual state practice. In order to understand actual state practice it is necessary to determine why states act the way they do’.

Theories of compliance with international law generally are of some, albeit limited, relevance in terms of compliance with international humanitarian law. The determinants of compliance involved in this area vary widely – depending on the relative power of parties involved, the political systems of the parties, the opportunities for reciprocity, and the degree

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85 Ibid.
87 Ibid.
of legal obligation. Another distinguishing feature of this system can complicate attempts to analyse compliance – the law both speaks to, and attempts to regulate individual and state behavior simultaneously. One of the challenges ultimately lies in the fact that the ‘ultimate determinants of IHL compliance lurk in the minds of the individuals who must decide whether to comply’. This may be true of many international regimes, but it is especially true in this case, where much of the day-to-day decision making at least, takes place away from the central authority of the national executive. It has been noted that if the field of international legal compliance ‘is still a “primitive science,” our ability to explain and predict the effectiveness of IHL is even more protean’. Nevertheless, the value of the venture necessitates an attempt to overcome these challenges, and whatever knowledge can be drawn from surveying compliance and attempting to decipher motivation is valuable, as:

the greatest impediment to more effective legal regulation of war is not a demonstrable pattern of noncompliance but rather the ongoing incapacity to explain and predict this pattern and offer policy-relevant guidance to the legal architects charged with making those modifications necessary to enhance compliance. Under-theorization, and not the inherent immiscibility of law and war, is the bane of IHL compliance, it is to empirical studies of the relationships between rules and behaviors that energies must be dedicated if armed conflict is to be held within the domain of global governance.

Different theories of compliance in international law, some of which were addressed in the previous section on general international law, all have something to contribute to the discussion. Realists would not have a particularly favourable view of international humanitarian law, and would give short shrift to its capacity for influencing levels of compliance in an armed conflict. Bradford has noted that for realists it is ‘axiomatic that armed conflict is a decidedly unfruitful arena in which to foster normative cooperation’. Realists would contend that states will only ratify treaties with which they intend to comply, and would comply with such norms in any case without the treaty, and so levels of compliance can be ‘contaminated by selection effects’. Enforcement theorists are a step removed from this position, and focus on the level of enforcement implemented within the regime. Abbott has argued that the regime is strongest where enforcement is strongest: in

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90 Bradford (n 77) 1439.
91 Ibid 1249.
92 Ibid 1436.
93 Ibid 1253.
94 Morrow 2007 (n 88) 559.
international armed conflicts, where all of the Geneva Conventions apply, including the grave breaches regime, and also Additional Protocol I.\textsuperscript{95} States can also in these cases ‘anticipate reasonable symmetry between opposing forces, facilitating tit-for-tat enforcement’.\textsuperscript{96} The system has the potential to be effective, but enforcement theorists regard ‘as dubious the prospect that legal engineers can ever muster more than the shallowness of regimes in IHL without constant and vigilant monitoring and, even more vitally, a stalwart commitment from powerful states to swiftly punish violations’.\textsuperscript{97} Significantly, Cassese has observed that until 1994 the criminal provisions of the Geneva Conventions had never been applied, and national courts only began to apply these provisions after the establishment of the \textit{ad hoc} tribunal for the former Yugoslavia.\textsuperscript{98} The record since, at least domestically, has not been exemplary.\textsuperscript{99}

Rational choice theory predicts increased compliance with increased fulfilment for individual states and/or convergence of the self-interest of states. This approach would therefore dictate that states would ‘comply with rules that limit the resort to particular methods or means only if the benefits gained through the resort to these methods or means are less than the costs imposed by third states, whether reputational or, more likely, economic and military’.\textsuperscript{100} Rational choice theory has been assigned a somewhat cynical approach relating to both the means and methods of customary international humanitarian law:

the customary principles of military necessity, proportionality, and distinction are nothing but the result of continuous pressure placed upon more powerful states by less powerful states seeking, under the guise of professions of humanitarian concern over unnecessary suffering attendant to war, to force the former to employ less potent weapons readily available to the latter and thus to tilt the battlefield toward equilibrium.\textsuperscript{101}

Liberalists view compliance as related to the interaction of aggregated actors and preferences within the state. It is likely that they would link democratic commitments which internalised the relevant norms to increased compliance with international humanitarian law, and thus, ‘by inducing democratic commitments to IHL norms, such programs [would] encourage elected leaders to translate domestic preferences into official policies limiting the

\textsuperscript{96} Ibid.
\textsuperscript{97} Bradford (n 77) 1255.
\textsuperscript{100} Bradford (n 77) 1259.
\textsuperscript{101} Ibid 1261.
resort to force and constraining methods and means while compelling them to conform their conduct in battle to the rules these norms reflect’.\textsuperscript{102}

Management theory offers a considerably less cynical view of the potential of constraining the behaviour of parties to an armed conflict. Managerialists would argue that managerial problems, such as ambiguity of provisions or lack of capacity, have more of an impact on compliance than ‘opportunistic defections in accounting for when states fail to comply with their agreements’.\textsuperscript{103} Effective management would increase compliance under this perspective, and ‘[w]ell-elaborated treaty instruments that plainly remove particular battle strategies from the repertoire of ratifying states will generate strong incentives toward compliance of their own accord, even under conditions of uncertainty as to the conduct of enemies that appertain during the “fog of war”’.\textsuperscript{104} Management theorists would also advocate introducing treaty-based monitoring and verification mechanisms, similar to those in the United Nations human rights system, in order to facilitate and increase compliance during armed conflicts.\textsuperscript{105} A view of international humanitarian law through the prism of transnational legal process theory would also offer a relatively optimistic view of compliance with the law, dependent on the following conditions: 1) the level of ratification of international humanitarian law instruments and the level of support expressed for customary obligations pertaining to the law, and 2) the degree of domestic implementing legislation incorporating the relevant rules into domestic law, both civil and military.\textsuperscript{106}

Legitimacy theory offers one of the most encouraging views of compliance in this field. Due to the universal nature of the regime under customary international humanitarian law, and the high level of ratification of many of its constitutive instruments, legitimacy theory ‘would predict that most states should perceive it as legitimate and that compliance should be high’.\textsuperscript{107} International humanitarian law is justified on the basis of its sound legitimacy and practicality, and there are three moments for the law to influence behaviour:

\textit{prior to conflict}, IHL is the basis for military doctrine and training on protection of civilians, proportionality, distinction and other key restraints on warfare; 
\textit{during conflict}, its provisions allow commanders and instructors to create simple, concrete rules for conduct ... and clear provisions for the treatment of various categories of individuals; 
\textit{after hostilities}, IHL provides the grounds for disciplining troops who violate the rules according to national military law grounded in international norms, as well as creates

\begin{footnotes}
\textsuperscript{102} Bradford (n 77) 1256.
\textsuperscript{103} See Morrow 2007 (n 88) 559.
\textsuperscript{104} Bradford (n 77) 1263.
\textsuperscript{105} Ibid 1263.
\textsuperscript{106} Ibid 1267.
\textsuperscript{107} Ibid 1270.
\end{footnotes}
the legal framework for accountability of military personnel and others in the command structure in other legal forums.  

To the extent that there is non-compliance, this could be attributed through this approach to a lack of clarity with the rules, and thus compliance could be foreseen to increase progressively: ‘as understandings of the meanings of rules converge through practice, [legitimacy theory] predicts that the legitimacy of, and compliance with, IHL should increase incrementally’. Constructivists also link increased compliance with the internalisation of norms. This perspective sees potential for improved compliance, and links it with increasing perceptions of legitimacy, but through the more specific means of ‘a joint program of norm inculcation and legal engineering’.  

While all of the above theories have value, none are tailored specifically to the framework of international humanitarian law, and none address the specific challenges inherent to compliance in this field. William Bradford has argued that all of these existing theories are ‘hobbled by structural biases that obscure human agency’. He has rationalised that:

Although subnational and supranational actors wax ever more important, the question of IHL compliance is ultimately directed to the question of responsibility for decisions, and neither the international system, nor states, nor domestic interest groups, nor bureaucracies have the capacity to elect compliance or noncompliance. The sole entities with the capacity to exercise choice are individuals, and only those individuals with the authority and power to commit the state are directly relevant to the study of compliance generally and IHL compliance in particular.

Bradford thus constructs a theory based on personality to explain compliance in international humanitarian law, and explores the effects of human agency on levels of compliance. This theory explores various dimensions of personality, including such categories as militarism, anomism, hostility, and adventurism, and links each to expectations of decision making and compliance. Bradford argues that personality is significant from a range of perspectives, and that enhanced compliance with international humanitarian law is a ‘moral imperative and a crucial step in the deepening of international civil society. It is therefore essential to identify

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108 Modirzadeh (n 78) 356 [emphasis in original].
109 Bradford (n 77) 1271.
110 Morrow 2007 (n 88) 559.
111 Bradford (n 77) 1272.
112 Ibid 1285.
113 Ibid 1285.
the most propitious point of entry into the decision making process in order to facilitate the sorts of interventions that can serve this teleological mission’.\textsuperscript{114} He argues that if:

‘history is a race between education and catastrophe,’ and if decision making with regard to IHL compliance carries with it the possibility for the latter, our prayers and best efforts should ride with the former. Crafting the most effective IHL regime is not merely a matter of the conjuration and codification of proper rules and institutions, although these are vital steps: it is to the selection and training of the right people to administer, interpret, and implement the normative content animating rules and institutions to which stakeholders must also direct their attention.\textsuperscript{115}

Others have similarly attempted to fill the gap by adapting theories to the specifics of the relevant regime. Eric Posner has proposed a number of hypotheses relating to compliance. Firstly, he argues that states who are militarily weaker will be stronger supporters of the laws of war when new expensive technologies are developed; secondly, states that have recently experienced armed conflict will strongly support the laws of war, because they will be better informed about the effectiveness of weapons; thirdly, wealthy states will more strongly support the law because they have more to gain from production than from ‘predation’; and fourthly, democracies will support the law more strongly, stemming either from concerns over public relations or from an increased commitment to the rule of law.\textsuperscript{116} These variants are certainly worth bearing in mind, although they are mostly state-centric and so may not account for the actions of non-state actors engaged in armed conflict. This theory certainly gives credence to self-interest and rational choice theory, as Posner has indicated in the following:

It might also be the case that war is a primal cultural expression rather than an instrument of policy, and perhaps states in interwar periods hope to prevent a predictable descent into barbarism during times of war. But international law would not be much use against those seeking a Götterdammerung. The better interpretation is that states ban weapons and tactics that states believe, or fear, will be highly effective, and indeed that was the attitude motivating regulation of poison gas prior to World War II.\textsuperscript{117}

Morrow has proposed an argument about international humanitarian law which he labels ‘institutional commitment’. He draws on all three perspectives of realism, liberalism, and constructivism. He tests the following hypotheses for institutional commitment to the law:

- Reciprocity exists; the compliance of one side increases with the compliance of the other.

\textsuperscript{114} Ibid 1438.
\textsuperscript{115} Ibid 1438-1439.
\textsuperscript{117} Ibid 312. ‘Götterdammerung’ denotes an apocalypse or a disastrous conclusion to events.
- Joint ratification strengthens reciprocal responses.
- Democracies are more likely to comply when they have ratified the most recent treaty even if the other side has not.
- Reciprocal responses are made to individual violations as well as to state ones.
- Compliance decreases as the scope for individual violations increase across issues. 118

Morrow argues that joint ratification of a treaty is a public demonstration that both parties accept the standards of that instrument and thus reciprocity is strengthened leading to ‘compliance generally through effective deterrence’. 119 He argues that compliance is more likely in the case of joint ratification of the relevant treaty, and that joint ratification reinforces reciprocity. 120 In relation to the impact of the domestic political system on compliance, he posits that democracies are more likely to comply when they have ratified a particular treaty, in line with ‘higher audience costs’ and the rule of law, but less likely than states with other political systems to comply with certain rules when they have not ratified the relevant treaty. 121 He finds through his empirical research that ‘democracies are willing to kill civilians if they believe that will shorten the war. Institutional commitment through ratification shapes state strategies; it does not dictate them. If ratification creates audience costs for democratic leaders, they might still choose to violate such a commitment if the consequences for losing were worse’. 122

It is further argued that the ‘noise’ which is a result of violations committed by individual soldiers ‘complicates reciprocal enforcement by obscuring whether violations are a product of state policy or individuals acting against state policy’, and that reciprocity exists not only between states, but also among individual soldiers on the battlefield, ‘where they may retaliate against enemy soldiers after their comrades have suffered at the hands of the enemy’. 123 In relation to the last hypothesis listed above, relating to the scope for individual violations, Morrow has introduced a useful hierarchy or spectrum of compliance with international humanitarian law. The prohibition on chemical and biological weapons has the greatest compliance, followed by armistice/ceasefire and conduct on the high seas:

After them, aerial bombing, cultural property, and treatment of wounded come next, with prisoners of war perhaps having less average compliance and treatment of civilians with definitely the worst record of compliance. At the

118 Morrow 2007 (n 88) 561-562.
119 Ibid 559.
120 Ibid 568.
121 Ibid 569.
122 Ibid 570.
123 Ibid 559-560.
other end of the spectrum of compliance, every individual soldier possesses the ability to commit atrocities against civilians. Further, civilians often lack the ability to retaliate against soldiers who commit such atrocities, removing the risk of immediate retaliation as a deterrent to such acts.\textsuperscript{124}

Morrow has argued thus that levels of compliance should be higher for issues with less scope for violations by individual soldiers and further towards the state policy end of the spectrum, and issues such as protection of cultural property, treatment of prisoners of war and wounded enemy combatants ‘provide individual soldiers with the opportunity to use protected cultural locations for a military advantage, to kill enemy soldiers trying to surrender, and to refuse to treat enemy wounded’.\textsuperscript{125} The threat of reciprocity from enemy combatants, however, may deter such violations, whereas no such factor of deterrence exists in relation to treatment of civilians, which is where compliance is often at its lowest level.\textsuperscript{126} Other factors of deterrence in relation to the protection of civilians may exist, however, in terms of either government or non-state actors, the former who may want to avoid increasing opposition forces by committing atrocities against civilians, and the latter wishing to avoid alienating the civilian population on whom it may depend for support. States and non-state actors may choose to comply with certain standards to seek and maintain support from both the general public and from other external allies.\textsuperscript{127}

While perfect compliance may be a futile ambition, given that the law attempts to regulate both state and individual behaviour, adequate training, dissemination and internal responses to violations may be key in keeping levels of compliance high:

Soldiers commit crimes against prisoners and civilians even in the best-disciplined armies ... The management of individual violations is generally left to the militaries of those violators. A violator’s own military justice system is more likely to be able to collect the information to determine what happened and bring the violator to trial. That system of devolved responsibility requires active state participation in disciplining its own soldiers. State policy can encourage individual violations in two ways: active policy to promote atrocities and neglect of discipline. The training and discipline of soldiers in the laws of war are essential for the limitation of individual violations.\textsuperscript{128}

While there are merits to these tailored theories as is the case with the other more general theories discussed, it has been acknowledged that no single theory can solve the puzzle, but each may contribute to developments in the area: ‘the most sophisticated model will likely

\begin{itemize}
\item \textsuperscript{124} Ibid 569.
\item \textsuperscript{125} Ibid 569.
\item \textsuperscript{126} Ibid 569.
\item \textsuperscript{127} Morrow 2002 (n 89) 51.
\item \textsuperscript{128} Ibid 52.
\end{itemize}
incorporate insights from all pre-theories and variables from multiple levels of analysis, including the nature of the foreign policy structures, the nature of the state, dyadic interactions with other states, and the international system'.

There are both advantages and disadvantages that emerge from the peculiarities of international humanitarian law relative to other regimes of international law, and naturally the aim is to capitalise upon the advantages, and to be aware of and attempt to mitigate the disadvantages. One of the advantages when it comes to compliance with humanitarian norms is that, unlike human rights norms, accusations of cultural relativism are scarce, given the unique development of international humanitarian law. In contrast with international human rights law, this body of law does not struggle with any ‘culture problem’:

the history of international humanitarian law rests on a number of factors that explain and ensure its widely recognized universality and legitimacy within a diversity of States. The law, rooted in early notions of chivalry and professional military conduct, was drafted in close coordination with military experts and senior military personnel, and is promulgated with a close eye to the practical challenges faced by military forces.

Nor is application of the law dependent on domestic, regional and international institutions to the same extent that other fields of international law are, and in theory it should apply ‘just just as efficiently and effectively in a jungle war with little to no judicial mechanisms as in a prolonged air war over an enemy capital’. It also does not form part of a long-term process of governance or expansion, but rather constitutes a relatively static corpus of norms which has evolved very gradually over a long period. A number of factors, such as inducement and deterrence factors, have the potential to promote compliance or deter violations. Inducement factors include reciprocal interests of the parties to a conflict, and deterrence factors include potential prosecution for serious violations of international humanitarian law. Some of the factors which have the potential to improve observance of international humanitarian law include: consideration of public opinion; reciprocal interests of the parties

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129 Bradford (n 77) 1347.
131 Modirzadeh (n 78) 374.
132 Modirzadeh (n 78) 362.
133 Modirzadeh (n 78) 383.
134 See Modirzadeh (n 78) 383.
to a conflict; fear of reprisals; disciplinary measures; liability for reparation; and potential prosecution for serious violations.  

Some of the challenges facing attempts at improved compliance and enforcement include: the argument of outdated humanitarian rules and the ‘new war’ phenomenon; the problems surrounding asymmetry in non-international armed conflicts; and issues of dissemination and training in relation to non-state actors.  

Firstly, in terms of the challenges posed, the ‘new war’ debate questions whether the rules of international humanitarian law continue to be relevant and useful. The ‘new wars’ are characterised as mostly non-international armed conflicts, and one of the concerns is that certain violations of *jus in bello*, such as violence towards or forced displacement of the civilian population, can represent the *intended* means or method of warfare of some non-state actors, rather than constituting aberrations.  

The destruction or forcible relocation of civilians and civilian groups may indeed be an aim in itself, as recognised by the UN Secretary General in 1998 when he observed that in certain conflicts ‘the main aim, increasingly, is the destruction not just of armies but of civilians and entire ethnic groups’.  

The Security Council has also recognised the ‘erosion of respect’ for international humanitarian law. It has been repeatedly questioned whether in this context ‘the new culture of war and its means and methods … necessarily engender greater violations of IHL, and thus whether IHL is relevant to this new culture of war and can be assumed to induce compliance with its norms’. Why would there be declining respect for international humanitarian law in these conflicts? One of the reasons that has been suggested is that non-compliance with international humanitarian law can be linked to the likelihood of parties to a conflict achieving their goals, and as such that ‘violence accompanied by IHL violations has tended to produce rewarding outcomes, which, it can be assumed, is not conducive to compliance with IHL and other international law norms’.  


137 Bassiouni (n 135) 711.  
141 Bassiouni (n 135) 717.  
142 Bassiouni (n 135) 749.
Numerous issues have also arisen surrounding the prevalent asymmetry in modern conflicts. Non-state actors in a non-international armed conflict are ordinarily in an asymmetrical relationship with the other party to the armed conflict in terms of military might and resources. This asymmetry has been said to induce these actors towards violations of the law, in other words ‘compels them to resort to unconventional and unlawful means and methods of warfare as the only way to redress the military and economic imbalance they face’. The proliferation of non-international armed conflicts has created the need to reconsider the traditional structures of compliance:

- it is axiomatic that such actors as guerrilla or insurgent movements and other irregular armed groups of all kinds play a major role in the contemporary armed conflict paradigm. Such groups have neither the structure nor the reciprocity derived incentive to observe humanitarian law in their military operations, and also lack the attributes of sovereignty and equality that would enable them to be held to account in public international law generally. In this sense it is not only ‘asymmetric warfare’ that is a problem, but ‘asymmetric law’...

The specific problems which arise in terms of the compliance of non-state actors are related to this asymmetry, and include the lack of discipline, command and training within many non-state actor armed groups, the lack of expectation of accountability for their actions, and a lack of incentive for non-state actors, in terms of an assurance of reciprocity for prisoner of war status. These problems are compounded by the reality that many non-state actors find themselves during non-international armed conflict ‘in a twilight zone between lawful combatancy and common criminality’. Non-state actors do not have the same public profile and standing that states do, and so may not share the same reputational concerns of states. They are not members of international or regional organisations where they:

- have to endure criticism of their actions and the threat of sanctions by the international community, and they are generally less dependent on the reciprocal goodwill of others for their external relations. While there are many ways in which the ICRC may engage with an armed opposition group, for example, it will generally be by the goodwill of the armed group rather than out of any sense of legal obligation.

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143 Bassiouni (n 135) 714.
144 Turns (n 84).
145 Bassiouni (n 135) 731.
147 Turns (n 84) 357.
The problem arises because non-state actors cannot ratify the relevant instruments, and do not generally formally declare their intentions with respect to the law.\textsuperscript{148} They may also ‘operate anonymously, hampering verification and reciprocity. They may be unable to control their own fighters, creating noise. They may favor “dirty” tactics to counter superior forces’.\textsuperscript{149} States encountering these actors in turn are less eager to allow limitations of their actions, and thus a limited part of the law is applicable in these conflicts.\textsuperscript{150} These challenges have been the subject of much debate and while they pose significant obstacles, there are some ways of mitigating their impact on compliance,\textsuperscript{151} and they are not entirely insurmountable. In any case, their relevance here is limited to the impact they may have on the capacity of the EU to encourage compliance in these ‘new’ conflicts, and to the ways in which the EU can engage with the ‘new’ actors involved – non-state armed groups.

Two further weaknesses in relation to compliance and enforcement in this domain are the lack of accountability for violations, and the absence of individual redress. \textit{Post facto} accountability for violations can be difficult to establish, and liability for ‘violations of provisions related to proportionality, distinction and other obligations under IHL that involve balancing or a reasonable-commander standard is, in practical terms, usually established only in the most extreme cases of violation’.\textsuperscript{152} \textit{A priori} prevention of violations is therefore extremely important.\textsuperscript{153} International humanitarian law, furthermore, provides no standing for individual complaints of violations, nor does it enumerate any obligation for the states or non-state actors involved in violations for provision of redress to the individual victims of war crimes or grave breaches.\textsuperscript{154}

Many non-state actors such as international organisations and international non-governmental organisations are involved in working towards increased compliance and enforcement of international humanitarian law, and have attempted to understand and adapt to both the advantages and disadvantages posed by the law. These have included, most notably, the United Nations Security Council,\textsuperscript{155} the United Nations General Assembly, and many prominent non-governmental organisations, such as Amnesty International, and the so-

\begin{footnotesize}
\begin{enumerate}
\item[149] Ibid.
\item[150] Ibid.\textsuperscript{151}
\item[151] For example, in terms of the application of international humanitarian law to non-state actors, see Bassiouni (n 135) 742, see also at 788 in terms of the recognition of non-state actors reducing violence.
\item[152] Modirzadeh (n 78) 356-357.
\item[153] Ibid.
\item[154] Ibid 390.
\end{enumerate}
\end{footnotesize}
called guardian of the law the ICRC. Bhutros Bhutros-Ghali, the former United Nations Secretary-General, also recognised and endorsed the increasing role of regional organisations in contributing to this area during his tenure, noting that such regional action ‘as a matter of decentralization, delegation and cooperation with United Nations efforts could not only lighten the burden of the [Security Council] but also contribute to a deeper sense of participation, consensus and democratization in international affairs’. While there have been some investigations of the role of international humanitarian law in the internal order of the European Union, and of the possibility of a regional approach to the law within such organisations, there has been little study to date on the role of the European Union in the larger external process in international affairs. The following part of this chapter explores the efforts of the European Union to engage with international humanitarian law compliance externally.

1.3 The European Union Guidelines on Promotion of Compliance with International Humanitarian Law

1.3.1 Background to the Guidelines

The Council of the EU Working Group on Public International Law, or Comité Juridique (COJUR), is the core group within the Council of the EU tasked with dealing with issues of public international law. COJUR is subsidiary to the Political and Security Committee within the Council of the EU. The Political and Security Committee monitors situations in areas covered by the European Security and Defence Policy (ESDP) and the Common Foreign and Security Policy (CFSP), contributes to the definition of policies, and coordinates the different working parties in the area of CFSP, including COJUR. The Committee is the

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160 COJUR was created under the auspices of what was originally called the Political Committee (it was known as the ‘Political and Security Committee’ since entry into force of the Nice Treaty on 1 February 2003); see ‘CFSP Guide: Compilation of Relevant Texts’, Council of the EU, 10898/08 (Brussels, 18 June 2008), and for a general discussion of the working group, see Frank Hoffmeister, ‘The Contribution of EU Practice to International Law’ in Marise Cremona (ed) Developments in EU External Relations Law (OUP 2008) 51.
Council body which examines options available for the EU’s response to a crisis, and so its decisions are crucial in terms of the foreign policy of the EU. COJUR itself is formed of representatives of the Member States who are normally legal experts. COJUR works to achieve a number of aims based on achieving common or coherent EU positions on questions of international law. The group examines reservations to multilateral treaties by third countries, issues of international humanitarian law and developments in general international law, for example issues surrounding the responsibility of states or the death penalty. COJUR also prepares EU statements, common positions and guidelines on various areas of international law. The working group has the potential to profoundly influence the policy decisions of both the Council of the EU and the Member States through these various activities. Purportedly responding to a Swedish initiative, COJUR drafted guidelines on international humanitarian law and finalised them at a meeting on 25 November 2005. The Political and Security Committee endorsed the draft guidelines shortly thereafter, following which the Committee of Permanent Representatives (COREPER) examined the text and invited the Council to adopt them.

The Council of the EU adopted the Guidelines on Promoting Compliance with International Humanitarian Law (IHL) in December 2005. The aim of the guidelines is to outline the operational tools available to the EU institutions and bodies to promote compliance with international humanitarian law by third countries and non-state actors operating in those countries, in line with the commitment of the EU and its Member States to international humanitarian law. The guidelines do not address measures to be taken to ensure compliance with the law in the course of the conduct of the EU and its Member States themselves, for example in the context of their own armed forces. It is acknowledged in the guidelines that, as all EU Member States are Parties to the Geneva Conventions and their Additional Protocols, they are already obliged to ensure compliance with international law.

162 From Delano V Verwey, The European community, the European Union, and the International Law of Treaties (TMC Asser Press 2004) 130: the information relating to COJUR was obtained through personal interviews with the Legal Services of the Commission and the Council in the period November-December 2003.
163 See Hoffmeister (n 160) 51.
164 Ibid.
165 Ibid.
166 Ibid.
167 Ibid.
168 Council of the EU, I/A Item Note, from the PSC to COREPER/Council, ‘Guidelines on the Promotion of International Humanitarian Law’ Doc 15246/05 (Brussels, 5 December 2005).
170 Ibid para 2.
humanitarian law in their own conduct.\textsuperscript{171} As such, the focus is on external promotion in the sphere of the external relations of the European Union, although some means of action provided for, such as dissemination and training, may have an internal element.

The guidelines note that the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, and state that this ‘includes the goal of promoting compliance’ with international humanitarian law.\textsuperscript{172} The guidelines then provide some general comments on the evolution, sources and application of international humanitarian law. It is noted that states are obliged to comply with the rules of the law to which they are legally bound by treaty or which form part of customary international humanitarian law, and that such rules may also apply to non-state actors. It is specified that compliance with these rules is of international concern, that the ‘suffering and destruction caused by violations’ of international humanitarian law can make returning to peace more difficult, and that there is thus a ‘political, as well as a humanitarian interest, in improving compliance’ with the law internationally.\textsuperscript{173} The policy document then refers to the scope of application of the law, the relationship between international human rights law and international humanitarian law, and individual responsibility. In relation to consideration of scope, it is noted that different legal regimes apply to international and non-international armed conflicts, and that the questions of whether a situation amounts to an armed conflict and what category of armed conflict it is are ‘mixed questions of fact and law’, which depend upon appropriate legal advice along with a determination of the particular context and a range of factors for a satisfactory answer.\textsuperscript{174} The guidelines then highlight the importance of distinguishing between international human rights law and international humanitarian law, recognising that while they are both aimed at protecting individuals, differences remain, namely that human rights law is applicable to everyone within the jurisdiction of the state concerned in time of peace and in time of armed conflict, whereas the latter is only applicable in times of armed conflict and occupation.\textsuperscript{175} Individual responsibility is then briefly addressed by the guidelines, which note that certain serious violations of the law are defined as war crimes, that these crimes are linked to an armed conflict, and that individuals bear responsibility for such crimes. It is underlined that states must, ‘in accordance with their national law, ensure that alleged perpetrators are brought before their

\textsuperscript{171} See Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) [2009] OJ C303/12, para 2 and fn 2.
\textsuperscript{172} Ibid para 3.
\textsuperscript{173} Ibid para 5.
\textsuperscript{174} Ibid para 9-11.
\textsuperscript{175} Ibid para 12.
own domestic courts or handed over for trial by the courts of another State or by an
international criminal tribunal’. 176

The operational section of the guidelines is then presented in two sections, the first
dealing with reporting, assessment and recommendations for action, and the second listing
the means of action at the disposal of the EU. The first section, in order to enable effective
action in terms of the promotion of the law, recommends timely identification of situations
where international humanitarian law is applicable, and identification of appropriate actions
to promote compliance in particular situations, including consultations with the ICRC and the
United Nations, and drawing on the International Humanitarian Fact Finding Commission
(IHFFC) if necessary. The latter mechanism was established by article 90 of the Additional
Protocol I to the Geneva Conventions of 1949, and is granted competence to: ‘(i) enquire into
any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other
serious violation of the Conventions or of this Protocol; and (ii) facilitate, through its good
offices, the restoration of an attitude of respect for the Conventions and this Protocol’. 177 The
relevant articles pertaining to grave breaches of the conventions, 178 however, continue to
apply, and so the parties to the conflict may themselves establish an inquiry into alleged
violations in accordance with those articles. 179

Another recommendation of the guidelines is that reports about a particular country or
conflict by EU Heads of Mission and other appropriate EU representatives (including Heads
of Civilian Operations, Commanders of Military Operations and Special Representatives),
should include information on compliance with international humanitarian law, and should,
where feasible, include analysis and suggestions of possible measures to be taken by the
EU. 180 COJUR should also be informed in situations where an armed conflict may be
imminent, and if necessary, COJUR could be tasked with making suggestions relating to
potential EU action. 181

This initial assessment of the applicability of international humanitarian law is crucial
to an awareness of the relevant issues being mainstreamed throughout the external action of
the EU. Dependent upon the information obtained through such reporting, assessment and

177 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims
of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, para 2(c) (i-ii).
178 Ibid 2(c): ‘Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third
Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the
Conventions and shall extend to any alleged violation of this Protocol’.
180 Updated EU Guidelines (n 171) para 15(c).
181 Ibid.
recommendation, the second part of the operational section of the guidelines then provides the means of action at the disposal of the EU in its relations with third countries. The options made available to the EU to promote international humanitarian law include political dialogue, public statements, démarches, training, restrictive measures and mainstreaming the law in its crisis management operations. While the guidelines state that these means are at the EU’s disposal in relations with third countries, and there is no mention of non-state actors, in the title at least, it is clear from some of the means listed that both non-state actors and individuals are relevant to the implementation of such means, especially with regard to sanctions and individual responsibility, but also with regard to public statements and other means. The section below provides an overview of the tools suggested by the guidelines, establishes their relevance to the framework of international humanitarian law, and provides some brief illustrations of whether and how these methods have been employed by the European Union.

### 1.3.2 Options for Action in Conformity with the Guidelines

The first measure mentioned in the list of actions available to the European Union is political dialogue. Both in peacetime, when the EU can urge the ratification and implementation of important humanitarian law instruments, and in the context of ongoing armed conflicts, where violations of international humanitarian law can be reported, political dialogue is a key measure available to the EU and its Member States to influence third states. It is also probably the measure most frequently used by the EU. In terms of implementation, the EU promotes ratification of significant humanitarian instruments adopted since the Geneva Conventions of 1949. An example would be the promotion of ratification of the Additional Protocols of 1977 to the Geneva Conventions. The EU Presidency has urged all UN Member States that have not ratified the Protocols to do so, and to also accept the competence of the International Humanitarian Fact-Finding Commission. The Council of the European Union has also itself established an Independent International Fact-Finding Mission on the Conflict in Georgia. Ratification of Additional Protocol III on the adoption of an additional emblem has also been encouraged. The EU supports the ‘Basic Principles and Guidelines on the

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182 Ibid para 16(a)-(i).
185 EU Presidency Statement, Status of Protocols additional to the Geneva Conventions (n 183).
Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ which encourage implementation of adequate remedies for victims of war at the national level.\textsuperscript{186} The EU Parliament has similarly urged ratification of the Geneva Conventions, the Additional Protocols, the Ottawa Convention prohibiting anti-personnel mines and the Rome Statute of the International Criminal Court, on the occasion of the 50th anniversary of the Geneva Conventions.\textsuperscript{187} EU presidencies have reportedly targeted over 110 third countries and international organisations to encourage ratification and implementation of the Rome Statute of the ICC particularly, and the influence of the EU in the process leading up to the accession of Japan in 2007 has been cited as a successful example of these efforts.\textsuperscript{188}

The EU has also addressed rule of law issues relating to the law through political dialogue in the context of counter-terrorism. An example of this practice is the dialogue on counter-terrorism and international law, initiated with the United States in 2006. A Joint Statement of the EU and the US has been adopted on the closure of the Guantánamo Bay detention facility and future cooperation in the realm of counter-terrorism, based on shared values, international law, and respect for the rule of law and human rights.\textsuperscript{189} This dialogue and resulting agreement could potentially signal a progressive development in terms of compliance with the rule of law in counter-terrorism measures and operations.\textsuperscript{190} The European Union approach to the application of international humanitarian law is on a case-by-case basis, as stipulated in the section on scope of application mentioned above, and clearly would not apply in many situations where national criminal law would remain the relevant applicable legal system.\textsuperscript{191} This is a nuanced approach to counter-terrorism, avoiding the automatic labelling of such situations as a form of armed conflict. In any case, the EU has affirmed that it will continue its efforts of ensuring that ‘all counter-terrorism efforts are

\textsuperscript{186} Ibid.
\textsuperscript{190} Ibid.
\textsuperscript{191} Hoffmeister (n 160) 104-105. The difficulties surrounding the classification of armed conflicts and the applicability of humanitarian law are often considered the ‘Achilles heel’ of international humanitarian law (see Toni Pfanner, Editorial, (2009) 91 IRRC No. 873). These issues will not be dealt with at length here, the focus being on the other issues of compliance and enforcement. For a thorough examination of the legal aspects of categorising armed conflict, see ‘Typology of Armed Conflicts’ (2009) 91 IRRC No.873; and also Anthony Cullen, \textit{The Concept of Non-International Armed Conflict in International Humanitarian Law} (CUP 2010).
consistent with international law, including human rights law, refugee law and international humanitarian law’. 192

Related to such political dialogue is the option of general public statements. This option emphasises the need to urge compliance in generalised statements related to international humanitarian law. An example would be the statement issued on the 60th Anniversary of the Geneva Conventions, where the EU reiterated that the ‘need to ensure respect for the law is more important than ever. This requires continuous efforts to mobilise political will, increase awareness of international law, and ensure accountability for violations, in particular for acts that amount to war crimes’. 193 It has been noted that issues relating to compliance with international humanitarian law have been addressed more than 300 times in public filings of the EU from the adoption of guidelines in December 2005 until spring 2009, in a study of the frequency of references to the law in the EU texts made by the ICRC. 194 Diplomatic démarches and/or targeted public statements are then listed within the options provided. These are issued in the context of specific conflicts, condemning known violations of international humanitarian law. The EU is not averse to issuing such statements when it has information of widespread violations of international humanitarian law. Frequent statements have been made for example, in relation to both Sri Lanka and Yemen, and have addressed the parties to the conflict, urging them to respect international humanitarian law. 195 Marsh and Mackenstein view these public démarches as an effective tool of coercion. They note that the European Union can

apply diplomatic pressure on a recalcitrant third party through the issue of a démarche. Although only declaratory, this can carry considerable force given the economic weight of the EU, the collective influence of the member states, the normative power of the EU and its ability in coalition building. The EU can also use its power to grant or refuse diplomatic recognition and take collective morally stigmatising action, such as the withdrawal of Union ambassadors from a country. 196

192 Council of the EU, ‘EU Priorities for the 64th GA of the UN’ 10809/09 (Brussels, 9 June 2009) para 28. 
193 Council of the EU, ‘Declaration by the Presidency on behalf of the European Union on the Occasion of the 60th Anniversary of the adoption of the four Geneva Conventions of 1949’ 12535/1/09 REV 1 (Brussels, 12 August 2009).
194 This was stated in a paper by Morten Knudsen, ‘The guidelines of the European Union on the promotion of respect for international humanitarian law and their implementation’, copy on file with author.
Despite the potential of these declarations, it has been noted that the ‘real teeth behind EU external relations policies is the threat of economic sanctions and the progressive politicisation of aid through the use of conditionality’.\textsuperscript{197}

Restrictive measures, or sanctions as they are more commonly known, are also listed as an option for action to be taken in conformity with the guidelines. The EU applies restrictive measures in pursuit of the objectives of the Common Foreign and Security Policy as set out in article 11 of the Treaty on the European Union, including the objective of developing and consolidating the rule of law and respect for human rights. The policy is outlined in a Council document entitled ‘Basic Principles on the Use of Restrictive Measures (Sanctions)’. The EU, according to these principles, is committed to cooperating with the UN in terms of the imposition of sanctions, but will also impose autonomous sanctions if necessary.\textsuperscript{198} Targeting of sanctions should reduce adverse humanitarian effects – so the preferences for restrictive measures include arms embargoes, visa bans and the freezing of funds.\textsuperscript{199} It has been noted that the European Union in fact has had a preference towards the imposition of economic sanctions, which have:

long been the EU’s principle punitive weapon. Strategic embargo policy was a significant tool of economic warfare during the Cold War and economic sanctions have since variously been used to defend EU economic interests, convey disapproval and force states to change policies regarded as unacceptably contrary to EU norms and/or interests.\textsuperscript{200}

Interestingly, a document outlining EU policy on sanctions in September of 2009 failed to explicitly refer to violations of international humanitarian law as a possible trigger or one of a set of triggers, but stuck to the common language of human rights and rule of law, and in relation to arms embargoes, the trigger was a conflict area or regime where the arms and military equipment was likely to be used for ‘internal repression’ (or aggression against a foreign country).\textsuperscript{201} It seems unlikely that sanctions will be imposed solely for violations of international humanitarian law, if it is not given priority in the policy documents, despite the guidelines giving clear authorisation of this measure as an appropriate way to promote compliance with international humanitarian law. Types of sanctions the EU can apply include diplomatic sanctions, suspension of cooperation with a third country, boycotts of sport or

\textsuperscript{197} Ibid.
\textsuperscript{198} See Council of the EU, ‘Basic Principles on the Use of Restrictive Measures (Sanctions)’ 10198/1/04 REV 1 (Brussels, 7 June 2004) para 5.
\textsuperscript{199} Ibid para 6.
\textsuperscript{200} Marsh and Mackenstein (n 196) 66.
cultural events, trade sanctions, financial sanctions, flight bans, and restrictions on admission. These means could all prove very useful in encouraging compliance with international humanitarian law in third countries. An example of a ban associated with violations of international humanitarian law would be the freezing of funds and resources of certain persons indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY); the freezing of funds and economic resources for individuals who violate certain principles of international humanitarian law in the Democratic Republic of Congo; and restrictions on admission to the EU for individuals who have violated international humanitarian law. It would appear that there is scope for a more explicit relationship between the promotion of compliance with the law and the threat and imposition of restrictive measures by the EU. Admittedly, however, it may not always be easy to achieve the agreement necessary for the imposition of sanctions or other coercive measures. While the EU’s relations with third countries are conditional on democratic principles and human rights,

taking action against a third country that has not met the EU’s conditions can be extraordinarily difficult; Member States often cannot agree to do so. One or more Member States will object to the imposition of negative measures, because the third country in question is an important security or strategic partner.

One of the core strengths of the EU in terms of the promotion of compliance with international humanitarian law generally would be its cooperation with and support of other international bodies, which is listed as another of the options or tools available to it and its Member States. Cooperation would include working alongside such bodies as the UN and the ICRC. International humanitarian law must also be promoted as suggested in the guidelines through its mainstreaming in crisis-management operations, for example, the ‘importance of preventing and suppressing violations of international humanitarian law by third parties should be considered, where appropriate, in the drafting of mandates of EU crisis-management operations’. The crisis-management activities of the EU, and its growing presence, both military and civilian in a number of conflict arenas, has been highlighted as potential leverage for the enforcement of the law in third states, considering the contact that EU personnel will have with parties to conflicts:

This presence in the field, which is often small, can increase EU political leverage, for instance the ACEH operation for the first time sees the EU as a

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203 Smith (n 45) 106.

204 Updated EU Guidelines (n 171) para 16(f).
security actor in Asia, the Rafah border crossing operation in Palestine gave
the EU more of a role in the MEPP. This is a leverage that could be used to
enforce IHL.  

In certain cases, missions may also collect information that may be of use for war crimes
investigations, for example by the International Criminal Court. Cooperation with the ICC is
important in ensuring individual responsibility, and one of the recommendations of the
guidelines is that the EU should ensure that there is no impunity for war crimes, either
through encouraging penal legislation for violations of international humanitarian law at the
domestic level, or by support of the ICC. The EU is a resolute supporter of the International
Criminal Court, and, in this way, supports accountability for serious violations of
humanitarian law. The EU has also attempted to facilitate the exercise of universal
jurisdiction by Member States, through the adoption of a number of decisions which aim to
strengthen cooperation between Member States in the investigation and prosecution of
genocide, crimes against humanity, and war crimes at the domestic level.  

The EU maintains that ending impunity ‘for the most serious international crimes must remain on the
agenda’. COJUR has a sub-group dealing specifically with the ICC, which was set up ‘due
to the complex nature of the issue and for reasons of efficiency’. The main duty of the sub-
group is to advise COJUR on legal issues relating to the work of the ICC. The EU’s main
focus in relation to the court has been to promote ratification and implementation of the
Rome Statute of the ICC.  

The EU has presented its conviction that:

Sustainable peace will not be achieved without justice. The EU remains
committed to supporting the International Criminal Court (ICC) as well as to
promoting the universality and integrity of the Rome Statute.  

A Focal Point position on the ICC has also been created within the Council Secretariat,
whose role is, *inter alia*, to coordinate démarches in relation to countries who may not have

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206 Council Decision 2002/494/JHA of 13 June 2002, setting up a European network of contact points in respect
of persons responsible for genocide, crimes against humanity and war crimes [2002] OJ L167/1; Council
Framework Decision 2002/584/JHA of 13 June 2002, on the European arrest warrant and the surrender
procedures between Member States [2002] OJ L190; and Council Decision 2003/335/JHA of 8 May 2003,
concerning the investigation and prosecution of genocide, crimes against humanity and war crimes [2003] OJ
L118/12.
207 Council of the EU, ‘EU Priorities for the 64th GA of the UN’ 10809/09 (Brussels, 9 June 2009) para 26.
208 Martijn Groenleer and David Rijks, ‘The European Union and the International Criminal Court: The Politics
of International Criminal Justice’ in Knud Erik Jorgensen (ed) *The European Union and International
Organizations* (Routledge 2009) 178.
209 Ibid.
210 Ibid.
211 Council of the EU, ‘EU Priorities for the 64th GA of the UN’ 10809/09 (Brussels, 9 June 2009) para 26.
ratified or implemented the Rome Statute. This coordinated approach to the ICC adds legitimacy to that institution – this is an example of a potential strength of the EU. If a certain proposal or institution is supported and advocated for by the EU as a whole, that can lend greater legitimacy than if it received support from states in their individual capacity. The EU, through its support of the ICC and its support for domestic investigation and prosecution of international crimes, including war crimes, promotes accountability through individual responsibility for serious violations of humanitarian law, using its collective voice.

Training is also listed as a key element of promotion, and the guidelines view this as including training and education on international humanitarian law in peacetime, and funding training in third countries. In terms of dissemination and training, the EU provides some training internally, for example to relevant working parties, although the primary responsibility remains with Member States. While this constitutes internal action, adequate training of EU personnel in international humanitarian law could lead to increased promotion of compliance with international humanitarian law while such personnel are acting in third countries or engaging otherwise with parties to a conflict. International humanitarian law ‘awareness’, within planning processes and within EU forces, and a capacity to implement it in EU operations, has been said to be ‘crucial’ to the conduct of EU peace operations. This is due to the reality that, firstly, in a situation where a crisis escalates EU forces may find themselves in a conflict situation to which international humanitarian law applies, i.e. to the EU forces themselves, and secondly, because they have to be able to provide ‘situational awareness’ as to the obligations of the parties to an armed conflict. The EU made a Joint Pledge at the 30th Conference of the Red Cross and Red Crescent which indicated that public dissemination and training, supported by effective enforcement, were crucial for improved compliance with international humanitarian law, and in particular pledged to pursue efforts to

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215 EU training activities include: an annual in-house seminar on international humanitarian law for EU staff and Member State delegations, and ICRC speakers in the margin of relevant working parties, e.g. in COJUR, as noted by Frederik Naert, from a presentation published in Gian Luca Beruto (ed) Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law: IHL Human Rights and Peace Operations (Sanremo, 4-6 Sept 2008).

train military and civilian personnel involved in EU crisis management operations. In 2010 the EU launched a military training mission for the Somali security forces in Uganda, as part of a comprehensive package of political, security, and development engagement, to respond to the situation in Somalia. The training covers international humanitarian law, human rights and refugee law.

Finally, the issue of arms exports is also addressed by the guidelines. The European Code of Conduct on Arms Exports provides that compliance with international humanitarian law should be considered before licenses to export are granted. The EU is already involved in this area, has contributed to movements against the proliferation of small arms, and has supported the treaty against landmines. Measures to combat the spread of arms can also affect compliance with international humanitarian law, by minimising the access of individuals, groups and/or regimes to weapons which are likely to be used for violating international humanitarian law. There have been a number of domestic, regional and international initiatives, from the early 1990s, aimed at the regulation of the global arms trade, especially with respect to human rights and repressive regimes. These initiatives have culminated in the UN process leading up to the adoption of an international arms trade treaty. A legally binding instrument is yet to be realised, but these initiatives provide a set of agreed guidelines and standards, and clarify the responsibilities involved for those willing to adhere to such standards.

1.3.3 Assessment of the Guidelines’ Potential

The guidelines have the potential to be a decisive factor in guiding both EU member states and the EU to work to increase levels of compliance with international humanitarian law. The means of action available laid out in the guidelines are a useful toolbox for EU Member States acting individually and for the EU acting as an institution. International humanitarian law is not one of the core values of the EU, but rather forms part of its commitment to human rights, human security and to the rule of law. In fulfilling these values, however, it is impossible for the EU to entirely neglect issues surrounding compliance with international humanitarian law. The Council of the EU has adopted conclusions which include initiatives

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217 EU Joint Pledge PO88 made at 30th International Conference of the Red Cross and Red Crescent (26-30 November 2007), Public Dissemination of and Training on IHL.

to ensure improved implementation of the guidelines.\textsuperscript{219} The Council has reaffirmed, in these conclusions, its support for the promotion and protection of international humanitarian law and to this end adopted an updated version of the guidelines.\textsuperscript{220} The Council asserted its commitment to implementing the guidelines and reiterated the importance of continuing to mainstream international humanitarian law in the external actions of the European Union. The need to improve coherence and coordination between the various policies and actions targeting respect for international humanitarian law, external action, development cooperation and humanitarian aid was also acknowledged, and it was stated that the need to respect humanitarian law should form part of all relevant dialogues with third countries. These conclusions represent a development of the EU’s approach to international humanitarian law promotion, and outline in detail the steps that must be taken in order to implement the guidelines fully. The conclusions can be used as a measure of any progress the EU makes in implementing the guidelines.

Another aspect of the guidelines which must be highlighted in order to assess their potential effectiveness is their non-binding character. Their status is well below that of directives and other binding instruments within the European legal order and is similar to a declaration of intent. Unlike directives, which require Member States to achieve a particular result, no response or implementation is required when guidelines are issued.\textsuperscript{221} The lack of legally binding effect does not mean, however, that they hold no potential for significant impact in practice. Non-binding instruments may exert ongoing influence on both the development of policy and practice. So-called ‘soft-law’ creation within the European Union has been recognized as

less as a surrogate, than as a preparatory mechanism, for the negotiation and development of ‘hard law’ proposals. Often, where the necessary agreement was lacking, soft law could provide an opportunity space for consensus to emerge on broad goals and principles, while more contentious details were still being worked-out.\textsuperscript{222}

\textsuperscript{219} Council of the EU, Council Conclusions on Promoting Compliance with International Humanitarian Law, 2958th Foreign Affairs Council Meeting (Brussels, 8 December 2009).
\textsuperscript{220} The publication of the Council Conclusions, it must be noted, coincided with the 60th Anniversary of the Geneva Conventions, and the updated Guidelines, while an important symbolic gesture, contain no substantive improvements or additions.
\textsuperscript{221} See Article 288 of the Treaty on the Functioning of the European Union, for the legal bases of regulations, directives, decisions and recommendations and opinions.
\textsuperscript{222} Frances Snyder has identified European ‘soft law’ in this manner in her work on the European Union. As paraphrased by Mark Dawson, ‘Soft Law and the Rule of Law in the European Union: Revision or Redundancy?’ (2009) EUI Working Papers RSCAS 2009/24. For the relative advantages of ‘soft-law’ in the international system, see also Raustiala and Slaughter (n 1) 552, and Dinah Shelton, Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System (OUP 2000).
The guidelines certainly represent broad goals and principles relating to the promotion of international humanitarian law. It is less certain whether there is potential for their development into a legally binding instrument, and unlikely that such a transformation would depend, in this instance, on working out contentious details. It is more likely that Member States would not welcome additional legal obligations in this field. It may be more useful to view the guidelines as an elaboration of the existing commitment of EU Member States to ensure respect for international humanitarian law, as will be discussed in the subsequent chapter.

The EU may have the potential to be potent in particular areas, for example political dialogue and the imposition of restrictive measures, and is also likely to develop preferences for the utilisation of certain tools over others. The most effective method of influencing compliance with international humanitarian law will depend on the given situation, the relationship between the EU and the parties to the conflict, and the level of existing EU influence and involvement in the country/region, among other factors. In many cases an array of approaches may be necessary to influence compliance on the ground. The EU is certainly adept at adopting policy on a plethora of issues relating to the reinforcement of existing international standards, but progress on effective implementation may lag behind at a considerable distance, due to the aforementioned issues of coordination and coherence within EU structures and institutions, among other external barriers.

1.4 Conclusion

The EU guidelines inform this thesis in two ways. Firstly, they are a starting point for an exploration of the relationship between the EU’s external relations and the promotion of compliance with international humanitarian law. Secondly, the EU’s policy objectives as outlined in the guidelines can be used as a benchmark by which to gauge the performance of the EU in promoting compliance with international humanitarian law internationally. The options provided by the guidelines as a means to encourage compliance with international humanitarian law will be explored individually in more detail alongside current EU practice, in chapter three.

The guidelines have been lauded as a positive development in the legal order of the EU. Javier Solana has framed the guidelines as an innovative measure, to respond to the ‘explosive growth’ in operations and missions conducted under the EU’s Security and Defence Policy, and as a representation of the EU position that counter-terrorism must be
conducted within the framework of international law.\textsuperscript{223} He views the guidelines as ‘growing in importance’\textsuperscript{224} Jacob Kellenberger has commended the guidelines as a means by which the EU can incorporate international humanitarian law as a core consideration of the Common Foreign and Security Policy and also as a core part of the EU’s relations with third countries.\textsuperscript{225} Kellenberger has highlighted the role of the EU, noting the ‘great significance of the political commitments undertaken by the European Union and its member States in recent years in an effort to weigh upon the behavior of belligerents on the battlefield, to induce a better application of IHL’.\textsuperscript{226} The challenge of course remains to adequately and effectively operationalise the guidelines, and Kellenberger has offered the full support of the ICRC in this respect.\textsuperscript{227} The ICRC has also praised Sweden’s role particularly in producing the guidelines, and has encouraged the EU to press ahead with its efforts to ensure that they are implemented.\textsuperscript{228} The Swedish Presidency of the EU in 2009 focused on increasing the visibility of international humanitarian law in the foreign policy of the European Union, and on strengthening the implementation of the guidelines. Concerted attempts have certainly been made in terms of increasing the visibility of international humanitarian law.\textsuperscript{229} At a minimum the guidelines can be seen to represent ‘the common legal understanding of EU Member States on this field of law and a political reference paper’,\textsuperscript{230} although there is scope for much greater impact on third countries as a result of this ‘reference paper.’

The danger is that the implementation of these guidelines, far from being universal and impartial, will be pursuant to the economic and political goals of the European Union.\textsuperscript{231} It remains to be seen whether their implementation will represent a piecemeal contribution towards ensuring respect for international humanitarian law or a consistent and coherent approach. The European Union may decide on the applicability of the law in any given

\textsuperscript{224} Ibid.
\textsuperscript{226} Ibid.
\textsuperscript{227} Ibid.
\textsuperscript{229} For example, the Swedish presidency also organised a high level seminar on current challenges for the law, focused on how to enhance respect by non-state actors, see website of the Swedish Presidency of the European Union for details: <http://www.se2009.eu/en>; see also ‘Interview with Ministry of Foreign Affairs Director-General for Legal Affairs Carl Henrik Ehrenkrona’ (17 September 2009), also available on the website of the Swedish Presidency.
\textsuperscript{230} Hoffmeister (n 160) 100.
\textsuperscript{231} For analysis of the EU’s impact on third-party countries embroiled in conflict in the EU ‘neighbourhood’, see Nathalie Tocci, ‘Comparing the EU’s Role in Neighbourhood Conflicts’ in Cremona (ed) (n 160).
situation and decide whether to take action depending on the extent of the interest of the EU in a particular armed conflict. Nevertheless, the guidelines represent an attempt at a coherent policy on the promotion of international humanitarian law, and an assertion of the importance and relevance of this body of law to the external relations of the European Union.

232 Ibid.
Chapter 2:
The Scope of the Duty to Ensure Respect for International Humanitarian Law

2.1 Introduction

The aim of this chapter is to explore the development of the scope of the duty to ‘ensure respect’ for international humanitarian law as provided in Article 1 common to the four Geneva Conventions of 1949.¹ There is a need to assess the current meaning and interpretation of this article, for the purposes of evaluating the nature and scope of the obligations of European Union (EU) Member States. All EU Member States are High Contracting Parties of the Geneva Conventions of 1949. The EU itself is not a party to the Geneva Conventions, nor has it declared itself bound by them, although, as discussed in the previous chapter, the EU has adopted guidelines in line with the commitment of the EU and its Member States to international humanitarian law, with the aim of addressing compliance with the law by non-EU countries, and where appropriate, non-state actors operating in those countries.² The guidelines serve to reinforce and also hold the potential to reinvigorate the existing obligations of EU Member States under common Article 1 to the Geneva Conventions. The duty to ensure respect may provide a firm foundation on which the goal of the EU to promote compliance can rest.

This chapter will explore the duty to ensure respect for the 1949 Geneva Conventions in terms of its history, development, and scope, and will consider what might amount to a valid trigger for such a duty. The drafting history of the article in question shall be discussed first, followed by an examination of the involvement of the ICRC in the subsequent development of the scope of the duty. The chapter then considers the treatment of common Article 1 in cases of the ICJ, and consider the duty


² Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL), [2009] OJ C303/12, para 2 [hereinafter Updated EU Guidelines].
in light of the concept of *erga omnes*, and in terms of state responsibility. The influence of human rights on the development of the duty shall also be analysed, as shall the duty to ensure respect for parties to an armed conflict under customary international law.

Frits Kalshoven has argued that the scope of the duty has blossomed considerably since almost 60 states agreed to respect and ensure respect for the Geneva Conventions in 1949. At that time, those High Contracting Parties may have supposed that this agreement extended only to the limits of their own jurisdiction. Around the time of the adoption of the Geneva Conventions, just after the end of World War II, there was indeed an emerging sense of internationalism, yet the international community was a long way away from such concepts as a duty to intervene on humanitarian grounds or a responsibility to protect. The states involved in the drafting of the Geneva Conventions would appear to have considered that the phrase ‘to ensure respect’ extended at best to their concerted supervision over actors under their control, mainly their own armed forces. The *travaux préparatoires* can help us to determine whether the states involved entertained notions that this duty held the potential for expansion into a duty of vigilance over the other parties to the Geneva Conventions. Could such a duty also extend to vigilance over all states under customary international humanitarian law?

It would be easier to ignore ongoing violations than to attempt to ensure compliance with international humanitarian law. Ensuring compliance with the law by third party states is indeed an enormous and complex task, and it must be considered first in terms of the scope and source of the obligation of states to ‘ensure respect’ for this system of rules. The modern interpretation of the duty to ‘ensure respect’ is

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3 Frits Kalshoven explores the developments of scope in his thorough study on the duty, in the article ‘The Undertaking to Respect and Ensure Respect in all Circumstances: From tiny Seed to ripening Fruit’ (1999) 2 *YBJHL* 3.


5 The phrase as used here broadly refers to the combination of states, international and regional organizations, and non-governmental organizations, for a discussion see Dino Kritsiotis, ‘Imagining the International Community’ (2002) 13(4) *EJIL* 961.


indeed compelling, especially from a humanitarian standpoint, but it needs to be assessed whether it is also convincing from a legal and normative standpoint. It is necessary to explore whether the construction of this obligation has firm foundations, and whether this duty has indeed cemented into an international norm, worthy of consistent vigilance.

Common Article 1 binds the state parties to the Geneva Conventions as follows: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’. Placing emphasis at the outset of each convention on the undertaking to ‘respect’ the provisions therein was intended to draw ‘attention to the special character of that instrument’. By explicitly and individually agreeing to respect the conventions, each state acknowledges that it is not concluding its agreement based on expectations of reciprocity, allowing it to relinquish its commitment if another party does so, but instead each state contracts its obligations under the conventions vis-à-vis itself and also vis-à-vis the other state parties. The phrase at the end of the provision in question, ‘in all circumstances’, indicates that the application of the convention does not depend on the legality of the resort to the use of force in a particular conflict, i.e. does not depend in any way on considerations of jus ad bellum. Neither can any legitimate reason be given for a decision not to respect the conventions in their entirety once the conditions of application have been fulfilled in accordance with common Article 2. This chapter aims to assess the current scope of the middle phrase contained in the provision, the duty to ‘ensure respect’, and to chart developments towards a communal responsibility of states for ensuring compliance with, and enhancing enforcement of international humanitarian law.

2.2 Origins of the Duty to Ensure Respect

It is appropriate to begin this section with the famous Martens Clause of the 1899 Hague Regulations, which set out a somewhat optimistic framework for invoking responsibility and obligation in times of war where there was no corresponding rule or regulation:

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9 Ibid.
10 Ibid 16.
Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.\textsuperscript{11}

As with common Article 1 of the Geneva Conventions, the Martens Clause has no one officially accepted interpretation. During the Hague Peace Conferences of 1899 there was disagreement between the delegates as to the status of resistance movements in occupied territory, as expressed in forceful terms by the Belgian delegate Mr. Beernaert.\textsuperscript{12} The Russian delegate, Fyodor Fyodorovich Martens, proposed the relevant clause in an attempt to prevent revision of the draft articles as agreed.\textsuperscript{13} Subsequent to Martens delivering his declaration in an attempt to appease the parties, it was clarified that ‘the only point settled is that armies, militia, organized bodies, and also the population which, even though unorganized, spontaneously takes up arms in \textit{unoccupied territory}, must be regarded as belligerents. All other cases and situations are regulated by the law of nations according to the terms of the declaration just read by the President’.\textsuperscript{14} The delegate from Belgium, Mr. Beernaert, who had so vociferously objected to the content of Articles 9 and 10 (adopted as Articles 1 and 2), immediately announced that he could, because of this declaration, vote for them.\textsuperscript{15} Unanimity, it was reported, ‘was thus obtained on those very important and delicate provisions relating to the fixing of the qualifications of belligerents’.\textsuperscript{16}

Despite the reasonably clear and apparently somewhat narrow motivation behind the adoption of the clause as presented during the Peace Conferences in the Hague, debate continues today both in relation to the motivations behind the clause,

\begin{itemize}
\item \textsuperscript{11} Preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land, named after Professor von Martens, the Russian delegate at the Hague Peace Conferences in 1899: Preamble, 1907 Hague Convention (IV) respecting the laws and customs of war on land, reprinted in Adam Roberts and Richard Guelf, \textit{Documents on the Laws of War} (2nd edn, Clarendon Press 1989).
\item \textsuperscript{13} On the approach of the ‘genius von Martens’ (Pictet as cited in Pustogarov) in this respect, see VV Pustogarov, ‘The Martens Clause in International Law’ (1999) \textit{1 J History Intl L} 125, 126-127.
\item \textsuperscript{14} Declaration of the President, Eleventh meeting of the Second Sub-commission (20 June 1899), in \textit{Proceedings of the Hague Peace Conferences} (n 12) [emphasis added].
\item \textsuperscript{15} See the Report of Mr. Rolin, in the name of the Second Commission, Annex I to the Fifth Meeting of the Plenary Conference (5 July 1899), in \textit{Proceedings of the Hague Peace Conferences} (n 12).
\item \textsuperscript{16} Ibid.
\end{itemize}
and as to the contemporary significance of the clause. Commonly held interpretations include the theories that means or methods which are not explicitly prohibited are not automatically permitted, and also that ‘conduct in armed conflicts is not only judged according to treaties and custom but also to the principles of international law referred to by the clause’. The clause can help by filling gaps in the law caused by rapid evolution in the means and methods of warfare, with the assistance of customary international law, which may include a prohibition that has not yet been incorporated into treaty law. In addition to this, the clause itself refers to possible norms deriving from the ‘principles of international law’. These principles are developed from three sources: usages established between civilized nations, the laws of humanity, and the requirements of the public conscience. In rejoinder to the argument that the gaps originally envisaged have been filled by more recent treaties on international humanitarian law, it can be accepted that ‘the Martens Clause was not an historical aberration. Numerous modern-day conventions on the laws of war have ensured its continuing validity’. This refers to the provisions in more recent conventions and protocols that explicitly endorse the relevance of the Martens Clause. The latter part of the clause is particularly relevant, that is, that in situations not explicitly covered by treaty law, the populations and belligerents remain under the protection of the laws of humanity and the dictates of public conscience. It has been argued that the laws of humanity and the dictates of public conscience were not intended as two new sources of law, but

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17 In relation to motivation, Cassese has questioned whether there were humanitarian considerations or whether the clause formed part of ‘diplomatic manoeuvring’: see Antonio Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ (2000) 11(1) EJIL 187, 216.
19 Ticehurst (n 18) text to fn 5.
20 See Ticehurst (n 18) text to fn 14.
21 Nauru, written submission requested by the World Health Organisation, on the Nuclear Weapons Case, as cited in Ticehurst (n 18) at fn 9.
22 The clause is mentioned, for example, in the Geneva Conventions of 1949 and the two Additional Protocols of 1977. In 1907 the wording of the clause was altered, but the core meaning remained: see Meron (n 18). Meron, discussing the ‘modernization’ of the clause, notes that the Geneva Conventions invoke the clause to make clear that the Geneva provisions will prevail through customary law despite any denunciations or for states no longer bound to them through treaty law. Meron also notes that the Conventions’ status as customary law is ‘hardly ever contested’: Meron (n 18) 80.
rather as permitting the ‘crystallization into such legal standards of only those “principles” that states consider, at a particular moment, as consonant with humanity and the dictates of public conscience’.\textsuperscript{23} With regard to the concept of the laws of humanity, neither domestic nor international courts have recognised it as a source of law in addition to treaties and custom, but rather as an aid to the development of and the interpretation of international humanitarian law, and thus the clause has ‘implicitly or explicitly been used as a sort of general instruction concerning the interpretation of certain international rules or as a means of better understanding the thrust of modern humanitarian law’.\textsuperscript{24}

With regard to the dictates of public conscience, Meron has argued that they can be viewed from two perspectives. Firstly, they can be viewed as ‘public opinion that shapes the conduct of the parties to a conflict and promotes the development of international humanitarian law, including customary law’.\textsuperscript{25} Secondly, they can be seen as reflecting to some extent \textit{opinio juris}, or at least as influencing and forming \textit{opinio juris}.\textsuperscript{26} Michel Veuthey has categorised consideration of public conscience as essential in the formation of both treaty and customary law, among two other functions:

Public conscience comes before treaty law: it underpins it and indeed reaches beyond it. Firstly, one could say that public conscience is the trigger mechanism of every codification of international humanitarian law. Secondly, public conscience is the driving force behind the implementation and enforcement of international humanitarian law. Thirdly, public conscience forms a sort of safety net for humanity for circumstances that written law has overlooked or not yet covered.\textsuperscript{27}

The provision placed with prominence at the beginning of the four Geneva Conventions is similar to the Martens Clause in that it can be said to belong to ‘a select group of norms and principles held by the international community to be of cardinal importance for the promotion of “elementary considerations of humanity”’.\textsuperscript{28} Common Article 1 can also be considered to introduce the notion of connectedness, or

\textsuperscript{23} Cassese (n 17) 191-192.
\textsuperscript{24} Ibid 208.
\textsuperscript{25} Meron (n 18) 83.
\textsuperscript{26} Ibid.
a community approach to the repression of violations of humanitarian norms, as arising from the interests and principles of the international community.

Was such a community approach emphasised in the drafting of common Article 1 to the Geneva Conventions? The Diplomatic Conference\textsuperscript{29} which adopted the Geneva Conventions in their final form convened from 21 April to 12 August 1949 in Geneva with representatives of 63 governments present, among other key participants, such as the ICRC.\textsuperscript{30} The conference considered drafts of the existing Geneva Conventions which had been revised during the seventeenth International Red Cross Conference held in Stockholm in August 1948, and also considered the new draft convention relative to the protection of civilians in time of war. Two concerns of the drafters invoked discussion of the duty to ‘respect and ensure respect’. The first was an aspiration that a preamble declaring the principles underlying the conventions be included. The second consideration was a desire to ensure respect of the conventions by the whole population concerned, including those who might become dissidents or rebels.

In relation to the proposed preamble for the convention relating to the protection of civilians, it was suggested that the wording should be expressed in less categorical terms than the ICRC draft which had provided that states ‘pledge themselves to respect and at all times to ensure respect’ for the rules of the convention. The replacement ‘pledge themselves to respect and at all times to ensure respect in all good faith in light of the high principles mentioned above’ was considered a suitable alternative.\textsuperscript{31} Much discussion was had on the content of the proposed preamble, but in the end it was decided not to include a preamble in the civilians convention, or in any of the conventions.\textsuperscript{32} The second concern, in relation to ensuring respect by the whole population, arose in the context of a discussion on the application of the convention to the parties to a conflict, and in particular whether dissidents or rebels would be bound by the conventions. The representative of Monaco referred to the

\textsuperscript{29} The formal title is the ‘Diplomatic Conference convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and Held at Geneva from 21 April to 12 August 1949’, convened by the Swiss Federal Council.


\textsuperscript{31} Final Record of the Diplomatic Conference of Geneva of 1949, Vol IIA 695. On discussion as to whether the text should form a Preamble or a preliminary Article, see Final Record of the Diplomatic Conference of Geneva of 1949, Vol IIA 112-114 [hereinafter Final Record].

\textsuperscript{32} Final Record (n 31) Vol IIA 777-782 and Vol IIA 181-182.
duty to ensure respect, stating that rebels might be regarded as bound by the conventions because of the parties’ undertaking ‘not only to respect them, but to ensure respect for them’.33 This aspect of Article 1 was seen as ‘providing for their dissemination among the population through instruction’.34

A representative of the ICRC stated in connection with this that the organisation would welcome the reinsertion of ‘in the name of their peoples’, a phrase removed from Article 1 during the Stockholm Conference.35 The French representative expressed the conviction that the term ‘to ensure respect’ had the same purpose as the expression ‘in the name of the peoples’.36 It was further mentioned in this context that the phrase ‘each Party to the conflict’ had been introduced into the text of Article 2 relating to application, ‘as a result of the comment made (…) that in accordance with Article 1, the Contracting State undertook to ensure respect for the Convention by its nationals’.37 A representative of the ICRC also highlighted that Article 1 was ‘along the lines’ of Article 83 of the Convention of Prisoners of War of 1929, in relation to ensuring continued application of the provisions on both sides.38 Interestingly in this context the phrase ‘joint responsibility’ arose - the Swiss delegate Mr. Stroehlin stated that ‘Article 1 provided for the principle of joint responsibility by requiring that all parties to the Convention should ensure respect for its provisions’.39 It would appear, however, that the presumed joint responsibility was limited to the belligerents, rather than the joint responsibility of all parties to the convention whether a party to the conflict or not.

In the discussion preceding the adoption of Article 1, both the Norwegian and United States delegates declared that the object of Article 1 was to ensure respect of the conventions by the population as a whole.40 The Italian delegate felt that the phrase ‘undertake to ensure respect’ was unclear, and either redundant or ‘introduced a new concept into international law’, depending on what way the phrase was construed.41 The ICRC representative noted that the organisation, in its proposals to the Stockholm conference, wished to highlight that the parties ‘should not confine

33 Ibid IIB 79.
34 Ibid Vol IIB 79.
36 Ibid Vol IIB 53.
37 By the French representative, ibid Vol IIB 84.
39 See ibid Vol II A 437.
40 Ibid Vol IIB 53.
41 Ibid Vol IIB 53.
themselves to applying the conventions themselves, but should do all in their power to see that the basic humanitarian principles of the conventions were universally applied'. As this statement did not receive any response, it is likely that it was interpreted by the other delegates to indicate universal application within the domestic sphere, in line with previous statements of the other delegates. The statement has since been invoked in favour of universal application of the basic humanitarian principles in the global, rather than domestic, sense. The Italian delegate may have been correct to suspect the potential for a progressive aspect to the undertaking to ensure respect.

The duty to ensure respect for the conventions, as discussed at the Diplomatic Conference in 1949, at most extended to a duty to ensure respect by the population as a whole, which potentially included parties to what are now referred to as non-international armed conflicts. The phrase ‘in the name of the peoples’ was originally connected to the duty to ensure respect – so the state could be in a position to demand respect from the whole population. This phrase was however omitted from the final draft. It is clear from the travaux préparatoires that a duty of High Contracting Parties to ensure respect of the conventions by all parties was not envisaged at the time of the adoption of the four conventions.

Kalshoven has probed at length the phrasing of common Article 1, which binds contracting parties to respect and ensure respect for the conventions in all circumstances. He has queried why it is necessary to reaffirm that states are bound to ‘respect’ their treaty obligations, and also whether the words ‘all circumstances’ add anything in particular to what he calls a fundamental rule of the law of treaties. Kalshoven has taken issue with the phrase ‘ensure respect’ and questions whether it should already be perceived as implicit in the duty to respect, ‘in the sense of a positive counterpart to the negative duty not to violate the terms of the

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42 Ibid Vol IIB 53.
44 It is interesting to note that there were no reservations made to common article 1 under Convention III or IV, while reservations were made to a number of other articles, including articles common to the four conventions. No discussion is undertaken with respect to it either, in articles examining the conventions in the period shortly after their adoption. See, Jean S Pictet, ‘The New Geneva Conventions for the Protection of War Victims’ (1951) 45 AJIL 462; and Raymund T Yingling and Robert W Ginnane, ‘The Geneva Conventions of 1949’ (1952) 46 AJIL 393.
45 Kalshoven (n 3) 3.
Conventions’.\textsuperscript{46} It is asserted that this important element of the implementation of international humanitarian law in modern times could be dismissed as ‘an innocuous sort of opening phrase’,\textsuperscript{47} but it has come to mean so much more than that, albeit through what some may well consider what is termed ‘creative interpretation’.\textsuperscript{48}

One of the key factors that drew the attention of Kalshoven to the peculiarities of Article 1 was an immigration case, concerning the deportation of an individual who would allegedly have been exposed to violations of international humanitarian law (specifically violations of common Article 3) if returned to El Salvador. One of the arguments raised in that case was that the likelihood of her exposure to such violations triggered the responsibility of the United States under common Article 1.\textsuperscript{49} The Board of Immigration Appeals stated that it was ‘unclear “what obligations, if any, Article 1 was intended to impose with respect to violations of the Convention by other States”, and that, in any event, Article 1 was not self-executing’.\textsuperscript{50} The main reason for Kalshoven’s casting of doubt on the interpretation of common Article 1 as referring to a duty of third states\textsuperscript{51} to ensure respect for international humanitarian law, is based on a lack of belief that any such intention existed in the minds of the drafters.

One approach to legal interpretation, however, is that ‘what counts in the interpretation of a law is not “what the lawmakers willed” but rather “what the law wills”’.\textsuperscript{52}

From a historical perspective the views of the drafters are certainly interesting and relevant, but for current purposes the most pressing issue is its modern interpretation, scope and usage. The drafting history is important as a supplementary means of interpretation,\textsuperscript{53} but the initial focus must be on the provisions in their proper context in light of the object and purpose of the treaty. Article 31 of the Vienna Convention also stipulates that, together with the context, interpretation shall take into account:

\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid fn 2.
\textsuperscript{49} Ibid 4.
\textsuperscript{50} Ibid 5.
\textsuperscript{51} The term ‘third states’ will be used here to indicate states not party to or directly involved with an armed conflict.
\textsuperscript{52} K Binding, as cited in Antonio Cassese, \textit{International Law} (OUP 2005) 18 at fn 6.
\textsuperscript{53} See Article 32 of the Vienna Convention on the Law of Treaties, UNTS 1155 (23 May 1969). For a rebuttal of Kalshoven’s interpretation of common Article 1 based on the drafters’ intentions, see also Cassese (n 52) 18 at fn 6.
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

Each of these aspects may be pertinent for our discussion of common Article 1, but what may prove most useful is the element of practice in applying the treaty provisions, which establishes the agreement of the parties regarding its interpretation. Notwithstanding Kalshoven’s recalcitrance, if the parties’ practice demonstrates a clear and particular understanding of the duties inherent in common Article 1, or of the duties subsequently understood to be contained within that article, then that shall be taken into account in its interpretation, along with the context, and the object and purpose, all of which are broadly concerned with the protection of civilians and combatants in times of armed conflict. Cassese, for example, has asserted that the interpretation of common Article 1 as entailing a duty to ensure respect by all states of the conventions, ‘in short, is the construction that is today universally accepted by both States and the ICRC’.

In terms of interpretation, it is worth mentioning in this context the prudent approach of the European Court of Human Rights to the content of the rights enshrined in the European Convention on Human Rights. The court espouses what is referred to as a ‘living instrument’ approach to interpretation, whereby the convention is considered, a ‘living instrument which [...] must be interpreted in light of present-day conditions’, rather than a static document. Emphasis is placed on contemporary relevance and effective rights protection, as values and society evolve in Europe.

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54 In terms of opinio juris, which can be important in the absence of sufficient state practice (albeit normally in determination of customary rules, but in this instance for the determination of a particular interpretation of a convention provision).
55 Cassese (n 52) 18 at fn 6.
The doctrine is also used to update the application of the rights enshrined in the convention ‘to reflect modern, higher expectations of States’. 58

Judgements and advisory opinions of the ICJ, such as the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, as discussed below, can similarly reveal that a ‘living instrument’ approach to the Geneva Conventions can be used to reflect the higher expectations of states in terms of ensuring respect for the conventions by third parties. The Geneva Conventions, it is here contended, must be interpreted in a manner which ensures effective protection for civilians, as the international community evolves. Interpretation in this sense is geared towards object and purpose, rather than relying on plain or ordinary meaning, or on the travaux préparatoires. An evolved interpretation of common Article 1 could move towards a system of protection that is not merely ‘theoretical or illusory’ but rather ‘practical and effective’. 59

The provision contained in common Article 1 may not have been effective and practical from the outset, although it clearly had the potential of providing a ‘nucleus for a system of collective responsibility’. 60 Even if the drafters did not have such an interpretation in mind, the travaux préparatoires reveal that ‘the negotiators at least bore in mind the need for the parties to the Conventions to do everything they could to ensure universal compliance with the humanitarian principles underlying the Conventions’. 61 Boisson de Chazournes and Condorelli go on to note that consideration of the travaux préparatoires is nevertheless a ‘minor consideration, since the historical interpretation of an international instrument can never prove decisive in identifying the current status of a legal norm’. 62 They state, as mentioned above in relation to ‘Vienna’ interpretation norms, that the meaning conferred by international practice is far more relevant, and that:

58 Alistair Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5(1) Human Rights L Rev 64. The court has been criticised for its expansive approach, and Mowbray has noted that a ‘greater judicial willingness to elaborate upon the application of the doctrine in specific cases would help to alleviate potential fears that it is simply a cover for subjective ad-hockery’ (Mowbray 71). The court has explained that a failure ‘by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement’ (Stafford v. UK, 2002-IV 115 (2002) 35 EHRR 32). One of the problems with the Geneva Conventions is that there is no permanent court with ultimate authority which can act decisively as a bar to or as a source of evolving jurisprudence.

59 Wording used by the ECtHR in relation to the ECHR, in Airey v Ireland, 9 October 1979, Series A no. 32, (1979-1980) 2 EHRR 305, para 24.

60 Boisson de Chazournes and Condorelli (n 28) text to fn 4.


62 Ibid, text to fn 6.
Indeed, over the last half century the practice of States and international organizations, buttressed by jurisprudential findings and doctrinal opinions, clearly supports the interpretation of common Article 1 as a rule that compels all States, whether or not parties to a conflict, not only to take active part in ensuring compliance with rules of international humanitarian law by all concerned, but also to react against violations of that law.63

Common Article 1 has indeed developed considerably since its inception, and today has a very special status, as pointed out by Boisson de Chazournes and Condorelli, ‘not only in United Nations law but more generally in the international legal order’.64 In their view, regardless of the original intentions of the drafters, common Article 1 has ‘almost become a basic norm of behaviour’, within the United Nations framework, and this development has ‘paralleled the growing interest taken by the UN in the “management of crises and armed conflicts”, be they international, internal or internationalized’.65 How did this development in state practice and in the behaviour of the main international institutions come about? The following section reveals the various actors and factors involved in the enhanced scope of common Article 1.

2.3 The involvement of the ICRC

While the drafting history and ideas which gave birth to common Article 1 are relevant, it is necessary to look at current interpretations of the duty in the context of practice in order to determine the scope of its current normative force, and the resulting reality for third states in ensuring respect for international humanitarian law. Whatever the motivations behind the original wording of the article, there is no doubt that there is consensus around a modern interpretation that involves third state interest and action in the faithful application of the Geneva Conventions by parties involved in an armed conflict. The ICRC, in their original commentaries and other efforts since, has played its part in clarifying and solidifying a more progressive and logical interpretation of the duty to ensure respect for the Geneva Conventions.

The ICRC laid the foundations for the current understanding of the relevant duty in their commentaries on the Geneva Conventions. The commentaries were not intended to be construed as an official interpretation of the conventions, the

63 Ibid, text to fn 7.
64 Ibid, text to fn 50.
65 Ibid, text to fn 27.
responsibility for which would fall to the contracting parties themselves.\textsuperscript{66} The far reaching influence of the commentaries, however, cannot be denied.\textsuperscript{67} In his commentary on Convention I of the Geneva Conventions, Jean Pictet conveyed that the choice of the words ‘to ensure respect’ was deliberate, that they were ‘intended to emphasize and strengthen the responsibility’ of the High Contracting Parties.\textsuperscript{68} It follows naturally, he reasoned, that if a party failed to fulfil its obligations under the conventions, the other parties, whatever their relationship to the conflict, ‘may, and should, endeavour to bring it back to an attitude of respect for the Convention’.\textsuperscript{69} A few years on it was noted that the article’s place of prominence at the beginning of each convention increased its importance, and also drew attention to the ‘special character’ of the treaty.\textsuperscript{70} This special character relates to the manner by which the treaty was agreed: each convention represents a non-reciprocal ‘series of unilateral engagements solemnly contracted before the world as represented by the other High Contracting Parties’.\textsuperscript{71} The universal character of the conventions is also emphasised in the commentaries on conventions II and III, in that effective functioning of the system of protection provided for ‘demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do \textit{everything in their power} to ensure that the humanitarian principles underlying the Conventions are \textit{applied universally}’.\textsuperscript{72}

According to Kalshoven, these commentaries contained somewhat ‘lofty’ views,\textsuperscript{73} which somehow transformed into the official ICRC position and general standard legal interpretation of common Article 1. Kalshoven could not accept that the authors of the commentaries wanted to suggest that ensuring respect had the effect of a legally binding obligation to actually endeavour to bring another state back to an

\begin{itemize}
\item \textsuperscript{66} This was noted in the foreword to each Commentary, see e.g., Jean S Pictet (ed), \textit{Commentary on the Geneva Conventions of 12 August 1949: I Geneva Convention} (ICRC 1952) foreword.
\item \textsuperscript{67} They have ‘proved to be a leading source of interpretation affecting the practice of states and their \textit{opinio juris}, and thus indirectly contribute to the formation of customary law’, Theodore Meron, ‘The Continuing Role of Custom in the Formation of International Humanitarian Law’ (1996) 90(2) \textit{AJIL} 245.
\item \textsuperscript{69} Ibid.
\item \textsuperscript{70} Jean S Pictet (ed), \textit{Commentary on the Geneva Conventions of 12 August 1949, IV Geneva Convention} (ICRC 1958) 15.
\item \textsuperscript{71} Ibid.
\item \textsuperscript{73} Kalshoven (n 3) 30.
\end{itemize}
attitude of respect. Instead, he argues, they merely saw an opportunity to present ‘the idea that states not involved in an armed conflict might wish to assume an active role, as an additional means for the promotion of respect for the Conventions over and above the formally accepted but not overly effective mechanisms of enforcement provided in these instruments’.\textsuperscript{74} It is precisely because there are limited mechanisms of monitoring and enforcement in international humanitarian law that the interpretation and implementation of Article 1 has assumed such importance and is the starting point for an exploration of the duties of third states and the responsibility of their representative organisations to enforce humanitarian norms. Whether it is necessary to establish a responsibility, or crystallize an existing obligation for states beyond the limits of their own jurisdiction with regard to humanitarian norms, there may be a need for an enhanced ‘activist’ role from states,\textsuperscript{75} and a cooperative approach to ensuring respect for international humanitarian law. This communal approach is essential for the object and purpose of the treaty to be attained to any meaningful degree. This approach is also widely considered acceptable, aided by the concerted efforts of the ICRC.\textsuperscript{76}

With regard to the early ICRC commentaries and their lack of adherence to the drafting history, perhaps at the very least their ‘show of optimism about the intrinsic force of Article 1 as an attempt to exorcise the evil spirits constantly threatening the respect for humanitarian standards’ can be appreciated.\textsuperscript{77} Kessler notes that the organisation has since 1979 ‘frequently reminded the High Contracting Parties of their duty to ‘ensure respect’ of the Conventions by taking action in order to stop

\textsuperscript{74} Kalshoven (n 3) 32.

\textsuperscript{75} Kalshoven notes that the authors ‘plausibly hoped to incite States Parties to overcome their habitual queasiness and assume a more ‘activist’ stance in relation to events beyond their borders that put the continued respect of the 1949 Conventions in jeopardy.’ Kalshoven (n 3) 33.

\textsuperscript{76} In terms of the interpretation of common Article 1 it is ‘generally recognised that common Article 1 requires States that are not party to an armed conflict to strive to ensure respect for the law by taking every possible measure to put an end to violations of the law by a party to a conflict, in particular by using their influence on that party’, see ‘Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence’ (2005) 87 IRRC 858, 395 [italics in original]; the UN General Assembly has adopted resolutions to this effect, see UNGA Res 63/96, UN Doc A/RES/63/96 (18 December 2008); Cassese has also noted that any ‘contracting State, faced with violations of the Conventions by a belligerent (or, more generally, a party to an armed conflict) may take action and demand cessation of the breach. Thus, we are faced with community obligations and community rights proper’, this ‘is the construction that is today universally accepted by both States and the ICRC’, Cassese (n 52) 18-19; and also common Article 1 is ‘today unanimously understood as referring to violations by other States’, Marco Sassoli, ‘State responsibility for violations of international humanitarian Law’ (2002) 84 IRRC 401, 421.

\textsuperscript{77} Kalshoven (n 3) 38.
violations’. It is important to highlight that these reminders of states’ duties to react to violations did not provoke any reaction or objection to this approach to the duty to ensure respect. It has been noted that in some instances, other international organisations ‘even openly adopted the ICRC’s interpretation. An outstanding example is the note verbale of the UN Secretary General during the war between Iran and Iraq’. The Secretary General noted that the ICRC had reminded states parties of their responsibility ‘to ensure respect for those Conventions not only by States involved in conflicts but also by all States Parties to the Conventions’. The note was addressed to all member states of the Geneva Conventions ‘in order to underscore the vital importance of ensuring the observance of the principles embodied in the Geneva Conventions’, and ‘earnest hope’ was expressed that all governments would ‘renew their determination to ensure respect for the Geneva Conventions, which are indispensable instruments in the task of mitigating the effects of war.’

This approach to law creation lies in the realm of ‘consent expressed by nonaction rather than by action’, and a form of acceptance ‘established by acquiescence’, which could not on its own, it is argued, provide evidence of a rule of customary international law, but could contribute to the crystallization of one. While the declarations and exhortations of UN actors, UN organs, and international organisations cannot replace states as the primary legislators for the purpose of creating international law, they can, and undoubtedly do, influence its development.

The practice of the ICRC has also strengthened the norm of a duty of third states to ensure respect. The organisation engages in both frequent diplomatic acts and on occasion resorts to public denunciation, in attempts both to bring parties to a conflict back into compliance with humanitarian rules, and also in the hope of involving third states in influencing the belligerents. This practice reflects the practice

79 Ibid 504.
80 Note Verbale from the Secretary-General Addressed to the Member States and Observer States that are States Parties to the Geneva Conventions of 1949, UN Doc S/16648 (26 June 1984).
81 Ibid.
83 Not that the contemporary creation of international law is the sole purview of states, either. For an overview of the processes and actors involved, see Alan Boyle and Christine Chinkin, The Making of International Law (OUP 2007). See also a discussion of various actors involved in Kritsiotis (n 5) 974-977. On the role of the General Assembly as legislator see Richard Falk, ‘On the Quasi-Legislative Competence of the General Assembly’ (1966) 60 AJIL 4. On the secondary rules of recognition in this context, see Charney (n 82).
of the EU, which alternates between a managerial approach to influencing compliance, centred on cooperation, support, and diplomacy, and a reputational approach when necessary, publicly calling on parties to ensure respect and engaging their reputational concerns. The EU also supports the work of the ICRC, as part of its policy commitment to cooperation with other international bodies in the promotion of international humanitarian law. ICRC diplomacy, however, is mostly confidential, aimed at reminding states of their duty to respect, if they are a party to the conflict, and their duty to ensure respect, if they are not. In terms of approaching third states ‘discreetly’, the choice must be a careful one, ‘bearing in mind their ability to exercise a positive humanitarian influence, particularly when they are close to the authorities concerned or they are paid heed by them’. One example would be a tendency to remind a third state of its duty to ensure respect, in the context of a request for them to ‘use their influence with a belligerent party, with a view to obtain full respect for humanitarian obligations. In particular, the ICRC may ask States to help it gain access to the territory of a State at war’. The preference of the ICRC in response to violations of international humanitarian law remains bilateral confidential dialogues, normally with the party or authority responsible.

If a number of measures aimed at stopping violations have been taken to no avail, the ICRC may decide on a public denunciation, which will outline the violations, and encourage action. Guidelines on the triggers and procedures involved in such uncharacteristically public measures, and on action taken in general in response to violations of international humanitarian law, have been published by the organisation for states. An early example of such action is the memorandum issued to states in 1983, in relation to the Iran/Iraq war. The memorandum pointed to grave violations by both parties, and state parties to the Geneva Conventions were asked to ‘make every effort – in discharge of the obligation they assumed under article 1 of the Conventions not only to respect but to ensure respect for the Conventions – to see that

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85 Action by the ICRC (n 76) 396.
87 See Action by the ICRC (n 76) 394.
88 Action by the ICRC (n 76) 397.
international humanitarian law is applied and these violations affecting tens of thousands of persons cease’. 89 Similar appeals were launched during the conflict in the former Yugoslavia in response to widespread violations of the conventions. In one example from 1992 the parties to the conflict were asked to comply with their international obligations, but the ICRC also took the opportunity to highlight the collective responsibility of state parties of the Geneva Conventions in terms of compliance with international humanitarian law. 90

The ICRC has constantly endeavoured to increase compliance with international humanitarian law, and to seek appropriate means to enforce the rules. Along with confidential dialogues and public denunciations, the ICRC instigates and participates in many initiatives aimed at the development of international humanitarian law, as a means of increasing understanding and dissemination, and thus enforcement of the law. This is another key tactic in a managerial approach to ensuring respect, which views a lack of knowledge, understanding or capacity rather than wilful neglect as the root cause of failure to comply with the law, and both dissemination and training are means available to both the ICRC and the EU to promote compliance with international humanitarian law. Dissemination and effective military training for both state and non-state actors can further facilitate internalisation of humanitarian norms and thus increase compliance with the law.

An International Conference for the Protection of War Victims was held in Geneva in 1993, to discuss means of enforcement of international humanitarian law. Its Final Declaration called upon the Swiss government (as the Depository State to the Geneva Conventions, and host of the ICRC headquarters) to convene ‘an open-ended intergovernmental group of experts to study practical means of promoting full respect for and compliance with that law’. 91 The Group of Experts adopted a series of recommendations to this effect, including a recommendation that the ICRC be invited to prepare a report on customary rules of international humanitarian law, and to

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89 See ‘External Activities’ No 235 IRRC (July-August 1983) 222.
90 ‘ICRC’s Solemn Appeal to all Parties to the Conflict’ (September-October 1992) No 290 IRRC 493. Pfanner has noted that similar appeals have become ‘more and more frequent, particularly in major conflicts such as those in Somalia, Rwanda, Congo, the former Yugoslavia, Afghanistan, Iraq, Israel and the occupied territories’, Toni Pfanner ‘Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims’ (2009) 91(874) IRRC 296.
circulate the report to states and competent international bodies.\footnote{Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23-27 January 1995` (1996) No 310 IRRC Annex II.} The purpose of the study on customary international humanitarian law requested was grounded in the position that violations of the law are not due to inadequacy of the rules, but rather to ‘a lack of willingness to respect them, to a lack of means to enforce them and to uncertainty as to their application in some circumstances, but also to ignorance of the rules on the part of political leaders, commanders, combatants and the general public’.\footnote{Henckaerts and Doswald-Beck \textit{Volume I: Rules} (n 7) xxvii.} Legitimacy theory would predict a high rate of compliance with international humanitarian law, but this is dependent upon the determinacy of the law among other factors. Increased clarity and awareness as to the solidified customary rules should allow for increased compliance with those rules. The utility of the study to the present exploration of compliance promotion lies in the assertion that it represents a reasonably accurate ‘photograph’ of customary international humanitarian law as it stands.\footnote{Henckaerts and Doswald-Beck \textit{Volume I: Rules} (n 7) xvii. For a critique of the lack of firm temporal frame on the practice presented in the study see Dino Kritsiotis, ‘Customary International Humanitarian Law: Review’ (2007) 101 AJIL 692. For an assessment of the methodology see Iain Scobbie, ‘The Approach to Customary International Law in the Study’, in Elizabeth Wilmhurst and Susan Breau (eds) \textit{Perspectives on the ICRC Study on Customary International Humanitarian Law} (CUP 2007). For more general critiques on customary international law, see Jorg Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems’ (2004) 15 EJIL 3; Hilary Charlesworth, ‘The Unbearable Lightness of Customary International Law’ (1998) 92 \textit{American Soc Intl L Proceedings} 44; NCH Dunbar, ‘The Myth of Customary International Law’ (1978-1980) 8 \textit{Australian YB Intl L} 1.} The study is useful in identifying a particular international humanitarian norm, as international law is ‘continuously evolving’, and since the process of customary international law formation ‘is more flexible than that involved in treaty negotiation and ratification, it helps international law to keep pace with the dynamic and fast-paced world it regulates’.\footnote{Phillipe Kirsh, ‘Customary International Humanitarian Law, its Enforcement, and the Role of the International Criminal Court’, in \textit{Custom as a Source of International Humanitarian Law: Proceedings of the Conference to Mark the Publication of the ICRC Study} (ICRC and AALCO, New Delhi 2006).} The form of the ‘photograph’ of the duty to ensure respect under customary international law is relevant here, for ascertaining what states are bound by, having contributed to the formation of the rules through state practice and \textit{opinio juris}.

The wording of common Article 1 is reflected in rule 139 of the study, stating that each ‘party to the conflict must respect and ensure respect for international humanitarian law’. These duties, however, are limited to ‘its armed forces and other
persons or groups acting in fact on its instructions, or under its direction or control’.96 This customary rule as presented could similarly be recognised as a general principle of international law, reflecting the obligation to respect any treaty in good faith and ‘carry out its provisions according to the maxim pacta sunt servanda’.97 It is also related to the rule under which states incur responsibility for the acts of non-state actors under particular circumstances (rule 149), and extends the obligation to respect and ensure respect for international humanitarian law to such actors.98 Related rules confirm the non-reciprocal nature of the duty to respect and ensure respect for humanitarian law, and outline the customary norms of domestic implementation and dissemination of the law (rules 140-143).99

The foregoing rules provide guidance as to customary norms of compliance with humanitarian law, but it is under the heading of enforcement that the third party duty to ensure respect is found. Here it is provided that states ‘may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law’ (rule 144). It has been lamented that this is a somewhat limited admonition, neglecting to mention the full responsibility of states for acts committed by their armed forces.100 The influence to be extended here is not towards a state’s own armed forces, but to parties to an armed conflict in general, setting aside any participation in the conflict of the state bringing the influence to bear. It has also been commented that this rule is a ‘statement of two halves, the first clearly correct and the second less obvious’.101 It is evidently easier to endorse a rule preventing states from encouraging violations of international humanitarian law, and more difficult to corroborate the duty to exert an unspecified amount of influence on parties to a conflict. It is also uncertain whether the degree of influence possible may depend on

96 Henckaerts and Doswald-Beck Volume I: Rules (n 7) rule 139.
98 On the implications of the study on the obligations of non-state actors, see Dieter Fleck, ‘International Accountability for Violations of the Ius in Bello: the Impact of the ICRC Study on Customary International Humanitarian Law’ (2006) 11(2) J Conflict and Security L 191; on non-state actors and the duty to ensure respect see also Turns (n 97) 358.
99 The crux of these rules is largely uncontroversial, while the scope is questionable in some instances: see Turns (n 97) 360-364.
100 Fleck (n 98) 186.
101 Turns (n 97) 364.
‘practical feasibility or political desirability’. It is submitted, however, that it would be impractical and indeed impossible to quantify this within the rule, as any efforts to stop violations based on influence will depend on the particulars of the situation in question.

In terms of practice related to this rule, the authors of the study cite the commentaries to the Geneva Conventions, resolutions of the UN Security Council and the General Assembly, and calls by other international organisations such as the Council of Europe, NATO, the Organization of African Unity, and the Organization of American States, to support their interpretation of the obligation to ‘ensure respect’, which involves ‘obligations beyond those of the parties to the conflict’. Appeals to ‘ensure respect’ during international conferences, including a Conference of the High Contracting Parties to the Fourth Geneva Convention, are similarly presented as further evidence of third state obligations having achieved customary status. The customary nature of the rule as interpreted thus may strengthen the argument that EU Member States have a duty to ensure respect for the applicable laws in conflicts to which they are not party, and is useful in providing additional support to the modern interpretation of the duty to ensure respect, however it does not bind the EU as an international organisation. The EU may be bound by customary international law only in relation to such rules as are relevant to its activities and which affect its sphere of competence, although it may be held internationally responsible for conduct when

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102 Turns (n 97) 365.
103 Henckaerts and Doswald-Beck Volume I: Rules (n 7) 510; for the examples of practice provided see Volume II: Practice, 3293-3296, paras. 21-25, and 30-37.
it exercises effective control over armed forces engaged in a conflict.\textsuperscript{106}

The study on customary international humanitarian law is also instructive in demonstrating how the duty to ensure respect can transcend the bounds of the Geneva Conventions. The duty to ensure respect was restated in Article 1 paragraph 1 of Additional Protocol I, covering international armed conflicts. The preponderance of attention during the negotiation, drafting and adoption of Article 1 centred on paragraph 4, relating to self-determination in situations of colonial domination, alien occupation and racist regimes, which naturally was quite controversial and divisive.\textsuperscript{107} Scant reference was made to paragraph 1, other than general support for its restatement in Protocol 1. The delegate from the United Kingdom, for example, drew attention to the words ‘respect and ensure respect’ which had, in his view, been taken ‘bodily’ from common Article 1 in view of their great importance.\textsuperscript{108} Other delegates linked the pertinent duty to Article 7, which provided for a meeting of the parties to the protocol, although it was lamented that such meetings were restricted to consideration of general problems concerning the application of the law, rather than explicitly permitting the consideration of particular situations.\textsuperscript{109} In addition, Protocol I provides in Article 89, which was also viewed by some delegates at the drafting stage to be closely related to common Article 1,\textsuperscript{110} that in ‘situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter’.

The duty in question was not reaffirmed in Additional Protocol II, relating to non-international armed conflicts. The duty enshrined in common Article 1 of the Geneva Conventions, however, covers obligations under common Article 3, which applies to non-international armed conflicts. The ICJ has held that the duty to ensure respect did not derive only from the conventions themselves, but ‘from the general principles of humanitarian law to which the Conventions merely give specific

\textsuperscript{106} For discussion of the applicability of international humanitarian law to EU-led forces, see Valentina Falco, ‘The Internal Legal Order of the European Union as a Complementary Framework for its Obligations under IHL’ (2009) 42 Israel L Rev 168; see also Naert (n 105) 515-40.


\textsuperscript{108} Ibid, Vol VIII, 29.

\textsuperscript{109} Ibid Vol VIII, 185.

\textsuperscript{110} As noted, e.g., by the Spanish delegate Mr Murillo Rubiera, see ibid, Vol IX, 203.
expression’. The customary rule relating to the duty under discussion refers to violations of general international humanitarian law, without mention of specific treaties, and so does not limit the duty of third states to ensure respect for the four Geneva Conventions. An example of practice supporting this approach can be appreciated in relation to appeals made by the ICRC to states not party to the Additional Protocols to ensure respect for rules contained in those protocols. It is noted in support of this broadened application of the duty to ensure respect that the appeals were addressed to the international community, that there were no subsequent objections to the appeals emanating from states, and that in fact support was proffered from some states not party to the Additional Protocols.

It is provided in the study that agreement on the positive obligations emanating from the duty to ensure respect extend only to a right to require respect for international humanitarian law. This entitlement is said to derive from the erga omnes character of the norms, which result in all states having a ‘legal interest’ in their observance and a correlating legal entitlement to demand respect for the norms. Diplomatic protest, collective measures, universal jurisdiction over grave breaches, and the investigation of war crimes are all mentioned in this context as options for states to exercise their entitlement to require respect for international humanitarian law, all of which options have been utilised by the EU and its Member States in their attempts to ensure respect. Ample practice is catalogued in the study in support of this entitlement to demand respect. While it is often contended that any statement of custom viewed as overly progressive represents an aspiration rather than reality, or lex ferenda rather than lex lata, the rules contained in the study relating to compliance and enforcement represent a useful starting point for affirming certain norms, and provide state practice in support of their assertions. The rule relating to the duty of third states to ensure respect, essentially a ‘photograph of a

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112 Henckaerts and Doswald-Beck, Volume II: Practice (n 7) 3300-3301, paras 52-55.
113 Henckaerts and Doswald-Beck, Volume I: Rules (n 7) 511.
114 Ibid.
115 The Study cites Funurdižija and Kupreskić cases of the International Criminal Tribunal for the former Yugoslavia to this effect, see Henckaerts and Doswald-Beck, Volume I: Rules (n 7) 512.
116 Henckaerts and Doswald-Beck, Volume I: Rules (n 7) 512.
117 This practice is dispersed throughout the study, for example for practice relating to rule 144 see Henckaerts and Doswald-Beck, Volume II: Practice (n 7) 3289-3302.
moving target’, \(^{118}\) does not represent a radical departure from a generally agreed norm, but rather continues the tradition of the ICRC, the ICJ\(^{119}\), the UN\(^{120}\) and the Council of Europe\(^{121}\) in interpreting the duty to include responsibility for parties not involved in armed conflict.

The ICRC has thus contributed to the development of the scope of the duty in a number of ways, and much of its work in terms of research and publication on the scope of the obligation is considered authoritative. It is also necessary to look to the ICJ to assess how the duty has been interpreted in jurisprudence deriving from the practical situations of disputes among states.

### 2.4 The Approach of the International Court of Justice

The ICJ has also played a role in clarifying and cementing the scope of common Article 1. One of the most influential cases in this regard is the *Case concerning military and paramilitary activities in and against Nicaragua*.\(^{122}\) The court was asked to assess the situation in relation to the conflict in Nicaragua between the Nicaraguan Government and the Contras, and the connection between the Contras and the United States Government. The involvement of the United States in the activities of the Contras and the methods used in their combat were called into question. The court explored this involvement with reference to the obligation of third party states under common Article 1 to ensure respect for the conventions, considering the United States not to be a party to the conflict:

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to ‘respect’ the Conventions and even to ‘ensure respect’ for them ‘in all circumstances’, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in conflict in Nicaragua to act in

\(^{118}\) Wilmhurst and Breau (n 94) 405.

\(^{119}\) See section below relating to the jurisprudence of the ICJ.

\(^{120}\) See UN General Assembly Res, UN Doc A/RES/43/21 (1988), para 5.

\(^{121}\) See Council of Europe, Parliamentary Assembly, Res. 984 (30 June 1992) para 13 (iii).

violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.\textsuperscript{123}

In this instance, there was easily accessible conclusive evidence that the United States had encouraged violations of humanitarian rules, in the form of a manual published and disseminated by the US, entitled ‘Psychological Operations in Guerrilla Warfare’. This manual included advice on ‘psychological operations to “neutralize” certain “carefully selected and planned targets” including judges, police officers, State Security officials, etc., after the local population have been gathered in order to “take part in the act and formulate accusations against the oppressor”.\textsuperscript{124} The court understandably found this to be in violation of the prohibition of summary or arbitrary execution of non-combatants as prohibited under common Article 3.\textsuperscript{125} The court did not consider the manual in isolation, but in the proper context of who it was issued to, and whether the advice was likely to be followed. It found that those responsible for issuing the manual were aware that the behaviour of the contras was inconsistent with international humanitarian law; illustrating such awareness was the fact that ‘it was even claimed by the CIA that the purpose of the manual was to ‘moderate’ such behaviour’.\textsuperscript{126} Given this context, the court considered that the advice in the manual constituted encouragement ‘which was likely to be effective’ to act in such a way as to violate certain principles of international humanitarian law.\textsuperscript{127} It was not difficult to conclude that assistance and encouragement had been offered in this situation, but this may not always be the case; many states are not as audacious in their chosen method of assistance to belligerents, especially when and if such assistance consists of encouragement which \textit{prima facie} involves violations of fundamental principles of international humanitarian law.

There are a limited number of judicial decisions to rely on for interpretation and clarification of this point, as there is no international institution to date with sole responsibility for the resolution of disputes regarding international humanitarian law. The ICJ is a significant authority and the additional and dissenting opinions can on

\textsuperscript{123} \textit{Nicaragua} (n 122) para 220. For purposes of state responsibility, it is important to note that the Court found that the United States \textit{encouraged} the commission of acts contrary to general principles of humanitarian law through the issuance of its manual on guerrilla warfare, but did not conclude that any such violations could be imputable to the US; see operative para 292 (9).
\textsuperscript{124} Ibid para 255.
\textsuperscript{125} Ibid para 255.
\textsuperscript{126} Ibid para 256.
\textsuperscript{127} Ibid para 256.
occasion provide equal if not greater clarification than the judgments and advisory opinions. At the very least, however, it was established in the *Nicaragua* judgment that common Article 1 precluded the United States from offering assistance or encouraging individuals or groups engaged in armed conflict in Nicaragua to act in a manner that would violate Article 3 of the conventions, applicable to non-international armed conflict. The court thus affirmed not only that a state party could not offer assistance or encourage violations of the conventions, resulting from their obligations under common Article 1, but also affirmed an important principle regarding the scope of the duty contained in common Article 1: that on a basic level, it should apply equally to all conflicts, whether international or non-international. Requesting states to abstain from encouraging violations of international humanitarian law, however, is a far cry from establishing an obligation to ensure respect in the positive sense, or to proactively promote compliance with international humanitarian law.

In another oft-invoked jurisprudential contribution by the court, the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, concerning the building of an extensive barrier to separate the West Bank from Israel, the court recalled an earlier Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* in relation to considerations of humanity and obligations *erga omnes*. The court evoked its earlier assertion that many rules of international humanitarian law are so ‘fundamental to the respect of the human person and elementary considerations of humanity’, that they should be ‘observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’. In the Advisory Opinion on the Wall, the court stated that these rules incorporate obligations of an *erga omnes* character. The court emphasised that it follows from common Article 1 that ‘every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with’, and further specified that all state

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128 Perhaps due in part to the broad consensus required for drafting the main document. This tendency is mentioned below with regard to the Advisory Opinion on the Wall in the West Bank.
130 Ibid.
131 Ibid para 158.
parties to the fourth Geneva Convention are obliged to ‘ensure compliance by Israel with international humanitarian law as embodied in that Convention’.

While the decision was praised from certain quarters, the ICJ faced both internal and external criticism for its perceived failure to satisfactorily address the scope of common Article 1, and for its invocation of obligations *erga omnes*. Internally, Judge Higgins questioned the use of the concept of *erga omnes* in the Advisory Opinion, finding its inclusion unnecessary. Judge Higgins asserted that the finding ‘[t]hat an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of “erga omnes”’. Judge Kooijmans criticised the content of the duty ‘not to recognize’ for third parties, discerning that the duty amounts to ‘an obligation without real substance’. While finding no fault with the conclusions of the court regarding the failure of Israel to act within the limits of self-defence as prescribed by international law, Judge Kooijmans could not agree with the court’s determination of the legal consequences for states. Judge Kooijmans found that, as in his opinion the court had not offered sufficient reasoning in support of its presentation of the scope of common Article 1, he could not concur with the paragraph on the legal consequences for states. With regard to common Article 1, Judge Higgins pointed to the ‘long-prevailing’ interpretation that ensures protection of the principles enshrined in the Conventions by providing that in the event of a state failing to fulfil its obligations, the other Contracting Parties:

may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.

Externally, many critics have also expressed regret that the court did not take the opportunity to enhance the understanding of this aspect of international

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132 Ibid para 159.
133 Separate Opinion of Judge Higgins 43 ILM at 1058 para 38 [hereinafter Higgins Opinion].
134 Separate Opinion of Judge Kooijmans, 43 ILM at 1065, para 44 [hereinafter Kooijmans Opinion].
135 Ibid para 1.
136 Ibid para 50.
humanitarian law through a more ‘comprehensive analysis and thoughtful exploration
of the question of third-state legal obligations under international humanitarian
law’.\textsuperscript{138} The lack of in-depth exploration results in the situation that the upper limits
of the obligation to ensure respect remain somewhat unclear, and the lower limits may
entail violation of the article only when a state ‘encourages or assists violations by
another State’.\textsuperscript{139} It must be remembered however, in this context, that it is most
likely easier for the judges of the ICJ to reach agreement on ‘detached legal principles
rather than the precise consequences their application might have’, and also that ‘even
in contentious cases, the Court is loathe to dictate courses of conduct to States when
the methods of compliance with its rulings are essentially at the parties’ discretion’.\textsuperscript{140}

The lack of clarity in relation to the scope of third state party responsibility is
unlikely to be entirely solved by the case law of the ICJ, for the aforementioned
reasons. It is clear that in a case such as this, however, where states are instructed not
to recognise an illegal situation, one avenue, as an example, would allow the options
and obligations of third states to become clearer. Insofar as any violations of
international humanitarian law are found to constitute grave breaches, third states
‘may (and in some circumstances, must) individually or collectively resort to more
serious enforcement mechanisms’.\textsuperscript{141} This is one option that deserves consideration in
relation to the situation examined by the court. Such enforcement mechanisms could
include economic and diplomatic sanctions, the exercise of universal jurisdiction,
referral to the International Criminal Court, and the creation of ad hoc international
criminal tribunals,\textsuperscript{142} all of which have been supported to varying degrees, and with
varying success, by the EU in its attempts to promote compliance with the law. It is
unfortunate that neither these options, nor the scope of third state responsibility in this
context, were explored by the court. The contribution of the ICJ in solidifying the
third party aspect of the duty to ensure respect cannot, however, be undervalued. The
scope of the duty of states not party to an armed conflict to ensure respect shall be

\begin{itemize}
\item\textsuperscript{138} Marc H Ellis ‘Problems of Religious Nationalism: The Mural-Covered Wall: On Separation and the
\item\textsuperscript{139} Sassòli and Bouvier \textit{How Does Law Protect in War} (1999) 231, as cited in Ardi Imseis ‘Critical
99 \textit{AJIL} 102, 115.
\item\textsuperscript{140} Iain Scobie ‘Smoke, Mirrors and Killer Whales: the International Court’s Opinion on the Israeli
Barrier Wall’ (2004) 5(9) \textit{German LJ} 1107, 1117.
\item\textsuperscript{141} Imseis (n 139) 115. Unfortunately the court ruled out the possibility of examining this because of its
interpretation of art 6 of the Fourth Geneva Convention.
\item\textsuperscript{142} Ibid.
\end{itemize}
explored in more detail below, as shall the relationship between obligations *erga omnes* with the duty to ensure respect.

### 2.5 The Scope of the Duty to Ensure Respect

If it is accepted that the obligation contained in common Article 1 of the Geneva Conventions is of *erga omnes* character, this would seem to indicate a community obligation, with a corresponding community right – the right of a legal claim to compliance, and the right to take action or demand cessation of breaches. Distinctions must be drawn between a right or an entitlement to act and an obligation to act. The extremes of ensuring respect could vary from a right to offer or provide humanitarian assistance, which is fairly benign, to a responsibility or an obligation to intervene militarily, which is fairly exceptional. The two have been separated by referring to the limits involved with the following approach:

An upper limit, corresponding to authorization, that specifies the measures the contracting States at most may take without unduly restricting the sovereignty of the State not respecting the Conventions; and a lower limit, corresponding to obligation, that indicates the measures the contracting States at least have to take in order to comply with their obligations under Article 1.

The primary concern is with what the lower limits are, that is, what states are obliged to do in order to comply with their duties under common Article 1. Yves Sandoz has identified the parameters by asserting that undertaking to ensure respect for international humanitarian law ‘establishes at least an obligation to remain vigilant’, and that ‘it can be concluded from the ever-increasing interdependence of all States, the development of human rights and the emergence of a principle of solidarity that States today are no longer allowed a “right of indifference”’. He identifies the outer perimeter of the duty (or upper limit) in the negative, by stating that it would be ‘excessive to infer from this that there consequently exists a duty to intervene by force outside of security systems as defined by the Charter of the United Nations’.

The measures available to states to prevent, and react to, violations of the conventions range from negative to positive actions, and this range is in turn

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143 Cassese (n 52) 19.
144 Kessler (n 78) 499.
146 Ibid 219.
associated with the degree to which states will accept legal obligation: it is certain that ensuring respect entails a duty to refrain from encouraging or assisting others to violate the rules contained in the conventions, it is less clear at what point the legal obligation to undertake positive actions is triggered. Measures to ensure respect for international humanitarian law could include control or preventative measures, repressive measures, and even help and assistance. Different measures would be necessary in reacting to different situations, in line with the capacity of the third states reacting, the specificities of the armed conflict in question, and the violations concerned. An example of a useful trigger could be the gravity, nature, extent, or intensity of the breach/breaches. This can be said to follow from the ‘ratio legis of the Geneva Conventions’. Unfortunately, however, one difficulty with this approach is that often a combination of violations and multiple violations of the rules occur, making it difficult to judge a single violation in isolation. It is more often necessary to ensure that a state party comes back into an attitude of respect for the entire regime of humanitarian norms, rather than discontinue the violation of a single rule. However, gravity is already a test used in international criminal law, and also within the Geneva Conventions, through the system of grave breaches, and so it has a role to play in determining which situations require third party intervention to persuade states to respect humanitarian rules during an armed conflict.

Aside from the regime of grave breaches, the drafters of the conventions stopped ‘halfway’ – they set out the entitlement of states to ensure compliance, but they neglected to specify the means by which this right could be exercised. Thus, it is not the obligation to ensure respect, nor the right to take measures to ensure such

147 Kessler (n 78) 506.
150 Cassese (n 52) 19.
respect that is in question, but rather the *means* by which this is to be achieved which must be scrutinised.

In assessing the means available and appropriate in this context, it is important to determine which states are likely to wield most *influence* in terms of bringing the ‘offender’ back into an attitude of respect, in order to isolate responsible parties and bring pressure to bear on them to begin taking positive measures, once the duty had been triggered. Kessler has explained that the violation of the duty to ensure respect creates international responsibility, like any other international rule:

> it is a common feature of the law regarding international responsibility that a State can only be responsible for its own deeds...This leads to the conclusion that the States have to exert some kind of influence on the party violating its commitments under the Conventions....Accordingly, the States’ obligation under Article 1 to take further steps to ‘ensure respect’ of the Conventions by stopping the violation of international humanitarian law depends on the States’ influence on the breaching party.\(^{151}\)

For the effective functioning of the protective rules provided for in the Geneva Conventions, states must act as a community with a legal interest in compliance with the rules of the system. The particular relationship of a third state with the party to a conflict who has strayed from the norms is likely to affect the level of interest, the likelihood of action or exertion of influence, and the effectiveness and outcome of that action. Thus the obligation to ensure respect may have greater force in a state party who has greater influence and leverage on a state or non-state actor in violation of the conventions.\(^{152}\) The obligation is a legal one, but the measures available to states to fulfil the obligation may vary. Rule 144 of the ICRC’s study on customary international humanitarian law provides that the influence must be exerted ‘to the degree possible’ to stop any breaches of international humanitarian law. The phrase ‘to the degree possible’ is significant here, and obviously depends on a case-by-case basis determination of particular states and their relationship with parties to a conflict. As noted above in discussion of this rule, the customary nature of the latter part of the rule has also been doubted because of the ‘vague and unquantifiable nature’ of that phrase, and it has been questioned whether an adjustment of the rule might help, ‘to the effect that the obligation to stop violations of humanitarian law is only applicable when States are actually in a position to do so by virtue of directing or controlling

\(^{151}\) Kessler (n 78) 505.

\(^{152}\) See Gasser (n 86) 28.
armed forces (whether regular or irregular) in another State, or being in alliance with another State that is committing violations’. Gasser has lamented that, unfortunately, ‘[l]egal theory still has to develop arguments for asserting an unconditional obligation of all States not involved in an armed conflict to discourage belligerent parties from violating humanitarian law’. The ICJ has assisted in clarifying what ‘to the degree possible’ could denote by introducing the concept of ‘due diligence’, in relation to the duty to prevent genocide under the Genocide Convention. In considering whether the respondent in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide had complied with their obligations to prevent and punish genocide under Article 1 of that convention, the ICJ decided that ‘the obligation to prevent genocide is not territorially limited and that it is violated by the failure to exercise a kind of “due diligence” to exert what influence one can to prevent an act of genocide’. It is worthy of note that the court dealt with the duties of third states in much greater detail in this case than in any decision where the duty to ensure respect under the Geneva Conventions arose. In terms of the capacity of a third state to influence another state, the Court provided guidance in the form of the following parameters:

The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.

These parameters are also relevant in terms of the duty to ‘ensure respect’. The capacity of a third state or a group of such states acting through a regional organisation to influence the conduct of a state involved in an armed conflict would

153 David Turms, ‘Implementation and Compliance’ in Wilmhurst and Breau (n 94) 366.
154 Gasser (n 86) 28.
155 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Bosnia v Serbia) ICJ Reports 2007, para 430[hereinafter Genocide Judgement].
157 Genocide Judgement (n 155) para 430.
also depend on geographical distance, political links, and links of ‘all other kinds’. The court continues to declare that it is irrelevant whether the third state declares that all means available to it, even if employed, would not be sufficient to prevent the breach in question. This is because, the court reasoned, the possibility remains that ‘the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result ... which the efforts of only one State were insufficient to produce’. 158 This reasoning is applicable in relation to the duty to ‘ensure respect’ for international humanitarian law – a state should not be able to avoid its obligation by declaring that any steps taken would be ineffective in terms of influencing the cessation of breaches – as the obligation to ‘ensure respect’ by whatever means possible and permitted remains, and furthermore, it is likely that the more influence exerted from a number of states, along with the regional and international institutions representing them, such as the European Union and the United Nations, the more likely a positive outcome in terms of bringing a belligerent back into an attitude of respect for international humanitarian law.

A useful trigger for the obligation of third states is also envisaged by the court, which, in the present analysis, could be represented in the following way: a state’s obligation to ‘ensure respect’ and the ‘corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of’, potential or real violations of international humanitarian law, and from then onwards, ‘if the State has available to it means likely to have a deterrent effect’ on the wrongdoing parties, ‘it is under a duty to make such use of these means as the circumstances permit’. 159 The court notes that the obligation cannot be one of result. 160 Similarly, the duty to ensure respect for international humanitarian law encompasses a duty to exert influence to the degree possible through the means available, but excludes an obligation, it is contended, to succeed in the prevention or cessation of violations. The obligation to ‘ensure respect’ is one of ‘due diligence’ in this regard, and it is argued in this study that both the EU and its Member States should exercise due diligence in relation to the conduct of parties in armed conflicts.

It is in state practice that the reality and practicality of ensuring respect and promoting compliance plays out, adapting to the dynamics of diplomacy and

158 Ibid.
159 Ibid para 341.
international relations, and also in the policy of individual states, regional and international institutions that the reinforcement and solidification of the obligation into a meaningful duty for states can be witnessed. Before moving to explore this practice in greater detail, however, certain developments help to establish the context for a broader concept of the duty to respect. As the influence of the ICRC and the ICJ were significant in charting the progression of the scope of the duty to ensure respect, so the developments in modern warfare and the role of human rights, both of which inform the practice relating to the duty, must be explored.

2.6 Changes in Warfare and Linking International Humanitarian Law to Human Rights

Much is written on the changes in warfare in the last century, but the object of interest in this instance is what impact these changes have had on the necessity for states to become involved, to promote, ensure, and even enforce, compliance with international humanitarian law by third parties. Some of the main developments which have changed the landscape of conflicts and thus the nature of the implementation of rules required are broadly: the increased targeting of civilians, the effects on third countries which border conflicts, the increasing connectedness of the international community through globalisation, and the danger of an escalation of violence and crime spreading across a region and causing widespread insecurity. Along with these developments, there has also been growing public awareness of both human rights and international humanitarian law violations, accompanied by growing demands to address them:

From the 1980s, awareness raising and international campaigning have taken on larger roles in policymaking and extending international humanitarian and human rights law. Spurred by the rapid growth and expansion of issue-oriented nongovernmental organizations (NGOs) and the vast expansion of the accessibility of information via the Internet and 24-hour TV and radio news channels, public conscience has been awakened to an ever-widening set of human rights and humanitarian issues.

161 Chapter 3 explores practice in the promotion of compliance with international humanitarian law.
163 Veuthey (n 27) 618.
Reputational concerns may be engaged with increased awareness through the media and accompanying public demands and outcry over violations. Western democracies may be particularly susceptible to such concerns, in relation to an increased awareness that violations of the law will be reported in the world media, and the forces of such states may be held to a higher standard than those of other states, or of non-state actors. Other states may not value their standing or reputation so highly, and so may require an alternative approach in terms of incentives to comply with the law.

International humanitarian law and avenues for influencing compliance have both been influenced by and have developed in reaction to the changing nature of conflicts, including the increase of non-international armed conflicts, a growing body of international human rights law, and atrocities witnessed on a global level as never before. As Meron has explained, the normative developments are in response to the movement towards non-international conflicts, which have ‘necessitated both new norms and reinterpretation of existing norms. The change in direction toward intrastate or mixed conflicts – the context of contemporary atrocities – has drawn humanitarian law in the direction of human rights law’. The modernisation of the code of warfare embodied in the Hague and Geneva Conventions was among the topics discussed during the International Conference on Human Rights held in Tehran in April 1968 (Tehran Conference), which is accepted as being ‘the definitive event’ in the development of what was at that time, the emerging relationship between human rights and international humanitarian law.

Contemporary developments in conflict rendered it necessary to finally begin a process of drafting and adopting ‘a more complete code of the laws of war’, as had been envisioned in the Martens Clause. Kalshoven has identified two of the most significant developments which had begun to threaten the protection of civilians; the nuclear build-up, and the guerrilla tactics used in wars of national liberation, both of which required amendments to and updating of both Hague law, the law governing the conduct of hostilities, and Geneva law, the body of law dealing with the protection of

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168 See Kalshoven (n 3) 38.
victims of armed conflicts. The revamping process was initiated by the General Assembly, with the assistance of the ICRC.

Along with the necessary development of international humanitarian law, the conference considered the linkages between protecting human rights and protecting civilians caught up in armed conflicts. Connecting the duty to ensure respect for international humanitarian law with the notion of human rights protection in times of armed conflict is appropriate, in terms of the European Union’s approach to the promotion of compliance with international humanitarian law, where language of compliance is often couched in a human rights framework, or combined with requests for compliance with human rights norms, along with humanitarian norms. The European Union is not unique in this respect; the United Nations Security Council also frequently combines the two in a similar manner in its statements. Both the connection between human rights protection and armed conflict, and the duty of third states to ensure respect for international humanitarian law, were issues raised, discussed and reinforced at the Tehran Conference. The notion of the responsibility of third party states arose in the preamble to the resolution adopted at that conference, which noted that parties to the Geneva Conventions ‘sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict’. The resolution requested that the General Assembly and the Secretary-General of the United Nations consider the development of the scope of humanitarian treaty law to improve the protection of civilians during armed conflicts. The relevant addressees were also asked to identify steps to further the application of existing rules and principles, and most importantly, the concept of extra-treaty protection provided for in the Martens Clause was reaffirmed, when the Secretary General was requested to draw the attention of all states to the relevant international law and to urge them to ensure that ‘in all armed conflicts the inhabitants and

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belligerents are protected in accordance with the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience’. 173

The failure to enumerate specific legal obligations in Resolution XXIII of the Tehran Conference in terms of third party states’ obligations to ensure respect, Kalshoven has argued, was purposeful; the goal of this apparent progression was instead to ‘win support for the political idea of third-party promotion of human rights in a setting of armed conflict’. 174 This aim is a legitimate one, and does fit in to the overall strategy adopted, however it is unfortunate that the parties involved could not have gone further in relation to the scope of the duties involved, and their relation with the obligations embodied in the Geneva Conventions, notwithstanding the fact that they may have been ‘unqualified gardeners’ for these purposes. 175 Despite whatever qualifications the participants at the conference had in the humanitarian arena, it has been conceded that the draft resolution, the relevant part of which contained text ‘that was so weak as to be almost meaningless’, in the end has become ‘remarkably successful in its substantive demands’, leading eventually to the adoption of the Additional Protocols of 1977, and the Conventional Weapons Convention three years later. 176

These developments also contributed to the UN becoming more engaged in matters related to the conduct of armed forces and the protection of civilians during armed conflicts, as its traditional role had related mainly to *jus ad bellum*. The Additional Protocols then ‘bridged the divide, allowing *jus in bello* to be dealt with by the United Nations’. 177 Boisson de Chazournes and Condorelli have noted that Additional Protocol I indeed ‘opened the door to enforcement of international humanitarian law within the UN framework’. 178 Protocol I not only retained the duties enumerated in common Article 1 of the conventions, but in Article 89, dealing specifically with cooperation, under the general heading of ‘Repression of Breaches of the Conventions and of this Protocol’, enjoined state parties of the protocol, in

173 Ibid.
174 Kalshoven (n 3) 44.
175 Ibid 44: ‘Most of them…were unqualified as “gardeners” of the Geneva Conventions’. See also Noelle Quenivet, ‘The History of the Relationship Between International Humanitarian Law and Human Rights Law’ in Arnold and Quenivet (n 167) 5.
176 Kalshoven (n 3) 44.
177 Boisson de Chazournes and Condorelli (n 28) text to fn28.
178 Boisson de Chazournes and Condorelli (n 28) text to fn 28.
situations of serious violations of the conventions or of Protocol I, to act either jointly or individually in co-operation with the UN and in conformity with the UN Charter. The adoption in the early 1990s of a Declaration of Minimum Humanitarian Standards also connected international humanitarian law and human rights law, reaffirming an ‘irreducible core of humanitarian norms and human rights that must be respected in all situations and at all times’. 179

2.7 Using Human Rights to Improve Respect for Humanitarian Norms

‘Humanizing war! You might just as well talk of humanizing hell’. 180

The influence of the human rights system is also relevant in terms of ensuring respect for humanitarian norms. If existing human rights mechanisms can be utilized to bring influence to bear on parties violating fundamental rules of international humanitarian law, and so improve compliance, it would appear in some respects to be a useful convergence, while bearing in mind the inevitable complications which may arise. 181

Certainly in relation to accountability for violations, human rights treaties and norms can prove useful in ‘filling a gap in the enforcement of humanitarian law’. 182 This trend has been followed by both the ICRC and the UN, in an attempt to compensate for the dearth of implementation mechanisms supplied by the latter regime:

The underdeveloped implementation mechanisms of international humanitarian law, which have to be described as fairly ineffective, are among its great weaknesses. So it comes as no surprise that both the ICRC and academics have on numerous occasions attempted to use the implementation mechanisms of the UN human rights treaties, disarmament treaties and environmental treaties as examples of

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182 Byron (n 181) 896. One of the issues, surrounding the lack of expertise of human rights bodies could be addressed by training and/or use of international humanitarian law specialists, as suggested by Hampson (n 181) 571.
possible systems to ensure compliance with international humanitarian law and to make them appealing to States.\textsuperscript{183}

It has been lamented, however, that one of the weakest implementing mechanisms of human rights has been repeatedly identified for this purpose – state reporting procedures.\textsuperscript{184} However ineffective the means chosen, the availability of additional means for enforcement is potentially a positive outcome of the convergence between international humanitarian law and human rights law.\textsuperscript{185} The significance of these developments includes recognition of the importance of basic rights of individuals, whether in peacetime as human rights, or during an armed conflict, as humanitarian protection or ‘human rights in armed conflicts’, and most importantly, the imperative duty, whether moral, legal or otherwise, to protect those rights. Many different actors contributed to this process. In addition to the United Nations and the ICRC, the ICJ also had a significant role to play in supporting and clarifying what Meron has classified as the ‘humanization’ of international humanitarian law.\textsuperscript{186} A complete convergence of the two, to the point where certain scholars and practitioners see no difference between the regimes, however, may pose a threat to the legitimacy of both regimes and thus affect compliance, as Modirzadeh has argued, because of the different relational structures assumed by the different regimes: the ‘admixture of what makes IHL legitimate and what makes IHRL legitimate may delegitimize both bodies of law, and impact the ways in which the law is able to regulate’.\textsuperscript{187} Thus it is imperative to recognise both the similarities and differences of the regimes and their application.

The ICJ proposed three potential situations in terms of the application of the two bodies of law in its Advisory Opinion on the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}. Some rights, the court

\textsuperscript{185} Kalshoven and Zegfeld have also come to this conclusion in relation to the advantages of utilising human rights mechanisms, see Frits Kalshoven and Liesbeth Zegfeld, \textit{Constraints on the Waging of War} (ICRC 2001) 201, also cited in Heintze (n 183) 813.
\textsuperscript{186} See Gardam, ‘In both the \textit{Nicaragua} case and the Nuclear Weapons Advisory Opinion, the Court has made a distinctive contribution to this evolving relationship’. Gardam (n 166) 352.
clarified, may be exclusively matters of international humanitarian law, some may be similarly exclusive to human rights law, while others ‘may be matters of both these branches of international law’.  

Three propositions have emerged from its case law; firstly that human rights law continues to apply during an armed conflict, secondly that it applies subject to derogation, and thirdly that when both human rights and international humanitarian law are applicable, the latter is lex specialis.  

Propositions such as these become valuable only when put into practice, and it has been acknowledged that their application is somewhat trickier than might be anticipated.  

The forgoing guidance provided by the court has nonetheless been of merit, in terms of outlining the relationship between the two fields of law. In terms of the Nuclear Weapons Advisory Opinion, for example, the analysis provided by the judges of the court has been welcomed by scholars for its ‘clarification that the norms developed for peacetime, i.e. human rights law, cannot be applied “in an unqualified manner” to armed conflicts. Human rights have instead to be inserted into the structure of international humanitarian law in a sensitive manner’.  

Fulfilling the obligation to ensure respect for international humanitarian law, similarly, must be done in a sensitive and judicious manner. Decisions relating to which states or institutions have the authority and capacity to act in an effective manner, and what approach or tactics might best suit a particular situation are inevitably complex.

The European Union, for example, in its Guidelines on Promoting Compliance with International Humanitarian Law, maintains that the two regimes are ‘distinct bodies of law and, while both are principally aimed at protecting individuals, there are important differences between them’. The guidelines state that international humanitarian law is applicable during armed conflicts and occupations, while human rights law is applicable to everyone within the jurisdiction of the state concerned, both in peacetime and during armed conflicts. In any case, it is safe to agree that in terms of the common objectives it is a ‘settled issue’, and that the ‘nature of the

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189 See Hampson (n 181) 550.
190 Ibid 571.
191 Heintze (n 183) 797. Heintze cites Matheson, in terms of inserting human rights in a ‘sensitive manner’: see Michael J Matheson, ‘The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons’ (1997) 91(3) AJIL 423.
192 Updated EU Guidelines (n 2), para 12.
193 See Raul Emilio Vinuesa, ‘Interface, Correspondance and Convergence of Human Rights and International Humanitarian Law’ (1998) 1 YBIHL 69-70. Heintze has also noted that while they ‘vary
relationship that is alleged to exist between the two regimes varies depending on the context, but the trend is well developed to treat international humanitarian law and human rights as sharing common values and as directed to the same ends'.

After the push for convergence of the two disciplines within the discussion at Tehran, the General Assembly adopted many resolutions entitled ‘respect for human rights in armed conflicts’. One of these was the resolution welcoming the adoption of the Additional Protocols to the Geneva Conventions and calling for their ratification, promoting their additional protection and enforcement mechanisms. In terms of non-international armed conflicts, which have proliferated since the foundation of the United Nations, the connection between protecting basic rights and ensuring respect for international humanitarian law has been strong: ‘[m]any of the humanitarian law rules applicable to internal armed conflicts are indistinguishable from human rights provisions. Both protect the individual human being against his own government’s abusive exercise of power.’ In terms of the duty to ensure respect, certain state parties may have the capacity in this context to temper not only a government’s abuse of power, but also any non-state parties over which it has influence, in order to bring all belligerents back to an attitude of respect for basic rules and rights. It is contended that if they indeed have the capacity to favourably affect such a situation involving serious violations of basic rights and rules of protection, they have a legal obligation to do so.

2.8 Obligations erga omnes

Although the invocation of the concept of erga omnes was criticised with respect to the Advisory Opinion on the Wall, the modalities of the concept are pertinent to the discussion of the duty to ‘ensure respect’. A failure to intercede and take any measures (whether diplomatic or otherwise) to ensure respect for international humanitarian law in many circumstances could entail disastrous consequences for

in terms of origin and the situations in which they apply, the two bodies of law share the objective of protecting and safeguarding individuals’, Heintze (n 183) 789.


195 See Gasser (n 86) 34. GA Res 32/44 of 8 December 1977 welcomed the Protocols.

196 Gasser (n 86) 35.
many states, as an escalation of violence may threaten peace not only in the immediate region but may affect external parties who have interests in the area.\textsuperscript{197} It has been recognised that this is an era in which the effects of conflicts ‘pass not only beyond borders, but beyond regions; in which the concept of state sovereignty is eroding and in which the protection of individuals therefore becomes increasingly an international concern’.\textsuperscript{198} The potential regional spill over of effects from conflicts, along with the desire for stable relations and trading partners, can serve as an incentive for states and organisations to strive to ensure respect, in line with self-interest and rational choice theory. As the EU Guidelines declare, the compliance of states and even non-state actors with the rules of international humanitarian law is a ‘matter of international concern. In addition, the suffering and destruction caused by violations of international humanitarian law render post-conflict settlements more difficult’.\textsuperscript{199} The concept of obligations \textit{erga omnes} is closely tied to situations where the community of states individually and together have a vested interest in fulfilling particular obligations. The High Contracting Parties to the Geneva Conventions form a legal community, with correlating duties to each other. It is this communal legal structure, that makes the duties and responsibilities flow to all. A reciprocal approach is not tolerated\textsuperscript{200} – all states must strive to fulfil their obligations, to avoid violating the rights of others involved in this communal arrangement.\textsuperscript{201}

The concept has been divided into categories of \textit{erga omnes}, and \textit{erga omnes contractantes}, the former comprising the entire community of states, and the latter being limited to a discrete group of member states.\textsuperscript{202} The former would include all states, and an example of the latter all High Contracting Parties of the Geneva Conventions. With respect to the latter, Cassese notes that as the duty under common Article 1 is an obligation \textit{erga omnes contractantes}, it follows that the obligation ‘incumbent upon each contracting State to comply with the Conventions’ provisions

\textsuperscript{197} Each measure may also entail its own pitfalls; these issues will be addressed in chapter three.
\textsuperscript{199} Updated EU Guidelines (n 2) para 5.
\textsuperscript{200} This means that ‘each contracting State is bound to abide by all the provisions of the Conventions regardless of any misbehavior of another State party’, Cassese (n 52) 19.
\textsuperscript{202} Kessler (n 78) 501.
operates towards all the other contracting States’. He also claims that any High Contracting Party has a ‘legal claim to compliance’ with the Geneva Conventions by any other High Contracting Party. Any state party to the conventions may also take action and demand cessation of its violation. The universal ratification of the Geneva Conventions renders the distinction between the two forms of community obligations marginal, nevertheless customary international humanitarian law continues to have relevance in terms of surmounting some of the limitations related to the application of the treaty law, especially with regard to the Additional Protocols of 1977, which do not enjoy such universal ratification. It has been noted that either set of rules, however, can ‘suffice to entitle States to ensure compliance with the norms’.

The International Criminal Tribunal for the former Yugoslavia (ICTY) has espoused the notion of the international community having a legal interest in the observance of fundamental norms of international humanitarian law, given that they establish ‘obligations towards the international community as a whole, with the consequence that each and every member of the international community has a legal interest in their observance and consequently a legal entitlement to demand respect for such obligations’. Similarly in the Furundžija case before the ICTY the violation of an obligation erga omnes (in this case relating to the prohibition of torture) constitutes a breach of the correlative right of all other states, and ‘gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued’. The importance of compliance with the fundamental norms of international humanitarian law, being of erga omnes character, can thus be said to ‘transcend[s] the sphere of interest of any individual State’.

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203 Cassese (n 52) 19.
204 Ibid.
205 Ibid.
206 Kessler (n 78) 501.
207 *The Prosecutor v. Zoran Kapreškić and others*, ICTY Trial Chamber, Judgment, 14 January 2000, Case No. IT-95-16-T, para 519 [emphasis added].
208 *The Prosecutor v. Furundžija*, ICTY Trial Chamber, Judgement, 10 December 1998, Case No. IT-95-17/1-T, para.151.
209 Gasser (n 86) 21.
[b]y their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law … others are conferred by international instruments of a universal or quasi-universal character.  

Relevant in this context are the obligations that derive from the principles and rules concerning the basic rights of the human person, and also those that derive from instruments of a universal character. The Geneva Conventions are unarguably international instruments of a universal character, having been ratified by every United Nations member state, but also having strong claims to almost comprehensive customary status.  

The application of the concept of *erga omnes* to the core obligations in the conventions concerned with the protection of individuals during armed conflict, does not clarify the extent and scope of the duty of third states to ensure respect in conflicts not directly concerning them, but it does strengthen the normative force of the duty of the international community to work individually and in union towards the improved compliance of all states.

It is unresolved whether all of the obligations contained in the conventions are of an *erga omnes* character, but certainly the more fundamental rules could be accepted as such. The rules in common Article 3 relating to non-international armed conflict are accepted as being of such fundamental character that they amount to obligations *erga omnes*, and Gasser has further argued that the essential provisions of Additional Protocol II and the relevant customary rules also ‘embody fundamental policy decisions of the international community’, and thus the entire community of states has an ‘obvious interest in ensuring respect for these fundamental rules, in all circumstances where they are applicable’.  

Non-international armed conflicts are

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211 See, e.g., Meron, ‘[o]f course, the status of the Geneva Conventions as customary law has been confirmed by the International Court of Justice (ICJ) and is hardly ever contested’, Meron (n 17) 80; similarly see Meron ‘Revival of Customary International Law’ (2005) 99 *AJIL* 817, 819.
212 Gasser (n 86) 23. Interestingly, Meron views common article 1 not as being of *erga omnes* character itself, but as being the ‘the humanitarian law analogue to the human rights *erga omnes* principle’: Theodore Meron, ‘The Humanization of Humanitarian Law’ (2000) 94(2) *AJIL* 249.
more prevalent than international armed conflicts, and all states should thus make efforts to ensure that the basic humanitarian norms that apply are complied with.

2.9 **State Responsibility and Common Article 1 of the Geneva Conventions**

While the means and methods of conflict have developed significantly, so too has state responsibility for actions by states during such periods been clarified and augmented. While serious violations of international humanitarian law entail individual responsibility, they may also entail the responsibility of states. There is an increasing emphasis on accountability, in terms of the evolution of individual criminal responsibility for violations of international humanitarian law, and in general there have also been efforts towards increasing accountability for conduct during armed conflicts than was present during the early years of the ‘Geneva’ system.213 As has been noted, the violation of any rule, including that of the rule enumerated in common Article 1, has the potential to create international responsibility.214 The first port of call for guidance on state responsibility are the Articles on Responsibility of States for Internationally Wrongful Acts (Articles on Responsibility of States), drafted by the International Law Commission, and received by the General Assembly in 2001, after a protracted process of drafting and negotiation.215 The interpretation of certain aspects of international humanitarian law can be aided by reference to corresponding norms in the rules on state responsibility. Sassòli has questioned whether the Articles can apply to international humanitarian law, if the latter is conceived of as being a ‘self-contained system’, which can be implemented only in accordance with its own rules.216 International humanitarian law is referred to both as an example of and an exception to the rules contained within the Articles on Responsibility of States, in both those Articles and the accompanying commentaries.217 So what then is the

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213 Durham and McCormack note that the ‘international community seems to be in the process of moving beyond the passive acceptance of minimum standards without a corresponding commitment to ensure respect for those standards’: Helen Durham and Timothy McCormack, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Kluwer Law International 1999) xx.

214 Kessler (n 78) 505.


216 Sassòli (n 76) 403.

217 Ibid.
relationship between the two sets of rules? Can the principles of state responsibility be harnessed to improve respect for, and compliance with international humanitarian law?218

The Articles on Responsibility of States essentially outline the conditions which trigger the international responsibility of states for internationally wrongful acts that are considered attributable to it.219 The acts which are attributable to it, and which consist of violations or breaches of international law, may involve the responsibility of the state, which must then work to end the violation(s), and in some cases provide reparations for the wrongful act(s). The wrongful acts of individuals, acting in the name of a particular state, may also involve state responsibility for those acts, and may therefore be attributable to them.220 State responsibility in international law has been supplemented by, rather than supplanted by, individual criminal responsibility.221 State responsibility is also of a ‘civil character’, whereas increasingly individual liability for gross violations of international humanitarian law is criminal in nature.222 In certain areas, for example in the field of international humanitarian law, the notion of state responsibility for wrongful acts remains relevant, and can be used as an additional tool in the struggle for improved compliance with humanitarian norms.

A number of key issues that arise when considering state responsibilities in terms of obligations deriving from international humanitarian law include: 1) the notion of a ‘self-containing system’ of law; 2) multilateral as opposed to bilateral obligations; and 3) invocation of responsibility by an injured state. Firstly, the concept of a ‘self-contained system’ was invoked by the ICJ to deal with issues surrounding

218 Ibid: In Sassòli’s view, this approach is necessary while international humanitarian law remains imperfect.
219 Articles on Responsibility of States, Art 2(a).
220 Article 8, Articles on Responsibility of States, see also Article 58. Sassòli has noted that even if violations of international humanitarian law cannot be found to be attributable to a state, they may still result in individual criminal responsibility, and that it is ‘this second possible attribution that differentiates international humanitarian law from most other branches of international law’: Sassòli (n 76) 404.
222 Ibid 222: Zimmerman has considered whether increased emphasis should be placed on ‘strengthening the regime of civil liability of individuals committing or ordering to have committed violations of international humanitarian law’.
the application of the law of diplomatic relations.\textsuperscript{223} It refers to a system which can be implemented only by the mechanisms explicitly provided for by the regime. While originally international humanitarian law may well have constituted such a system, the developments and convergence mentioned earlier would suggest that not only international humanitarian law, but also other bodies of law such as human rights law and international criminal law are increasingly intertwined, both in terms of aims and norms, but also increasingly in their implementation.\textsuperscript{224} Sassòli has refuted the idea of international humanitarian law as self-contained by referring to the fact that many of the mechanisms contained in international humanitarian law ‘spell out in detail or modify general rules on State responsibility and can be understood only within that framework’, and also in reference to the international criminal tribunals which have ‘applied general rules on State responsibility in order to attribute or not to attribute certain violations of international humanitarian law to a given State’.\textsuperscript{225}

Secondly, it has been conceded that under multilateral agreements, it can be difficult to determine which states can be considered ‘injured’, or concerned by certain violations of other states, for the purposes of making claims and taking measures against the violating state, as the ‘general principle of State responsibility is that claims and entitlements within the framework of international responsibility arise only for that State whose rights have been violated by a breach of a legal obligation’.\textsuperscript{226}

Thirdly, with regard to the invocation of responsibility by an injured state, a state is generally considered injured by an action when it is directly involved, and suffers direct harm from the wrongful act committed. However, the Articles provide that a state is entitled as an injured state to invoke the responsibility of another state if the obligation breached is owed to either that state individually, or is ‘owed to a group of States including that State, or the international community as a whole’, but only in the case that the breach either specially affects that state, or is ‘of such a character as

\textsuperscript{223} See US Diplomatic and Consular Staff in Tehran, ICJ Reports 1980, paras 83 and 86, as cited in Sassòli (n 76) fn 6.

\textsuperscript{224} For example, to the extent that international criminal law holds individuals responsible for violations of human rights and of international humanitarian law that amount to international crimes.

\textsuperscript{225} Sassòli (n 76) 404.

\textsuperscript{226} Kamen Sachariew, ‘States’ Entitlement to Take Action to Enforce International Humanitarian Law’ (1989) 29 IRRC 177, 181.
to radically change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation’.  

Humanitarian obligations are, it is argued, owed to the international community as a whole, but it may be difficult to prove that particular breaches ‘radically change the position’ of all other States. Marco Sassòli does not agree with the argument that common Article 1 makes all states ‘injured’, nor does he conclude that humanitarian law can lend itself easily to the exception mentioned above: The sole fact that many international humanitarian law obligations are integral in the sense that they can only either be respected vis-à-vis all States or violated vis-à-vis all States does not make them come within this exception. It therefore seems that only the adverse party in an international armed conflict, the State on the territory of which a violation of international humanitarian law has occurred or the national State of the victims can be considered as ‘injured’.  

Others would consider the multilateral nature of humanitarian obligations sufficient for a determination of all parties being ‘injured’ by any breaches. The multilateral character of the Geneva Conventions results in the situation whereby all states are considered to be affected by violations committed by any state. Where breaches of international humanitarian law are found not to fit into the exception mentioned above, the Articles on Responsibility of States provide for the ‘invocation of responsibility by a State other than an injured State’. The invocation of responsibility in this case is allowed where the obligation breached is owed to the international community as a whole. This is related to the notion of obligations of an *erga omnes* character. Cassese has categorised responsibility of this nature as ‘aggravated’ state responsibility – whereby a state violates a rule which has the character of a ‘community obligation’. States that invoke such responsibility ‘*do not pursue a personal or individual interest*; they pursue a *community interest*, for they act on behalf of the whole world community or of the plurality of States parties to the multilateral treaty’. Such states may take action to compel the state to cease violation of the rule in question or to make reparation for harm caused. A third state invoking the responsibility, for

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227 See Articles on Responsibility of States, art 42.
228 Sassòli (n 76) 422-423.
229 Sachariew (n 226) 184.
230 Articles on Responsibility of States, art 48.
231 Cassese (n 52) 262.
232 Ibid [italics in original].
233 Ibid 263; for practice related to aggravated state responsibility in the context of international humanitarian law, see 265-267.
example, of a state involved in an armed conflict to whom certain breaches are attributable, may claim the following:

a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.²³⁴

Significantly, common Article 1 has been viewed as a ‘forerunner codifying such a possibility for all States to invoke State responsibility for reasons of community interest’.²³⁵ The obligations under this article, as asserted before the UN General Assembly in 1980, ‘involve collective action to ensure adherence to the Convention, non-recognition of measures taken in contravention of its provisions and refraining from offering any aid to the [State in question] which might encourage it in its obstinacy’.²³⁶

The concepts of due diligence, and the idea of aid or assistance in a violation invoking responsibility, are also dealt with by the Articles on Responsibility of States, and are closely related to the duties enumerated under common Article 1. Both of these issues relate to the degree of influence and capacity of states to effect change in the behaviour of other state or non-state actors. It has been suggested that certain rules contained within international humanitarian law request a certain level of due diligence where influence is possible, and that violations of preventive measures such as the dissemination of the law in peacetime, or enforcement measures such as the prosecution of grave breaches, ‘could also imply responsibility for conduct by private players that is facilitated by such omissions’.²³⁷ A universal standard of due diligence would indeed be useful in reinforcing the duty to ensure respect for international humanitarian law, and would also allow for the inherent variables due to capacity to act, influence on the offending state, nature of the violation and so forth. The concept of due diligence and the parameters of influence as set out by the ICJ have been invoked above in assisting the establishment of the scope of the duty to ensure respect.

Aiding or assisting in a violation of an international obligation is also addressed by the Articles on Responsibility of States, which reflect the logic in the

²³⁴ Articles on Responsibility of States, art 48(2).
²³⁵ Sassòli (n 76) 424.
²³⁶ Statement made by Oman, at the General Assembly debate on Israeli practices in occupied territories, UN Doc. A/SPC/35/SR.27, para 8 (also cited in Cassese n 52, 266).
²³⁷ Sassòli (n 76) 412 [emphasis added].
interpretation of common Article 1 which precludes states from participating to any degree in violations of the conventions, as doing so would be a breach of the duty to ensure respect. Chapter VI of the Articles on Responsibility of States deals with aiding and assisting, direction and control, and coercion of a state in the commission of an internationally wrongful act. The establishment of international responsibility for such actions under the particular circumstances laid out therein assists in a determination of what a duty to ‘ensure respect’ would entail, in terms of what a third state would be obliged to refrain from to avoid association and ‘attributability’ with respect to violations of the conventions, in essence, what a third state must avoid in order to respect and ensure respect for the Geneva Conventions. State responsibility is also triggered where there are violations which amount to serious breaches, when there is an obligation not to recognise as lawful certain situations; an example of this was seen in the Wall case mentioned above.238

Some of the significant links between state responsibility and the duty to ensure respect for the Geneva Conventions have been outlined here. The importance lies in the fact that third states can and should react to violations of humanitarian law ‘through the combined mechanisms of international humanitarian law and of the general rules on State responsibility’.239 It has been stressed, and seems self-evident, that the ideal reaction is action through either a universal or regional institution, rather than unilateralism.240 The subsequent chapter will examine action taken through the auspices of the EU as a regional institution, and how a unified approach can improve the effectiveness of such measures. While the rules regarding state responsibility can surely continue to shed light on the dynamic elements involved in ensuring respect for humanitarian law, and support many aspects of the necessity for compliance, meaningful compliance with this duty will involve more than states acting alone or unilaterally; instead effective compliance with the duty to ensure respect demands ‘multilateral support for which the role of international organizations and regional arrangements must be stressed’, along with the engagement of non-governmental

238 See Articles on Responsibility of States, arts 40 and 41.
239 Sassòli (n 76) 433.
240 Ibid, 430-431: Sassòli raises the interesting question ‘whether States, having an obligation under common Article 1 and Article 89 of Protocol I to act under certain circumstances through an international organization, do not violate that obligation if in their capacity as members of organs thereof, for example as members of the UN Security Council, they hinder that organization from taking action.’ Compelling an idea as this may be, it would appear unlikely to gain much credence on the international plane in the normative sense for obvious reasons.
organisations and civil society. A deep engagement of states with the transnational legal process, including engagement with regional and international organisations, and wide ratification and implementation of humanitarian norms, along with recognition of customary norms, is likely to lead to increased respect for humanitarian rules for the forces of those states.

2.10 Conclusion

The accepted contemporary interpretation of common Article 1 to the Geneva Conventions is that the duty to ensure respect confers an obligation on each state party to react to potential or real violations of the conventions. There is also clearly a right, a moral obligation, a degree of international and state responsibility, and a strong legal interest for third states to take steps to ensure respect by other parties, if only in an attempt to uphold some level of effective functioning of the system of basic norms which they have an enduring interest in, for the peace and security of the community of states. This obligation is strengthened if, as in the case of EU Member States, they are party to an additional policy document which reinforces the concept of third party and community responsibility for the effective implementation and enforcement of humanitarian law.

The obligation itself is clear. What is more difficult to define is the precise scope of the obligation, which can affect determinacy of the rule and thus undermine its legitimacy and the likelihood of compliance. The scope becomes clearer in specific contexts, for example, dependant on the relationship between the third state and one of the belligerents. If the third state has no relationship, and can bring no influence to bear on one of the belligerents, it may still bring pressure to bear on another state party which may have a closer connection to the conflict or on a regional or international institution with responsibility for maintaining peace and security. It has been convincingly asserted that the history of common Article 1 provides little opportunity for an interpretation of the intent of the drafters to invoke the responsibility of third states. There is now a general and broad consensus, however, that ensuring respect for the conventions entails a responsibility that transcends the

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241 Dieter Fleck, ‘Individual and State Responsibility for Violations of the Ius in Bello’, in von Heinegg, and Epping (n 202) 200. See also Sachariew (n 224) 177.

domestic jurisdiction, this is clear from scholarly work, the few judicial decisions available, and the *modus operandi* of international institutions with responsibility for the maintenance of peace and security, and the policy of other organisations such as the European Union. The High Contracting Parties to the Fourth Geneva Convention adopted a declaration in 2001 expressing that:

The participating High Contracting Parties call upon all parties, directly involved in the conflict or not, to respect and to ensure respect for the Geneva Conventions in all circumstances (...) The participating High Contracting Parties welcome and encourage the initiatives of States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring respect of the Convention, and they underline the need for the Parties to follow up on the implementation of the present Declaration.243

Similarly, a series of expert seminars convened around the world by the ICRC has confirmed that common Article 1 entails an obligation both on states party to an armed conflict and on third states not involved in an ongoing armed conflict. All participants agreed that this included a negative legal obligation to neither encourage nor assist violations of international humanitarian law, and a majority viewed the positive obligation to take appropriate action in the case of violations by parties to a conflict as a legal obligation under common Article 1. 244 It would seem counterintuitive to attempt to discredit this interpretation after the consolidation of these developments, and the only option that remains is to seek further clarification on the scope and implementation of the obligation.245 On the international plane this is a difficult prospect, but by selecting a regional grouping of states who are expected through explicit policy to improve compliance with international humanitarian law, the potential of this article, and the relevant practice of certain state parties can be assessed, whether they act individually or collectively through the EU. Certainly, it is no longer highly controversial to read common Article 1 as entailing the responsibility of states not involved in an armed conflict, or indeed of the responsibilities of the

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243 Conference of the High Contracting Parties to the Fourth Geneva Convention (Geneva, 5 December 2001), Declaration, paras 4 and 17.
245 See Kessler (n 78) 516. It is the lack of specificity in practice, not the norm itself that is now widely debated, see also Laurence Boisson de Chazournes, ‘The collective responsibility of States to ensure respect for humanitarian principles’, in A Bloed et al (ed), *Monitoring Human Rights in Europe* (Kluwer Law International 1993) 248.
international community; as Boisson de Chazournes has affirmed, the approach is not ‘as heretical as it might have been a few decades ago’. 246

Examining the practice related to compliance is important, in order to explore the different means available, determine which theories best explain how conduct can be influenced, and determine patterns and the potential advantages and disadvantages inherent in the different approaches. As noted in chapter one, international humanitarian law offers three key stages for the law to act: prior to conflict through dissemination and training, during conflict through clear and determinate rules on the legitimate means and methods of warfare, and after the end of hostilities through accountability for violations through appropriate forums. 247 The EU can attempt to influence compliance at each stage, enabling its Member States to ensure respect for the law in accordance with their international obligations. The European Union Guidelines on Promoting Compliance, as demonstrated in the first chapter, have made some significant inroads in terms of addressing what measures are available and appropriate for EU Member States in promoting international humanitarian law, at these various stages. The following chapters, focusing on promoting compliance, engaging with enforcement, and a case study with respect to Gaza, explore what means and methods have been adopted in the EU’s attempts both to promote compliance and support enforcement with regard to international humanitarian law generally, and to ensure respect for international humanitarian law in specific situations.

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246 Boisson de Chazournes (n 245) 247.
247 Modirzadeh (n 187) 356.
Chapter 3:

The ‘Promotion of Compliance’: Practice of the European Union

3.1 Introduction

This chapter explores the practice of the EU and its Member States regarding the promotion and enforcement of international humanitarian law. It considers the application of the various means set out in the EU’s Guidelines on Promoting Compliance with International Humanitarian Law. The current practice of the EU in promoting compliance is examined, and the success, motivations and potential associated with the various approaches outlined. This chapter discusses the specificities which can affect compliance in particular situations and with regard to particular countries.

In terms of the prioritisation of implementing all of the EU guidelines relating to human rights and international humanitarian law it would appear that from 2007 until 2009, only one individual working under Javier Solana (former EU High Representative) was tasked with improving the implementation, mainstreaming and coherence of EU human rights policy externally.¹ It may be that the appointment of a High Representative for Foreign Affairs and Security Policy, as a result of the entry into force of the Lisbon Treaty and the subsequent creation of the European External Action Service, will allow for more concentrated attention on the various EU guidelines, and potentially allow for at least one individual with a degree of expertise in international humanitarian law, and overall responsibility for improving implementation of the Guidelines on Promoting Compliance with International Humanitarian Law.² The overall practice since the adoption of the guidelines in 2005 has been reasonably consistent in some areas, such as general public statements and targeted public statements, but less consistent in others, such as the imposition of sanctions and efforts towards ensuring accountability for violations. It is easier for the EU to issue statements condemning certain action, and more difficult to obtain consensus within and indeed between the different EU institutions on taking action in the case of continuing violations. The EU may also become more involved in some conflicts over others, dependant

¹ This individual was Riina Kionka, former Personal Representative of Javier Solana. See ‘Human Rights and Democracy in the World: Report on EU action July 2008 to December 2009’ (European Commission, May 2010) 26. All websites in this chapter were last accessed 10 July 2011.
² Although it would appear from the composition of the first cabinet of the European External Action Service that the focus for individual responsibility is country and region specific, along with thematic responsibility. See <http://www.eeas.europa.eu/ashton/team/index_en.htm>.

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on its relations with the parties, and the incentives involved. Each of the means discussed below has unique strengths and weaknesses in promoting compliance and in many cases a combination of the means provided by the guidelines are used.

### 3.2 Promoting Compliance with International Humanitarian Law

#### 3.2.1 Political Dialogue

The EU recognises that political dialogue is an important way of promoting respect for human rights, democracy, and the rule of law, including respect for international humanitarian law. To this effect it has increased consultations with non-EU countries on all of these topics.\(^3\) The EU guidelines provide that where international humanitarian law is relevant, it should be raised in dialogues with third states, and this is said to be of particular importance in situations where widespread violations have been reported.\(^4\) It can be assumed that at least sometimes, when in consultation with parties to an armed conflict, pursuant to the EU guidelines, compliance with humanitarian principles are raised alongside human rights and the rule of law.\(^5\) In accordance with the guidelines, the ratification and full implementation (including the adoption of domestic legislation and training of relevant personnel) of important humanitarian instruments should also be raised in peace time.\(^6\)

Human rights promotion has been given additional strength with specialised dialogues on human rights and with the inclusion of human rights conditionality clauses in EU agreements, neither of which apply to international humanitarian law. EU Guidelines on Human Rights Dialogues were adopted in 2001, highlighting the value placed by the EU on mainstreaming human rights in the EU’s external policy. The issues that can be addressed in these dialogues are decided on a case-by-case basis, but the professed priorities of the EU include topics that are often relevant in the context of an armed conflict, such as torture, the rights of children in armed conflict, cooperation in international justice, conflict prevention and the rule of law.\(^7\) As this existing structure has been operational for over a decade, it would be logical to systematically incorporate discussion of international humanitarian law

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3 Human Rights and Democracy in the World (n 1) 10.
5 In the human rights report in 2007, for example, details on action relating to raising IHL-related issues were discussed within the framework of the Human Rights Dialogues, see ‘EU Annual Report of Human Rights 2007’ (European Communities 2007) 21.
6 Ibid.
issues within these dialogues where relevant, rather than creating a parallel stream of dialogues. For example, a communiqué of the African Union-European Union human rights dialogue in 2011 mentioned both Security Council resolution 1325 on women, peace and security (which explicitly refers to international humanitarian law), the crucial issue of the governance of natural resources in conflict situations, and EU support for African Union training of peacekeepers, but failed to make any reference to the relevant principles of international humanitarian law.

The inclusion of a discussion relevant to humanitarian principles could be made more explicit in this respect, where applicable, not only in public communications relating political dialogues to the wider public, but also when assessment of the dialogues takes place, and when outcomes are reported in the EU’s Annual Report on Human Rights. The need for maximum possible consistency between Member States’ bilateral dialogues and EU dialogues is underlined in the EU Guidelines on Human Rights Dialogues, and an effective information exchange is called for. This would also seem to be an appropriate approach in relation to international humanitarian law, but no such expectation is explicitly communicated in the EU Guidelines on Promoting Compliance with International Humanitarian Law. The human rights dialogues have a further advantage that could be useful in relation to information exchange on alleged violations of international humanitarian law, in that provision is made for civil society involvement, i.e. consultation between the EU and the civil society, including NGOs, activists and academics, in the third country concerned, alongside the formal political dialogue with the state.

A number of strategic partnerships have also been set up, reflecting important relationships between the EU and other major world players, and while not specifically targeting issues of international humanitarian law, these can touch on compliance issues through platforms addressing broader issues. Examples include the discussion on freedom, security and justice with Russia, covering issues related to the conflict in Chechnya, and the discussion on counterterrorism with the United States. The EU-US dialogue in particular affords the EU an opportunity to cooperate in matters related to counterterrorism, while simultaneously promoting compliance with the applicable international legal principles. A joint statement declared that the EU and the United States consider that efforts to combat

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10 EU Guidelines on Human Rights Dialogues with Third Countries (n 7) para 8.
11 Human Rights and Democracy in the World (n 1) 10.
terrorism which are conducted in a manner comporting with the obligations under international human rights law, refugee law, and international humanitarian law, make both parties stronger and more secure. Some of the key issues that have been raised in this transatlantic dialogue on the subject of counterterrorism are the closure of Guantánamo bay, the geographic scope of the battlefield, the use of drones for targeting suspects, and the use of military commission trials.

The EU has been criticised for adopting a ‘cooperation and dialogue’ approach to some issues, as opposed to a more robust approach. Political dialogue at the very least affords the EU an opportunity to raise issues of concern in relation to compliance with international law directly with the parties concerned, and provides an opportunity for cooperation and negotiation instead of, or prior to, a more confrontational approach. Such a managerial approach to improving compliance may not always be appropriate. The EU has recognised that formal dialogue with non-EU states is not always sufficient to ‘influence events’, and that public declarations or statements are sometimes required to draw attention to certain issues with respect to both implementation of, and compliance with international humanitarian law instruments.

3.2.2 General Public Statements

Part of the EU’s promotion of international humanitarian law is in the form of encouraging ratification of the important instruments, and issuing generalised statements on the law. The EU often calls for universal ratification of the 1977 Additional Protocols, the Ottawa Convention prohibiting anti-personnel mines and the statute of the International Criminal Court. Aside from statements reaffirming the importance of the law released to coincide with significant dates, such as those commemorating the 50th and 60th Anniversaries of the Geneva Conventions, the 150th Anniversary of the Battle of Solferino, and World Red


15 Human Rights and Democracy in the World (n 1) 6.

Cross/Red Crescent Day\textsuperscript{17}, the EU often issues statements at the UN related to improved compliance with international humanitarian law generally. The EU guidelines provide that in public statements on issues related to international humanitarian law, the EU should emphasise the need to ensure compliance with the law where appropriate.\textsuperscript{18} On occasion issues linked to armed conflicts arise, and the EU neglects to highlight the international humanitarian law dimension, such as in discussions regarding the use and impact of mercenaries on conflict and the role of diamonds in fuelling armed conflicts.\textsuperscript{19}

More often than not the law is mentioned, however, and examples of the issues raised in such statements are: the situation of journalists in armed conflict, the protection of children in armed conflict, and the protection of civilians in armed conflict. The protection of journalists was raised in an EU intervention at the Human Rights Council, where the EU stated that more than ever the issue was one of serious concern for the international community. Concern was expressed over the deliberate targeting and kidnapping of journalists in armed conflict, and it was noted that such attacks were in ‘stark violation of international humanitarian law under which journalists enjoy the same protection as all civilians, and are committed in an environment of almost total impunity’.\textsuperscript{20} The EU often engages in discussions on the protection of children in armed conflict at international fora, and consistently includes mention of international humanitarian law in its contributions, seeking in particular to find ways to prevent the recruitment of children in armed conflict.\textsuperscript{21} A Joint European Union-African Union statement was issued on the international day against the recruitment of child soldiers in 2011, welcoming progress made in previous years on the issue, such as the adoption of Security Council resolution 1882 (2009) on children in armed conflicts.\textsuperscript{22} The statement noted that the African Charter on the Rights and Welfare of the Child calls upon state parties to respect and ensure respect for the rules of international

\footnotesize{\begin{itemize}
\item\textsuperscript{17} Declaration by the Presidency on behalf of the EU on the occasion of the 50\textsuperscript{th} Anniversary of the four Geneva Conventions 10394/99 (Brussels, 12 August 1999); Declaration by the Presidency on behalf of the EU on the Occasion of the 60\textsuperscript{th} Anniversary of the adoption of the four Geneva Conventions of 1949, 12535/1/09 REV 1 (Brussels, 12 August 2009); Declaration by the Presidency on behalf of the EU on the Occasion of the 150\textsuperscript{th} Anniversary of the Battle of Solferino, 11280/09 (Brussels, 24 June 2009); and Statement by Commissioner Louis Michel on the Occasion of World Red Cross Red Crescent Day, IP/09/728 (Brussels, 8 May 2009).
\item\textsuperscript{18} Updated EU Guidelines (n 4) para 16(b).
\item\textsuperscript{19} EU Explanation of Vote – UN Third Committee: Use of Mercenaries, L.57 GA64 (New York, 19 November 2009); Statement by Anders Liden on behalf of the EU, 64\textsuperscript{th} Session of the UN General Assembly, 63\textsuperscript{rd} Plenary Meeting, Agenda Item 12, A/64/PV.63 (11 December 2009).
\item\textsuperscript{20} EU Intervention at the 14th session of the Human Rights Council Panel discussion on the protection of journalists in armed conflict (Geneva, 4 June 2010).
\item\textsuperscript{21} Statement by Pedro Serrano on behalf of the EU, Security Council Debate on Children and Armed Conflict, S/PV.6341 (16 June 2010).
\end{itemize}}
humanitarian law which affect children. The EU declared that it actively promotes the implementation of international humanitarian law, and supports the struggle against the recruitment of children in armed groups, the rehabilitation and reintegration of former child soldiers, and the struggle against impunity for crimes committed against children. The EU Guidelines on Children and Armed Conflict were mentioned, noting that the guidelines had been updated to provide for more ‘enforced concrete actions’ in terms of political dialogue, monitoring and reporting, and training. The EU and the African Union also used the statement as an opportunity to call for universal ratification of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

General public statements are frequently issued by the EU in relation to the protection of civilians in armed conflict. It has been recognised that this is a wide-ranging issue, and that the strategy adopted needs to encompass activities ranging from ‘ensuring the safety and physical integrity of civilian populations to preventing war crimes and other deliberated acts of violence, securing humanitarian access and ensuring full respect for human rights and international humanitarian law by all parties to conflict’. The EU has also recognised that improved protection of civilians demands comprehensive action responding to five core challenges: enhanced compliance with international humanitarian and human rights law, including by non-state actors, improving the protection provided by peacekeepers and other operations, improved humanitarian access, and accountability for violations. Accountability in particular is often emphasised in the general public statements of the EU, for example on the protection of civilians in armed conflicts, more often and more forcibly perhaps than in targeted public statements responding to particular conflicts:

The EU is grateful for the strong call to improve accountability for violations of international humanitarian law and human rights law in situations of armed conflict … We encourage the [Security] Council to explore the Secretary-General’s recommendations further, including referrals to the International Criminal Court, support to national-level investigation and prosecution, as well as the increased use of commissions of inquiry or fact finding missions.

24 Ibid.
26 Ibid.
29 Ibid.
The belief was also expressed by the EU that increased action towards accountability would help to deter perpetrators of atrocities, and the emphasis on prevention, including through early warning and assessment, was welcomed. Reference to international humanitarian law where relevant in the general public statements of the EU is mostly consistent and appropriate, although sometimes in overly generalised terms: specific provisions of the humanitarian instruments or customary norms are seldom referred to. A more detailed approach could potentially aid increased awareness and understanding of the law, notwithstanding the broad context in which the statements are issued.

3.2.3 *Démarches and/or Targeted Public Statements*

Targeted public statements can also be directed at parties to specific conflicts in accordance with the guidelines. Since the adoption of the guidelines, the EU has issued public statements including reference to humanitarian principles, criticising violations and/or calling on the parties to respect international humanitarian law in relation to, for example, Pakistan, Nepal, Afghanistan, Côte d'Ivoire, and the Democratic Republic of Congo. The EU has also frequently raised the issue of international humanitarian law compliance in relation to Yemen, Sri Lanka, Sudan, Burma, and Somalia.

The conflict in Yemen has repeatedly drawn the criticism of the EU. Events occurring in the summer of 2009, when security forces launched an operation known as ‘Operation Scorched Earth’ to quash a long standing rebellion by Zaidi Shiite rebels, sparked allegations of violations of international humanitarian law by both parties. The events...

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30 Ibid.
31 Updated EU Guidelines (n 4) para 16(c).
33 Council of the EU, Declaration by the Presidency on behalf of the EU on Political Situation in Nepal, 5493/1/06 REV 1 (Brussels, 30 January 2006).
37 The EU has also raised compliance in communications relating to Israel and the Occupied Palestinian Territories, which are numerous and are discussed separately in a case study in chapter five.
attracted a number of public communications by the EU, criticising the conduct of the parties
to the conflict and reminding them of their obligations under human rights and international
humanitarian law.\footnote{See Council of the EU, Declaration by the Presidency on behalf of the EU on the
deteriorating security situation in Yemen, 12751/1/09 REV 1 (Brussels, 27 August 2009); European Parliament Resolution on the
situation in Yemen, para 5, (adopted 10 February 2010).} The EU became ‘deeply concerned by the deteriorating security, political
and economic situation’ throughout Yemen.\footnote{Council of the EU, General Affairs and External Relations, Press Release 14658/09, Council Conclusions on
Yemen (27 October 2009) 18.} Conflict in the North of the country caused
large numbers of civilian casualties and internally displaced people.\footnote{As noted in Human Rights and Democracy in the World (n 1) 150.} The EU through its
various communications ‘insisted’ on the obligations of all parties to the conflict to respect
international humanitarian law, particularly in terms of the protection of civilians, and
allowing civilians to flee to safe areas.\footnote{See Declaration on Yemen (n 40); Joint Communiqué: Sixteenth Meeting of the EC-Yemen Joint Cooperation
humanitarian NGOs was also repeatedly raised as an issue.\footnote{See Declaration on Yemen (n 40); Human Rights and Democracy in the World (n 1) 151.} The EU maintained that there
was no military solution to the crisis,\footnote{Statement by the High Representative Catherine Ashton, on behalf of the EU welcoming the ceasefire in the North of Yemen, Press Release 6720/10 (Brussels, 19 February 2010).} encouraged the parties to negotiate, and welcomed the
ceasefire in the North of Yemen that occurred in early 2010,\footnote{Statement by the High Representative Catherine Ashton on the national dialogue process in Yemen, Press Release A 146/10 (Brussels, 19 July 2010).} and the subsequent national
dialogue process.\footnote{See Delegation of the EU to the Republic of Yemen <http://ec.europa.eu/delegations/yemen/ eu_yemen/political_and_economic_relation/index_en.htm>.}

It is uncertain what confidential dialogue also occurred at this time, although it is
likely that formal dialogue or confidential démarches were also part of the EU reaction to the
escalation in violence. Yemen is a key strategic priority for the EU, and in 2009 the bilateral
relations were strengthened with a full diplomatic representation to the Republic of Yemen,\footnote{See Delegation of the EU to the Republic of Yemen <http://ec.europa.eu/delegations/yemen/ eu_yemen/political_and_economic_relation/index_en.htm>.} signalling the increasing importance of a close relationship to the EU. The public EU reaction
to the escalation of the crisis could have been improved by the outlining of more specific
violations of international humanitarian law that were committed by the parties to the conflict,
by suggesting remedies for the victims of such violations, and by addressing the violations in
a more visible and transparent manner. It would appear that, despite the EU’s strong public
stance against impunity, the lack of independent investigations, or even suggestion of such,
into violations committed in Yemen by the parties to the conflict resulted in support for peace negotiations trumping calls for accountability.\textsuperscript{49}

In the case of its engagement with Sri Lanka, increased compliance with international humanitarian law became a professed priority for the EU in 2006. At that time, the EU became ‘gravely concerned’ at the violence in Sri Lanka, and urged those engaged in the violence, and those with influence on them, to ‘arrest [the] descent into conflict’.\textsuperscript{50} The EU then encouraged talks between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), aimed at improving implementation of the ceasefire agreement that had been concluded between the parties in 2002, and welcomed the agreement to hold talks in Switzerland.\textsuperscript{51} While Javier Solana, former High Representative for the Common Foreign and Security Policy, had hoped that the talks would ‘contribute to a climate conducive to peace’,\textsuperscript{52} later that year the Council of the EU expressed concern about the escalation of conflict which had, according to the Council, led to increasing violations of international humanitarian law.\textsuperscript{53} Both parties to the conflict were urged to ensure respect for international humanitarian law, and especially to guarantee access for humanitarian aid to the population, after continuing violence.\textsuperscript{54} The EU lamented the Sri Lankan Government’s decision to abrogate the ceasefire agreement, and continued to lament the humanitarian and human rights situation, without specifically referring to any violations of international humanitarian or human rights law, or calling on the parties to ensure respect for the laws.\textsuperscript{55} The situation worsened in 2009, causing the Council of the EU to condemn an attack on Colombo by two LTTE planes and to adopt the following as part of its conclusions:

\begin{quote}
The EU is deeply concerned about the evolving humanitarian crisis and vast number of Internally Displaced People (IDPs) trapped by the fighting in northern Sri Lanka, as well as the continuing reports of high civilian casualties. To prevent the loss of civilian life, the EU stresses the need for the provisions of international humanitarian law and the principles of the laws of war to be
\end{quote}

\textsuperscript{49} The EU did call for accountability in response to the repression of demonstrations in Yemen in 2011, however made no mention of international humanitarian law in this context. See Council of the EU, 3082\textsuperscript{nd} Council Meeting, Foreign Affairs, 8741/1/11 REV 1 (Luxembourg, 12 April 2011).
\textsuperscript{50} Council of the EU, Declaration by the Presidency on behalf of the European Union on the situation in Sri Lanka, 5510/1/06 REV 1, P 15/06 (Brussels, 23 January 2006).
\textsuperscript{51} Council of the EU, Declaration by the Presidency on behalf of the EU to welcome the agreement by the Government and the LTTE to hold talks, 5736/1/06 REV 1, P 019/06 (Brussels, 31 January 2006).
\textsuperscript{52} Statement by Javier Solana, EU High Representative for the CFSP, on talks between the Government of Sri Lanka and the LTTE, S051/06 (Brussels, 21 February 2006).
\textsuperscript{53} Council of the EU, Declaration by the Presidency on behalf of the European Union to welcome the agreement by the Government and the LTTE to hold talks, 5736/1/06 REV 1, P 019/06 (Brussels, 31 January 2006).
\textsuperscript{54} Council of the EU, Declaration by the Presidency on behalf of the EU on the Government of Sri Lanka’s decision to withdraw from the ceasefire agreement, 5055/1/08 REV 1, P 5/08 (Brussels, 8 January 2008).
respected by parties to a conflict. The EU calls on the Government of Sri Lanka and the LTTE to comply with these laws.\textsuperscript{56}

The language in this statement is rather unclear, referring both to the provisions of international humanitarian law and the principles of the laws of war, without providing more detail on either. The EU also called for the alleged violations to be investigated by an independent inquiry, stating that those ‘accountable must be brought to justice’. \textsuperscript{57}

A military defeat of the LTTE and the death of its leader brought the conflict to an end in May 2009. The Sri Lankan Government has come under criticism from both the UN and the EU for alleged violations of human rights and international humanitarian law committed during the conflict, and both organisations also called for an investigation into violations.\textsuperscript{58} The Defence Secretary of Sri Lanka argued in an interview that ‘[i]nstead of criticizing and blaming the government, the world should study the unique strategy adopted to protect displaced civilians during the three and a half years old battle against defunct LTTE terrorists’. \textsuperscript{59} Despite repeated statements relating to violations of international humanitarian law, the only concrete action taken by the EU related to unsatisfactory implementation of human rights conventions in Sri Lanka. The Council of the EU adopted a decision suspending Sri Lanka from an EU preferential trade scheme as a result of Sri Lanka’s overreliance on emergency legislation and extensive restrictions on human rights.\textsuperscript{60} It is noteworthy that publicly no action was taken other than issuing statements to either prevent violations or to ensure accountability, although it is possible that diplomatic pressure was applied simultaneously.

The situation in Sudan has also been a source of public concern for the EU. In its response to the conflict in Darfur, the EU has purportedly been ‘at the forefront of international assistance backing up efforts led by the African Union’. \textsuperscript{61} In 2004, an arms and

munitions embargo was imposed against Sudan. The EU also supported the Abuja peace talks, which led to the Darfur Peace Agreement, and the Comprehensive Peace Agreement, through both diplomatic efforts and operational and material support. In 2005 onwards the focus of the EU was on the implementation of the Comprehensive Peace Agreement which signalled the end of the civil war between the North and the South, and support of the African Union Mission in Darfur. Despite such concrete measures, the EU’s response has been labelled ‘feeble’. A former European commissioner for external relations, Chris Patten, has noted that, considering European foreign ministers had announced their ‘concern’ regarding Darfur a total of 53 times between April 2004 and March 2007, ‘if official European expressions of unease were effective, Sudan’s ethnic cleansing would have been halted long ago’. Patten also labelled the existing arms embargo ‘weak and ineffective’, and recommended a call for sanctions, travel bans and asset freezes on all the individuals named in the UN Commission of Inquiry and Panel of Experts Reports. In 2008 the EU continued to express its concern and to remind the parties of their obligations under international humanitarian law, both in relation to Darfur and to Southern Sudan. A decision issued by the International Criminal Court (ICC) in the following year against Sudan’s President Omar Hassan Al-Bashir turned the focus squarely on accountability. The EU issued many

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67 Ibid.  
68 Ibid. An Irish Minister who was a member of the European Parliament at the time, concurred with Patten, called for a blockade on Sudanese oil exports, and highlighted that the EU did not ‘even have a travel ban on the Sudanese Humanitarian Affairs Minister...who has been named by the International War Crimes Tribunal as a key figure in recruiting people to the Janjaweed – the group that has carried out the most brutal of atrocities in Darfur’ see Eoin Ryan, ‘Darfur: EU Must Act against the Regime’ Irish Examiner (22 March 2007) <http://archives.tcm.ie/irishexaminer /2007/03/22/story28442.asp>. On the lack of EU leadership and on links to European oil interests see David Cronin, ‘EU Watches Sudan, then Watches Some more’ Inter Agency Press Service (Brussels, 5 April 2007) <http://ipsnews.net/news.asp?idnews=37230>. For details of alleged violations of international humanitarian law, see e.g., ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General’, Pursuant to Security Council Resolution 1564 of 18 September 2004 (Geneva, 25 January 2005).  
69 EU Presidency Declaration on recent upsurge in violence (Brussels, 14 May), European Commissioner for Development and Humanitarian Aid appeals to Sudanese parties for end of violence in Abyei (21 May 2008), Council Conclusions on Sudan, 2879th External Relations Council meeting (Luxembourg, 16-17 June 2008).
statements of support for the ICC in this context, but interestingly some glimpses of hesitation to robustly support the arrest warrant have also emerged. The public statements issued by the EU were in essence repetitive and ineffective, and it would appear that use of this public targeting approach had negligible effect on the relevant authorities.

In relation to Burma, even though the ICRC was compelled to take the exceptional step of publicly denouncing violations of international humanitarian law, the EU’s publicly voiced concerns have mostly focused on human rights. EU relations with Burma have been governed in conformity with the Common Position which contains a series of restrictive measures towards the country, adopted in relation to widespread violations of human rights. The EU has sought to avoid isolating Burma through continuing to provide humanitarian aid, while the sanctions imposed over a considerable period have been criticised by some as ineffective. A special EU envoy position was created in 2007 in an attempt to move towards fostering dialogue among the different sectors of Burmese society, including the military authorities and the democratic opposition.

Concerns surrounding compliance with international humanitarian law, especially relating to the protection of civilians from inhumane treatment and violence to life and person under Common Article 3 of the Geneva Conventions, were raised in a progress report of the UN Special Rapporteur on Burma, and echoed and endorsed in conclusions adopted by the Council of the EU shortly thereafter. The Council called upon the authorities in Burma to ‘cooperate with [the Special Rapporteur] in a constructive manner and comply in full with the UN’s recommendations, by taking urgent measures to put an end to violations of international

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70 EU Council Conclusions on Sudan, 29614th External Relations Council Meeting (Brussels, 15 Sept 2009) para 11.
71 See, e.g., EU Factsheet, ‘Non-ratification of the revised Cotonou Agreement by Sudan’ (August 2009) <ec.e.europa.eu/external_relations/sudan_final_non-ratification_faq_200908.pdf>, which states that it would be ‘counterproductive to further isolate Sudan as a country and to abandon the Sudanese population due to the indictment of President Bashir. This would only radicalise the regime further’. See also ‘Letter to High Representative Catherine Ashton on Deployment of EU Election Observation Mission in Sudan’, where in a public letter from Human Rights Watch the EU is criticised for failing to maintain the EU’s public line on the Bashir arrest warrant.
74 See Human Rights and Democracy in the World (n 1) 155.
human rights and humanitarian law. Given the gross and systematic violations of both human rights and international humanitarian law over a period of years, the ineffectiveness of sanctions and ritual condemnations of Burma by the EU and the UN General Assembly, and the lack of accountability, the UN Special Rapporteur called on the UN to consider the possibility of establishing a commission of inquiry with a specific fact-finding mandate to address the question of international crimes. The European Parliament called on the EU High Representative and the EU Member States to publicly support the recommendation of establishing such a commission. The EU was called on by many human rights organisations to urge the establishment of an international commission of inquiry during the 65th session of the General Assembly of the UN. Calls were repeated by many in the outcomes of the Universal Periodic Review on Burma adopted by the Human Rights Council in 2011. In order to demonstrate its stated commitment to accountability in relation to war crimes and crimes against humanity, it would be prudent of the EU to strongly support this development in relation to Burma, given that long-standing efforts at criticism and persuasion through other means have proven ineffective.

The EU also became increasingly involved in publicly attempting to influence compliance through public criticism in relation to the conflict in Somalia. Conflict and insecurity resulted in widespread civilian deaths and casualties in the country, in addition to severe difficulties relating to humanitarian access and internally displaced people. The European Commission is one of the most prominent donors of humanitarian and development aid to Somalia, and enabling safe humanitarian access and security for the delivery of

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82 UN Human Rights Council, Outcome of the Universal Periodic Review: Myanmar, UN Doc HRC/17/107 (8 June 2011).
development programmes is crucial for its continuing involvement. In 2009 the EU made a statement before the UN, deploiring the humanitarian consequences of recent attacks and calling for an immediate cessation of hostilities to avoid further civilian casualties. The parties to the conflict were urged to abide by international humanitarian law and to protect the civilian population. The Council of the EU separately condemned armed attacks against the Transitional Federal Government and against the United Nations and NGOs during the same period, and expressed ‘deep concern’ over the violations of international humanitarian law, stating that the situation in Somalia ‘remains one of the worst humanitarian crises in the world’.

The different phases and nature of the conflict along with other security concerns such as piracy are complex, and any attempt at improving the situation requires a comprehensive approach. The Council of the EU has confirmed its support for such an approach, linking security policy with development, rule of law, respect for human rights, gender-related aspects and international humanitarian law. It could be problematic to address isolated issues without attempting to make progress on all of these areas. The EU has publicly recognized that attempts to ensure compliance with international humanitarian law cannot be separated from comprehensive and integrated efforts to stabilise Somalia.

The targeted public statements of the EU attempt to influence compliance through persuasion and by engaging with the reputational concerns of the parties to a conflict. The potential strength of the EU in this context is that many states may seek increased cooperation with the EU, and many non-state actors may seek recognition or legitimacy from the EU. The parties to a conflict may be concerned with establishing or maintaining good standing in the eyes of both the EU and the broader international community, especially in the case of states. The inducement factor is related to future cooperation: the state which honours its international obligations ‘will find more partners when it seeks to enter into future cooperative arrangements, will be able to extract more generous concessions in exchange for its promises, and will be able to solve more problems of cooperation than will a state that has

85 Ibid.
86 Council of the EU, 2958th External Relations Council Meeting, Conclusions on Somalia, (Brussels, 27 July 2009).
87 Council of the EU, 3023rd Council Meeting, Foreign Affairs, 11022/10, Presse 175 (14 June 2010).
88 Statement by Anders Lidén, 9 July 2009 (n 84).
a less favorable reputation’. 89 Non-state actors may not have the inducement factor of facilitating future cooperation, and may not be able to ‘formally engage their reputations’ through ratifying humanitarian instruments (although they can declare their intention to abide by them), 90 but concern for legitimacy and recognition may remain. Engaging reputation, as clear from the examples above, is not always effective, as the incentive ‘operates at the margin’, and is only one of the variety of factors that a party to a conflict will consider when decisions on compliance are made. 91

The suitability of public statements as a means of influencing compliance will vary depending on the actor involved and the balancing of costs and benefits for that actor. In addition to this calculation, predicting the impact of this approach is complicated by the fact that actors can have ‘multiple reputations that operate to limit the reputational consequences of a given incident’, and can develop different reputations within different regimes and in relation to different treaties. 92 This explains how the EU can publicly criticise states for violations on the one hand, and continue cooperation on other fronts. It has been argued by reputational theorists that during a conflict short-term gains over the opponent may be more attractive and more valuable than long-term reputational considerations, that the ‘potency of reputational effects is probably lowest in issue-areas where the stakes are highest and that for states the benefits that accrue from being perceived as a rule-follower are far less than the gains to be had through the election of prohibited but highly useful battle strategies’. 93 If the territorial integrity or political structure is under threat, as is often the case in non-international armed conflicts, states will do whatever they can to protect themselves, and ‘only if they survive do they worry about what other states think of them’. 94 In essence, engaging reputation through targeted public statements may have some influence, and reputation does matter in relation to compliance, ‘just not so much as some might like’. 95

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89 Andrew T Guzman, How International Law Works: A Rational Choice Theory (OUP 2008) 34.
91 Guzman (n 89) 40-41.
94 Ibid.
95 Downs and Jones (n 92) 113.
3.2.4 Restrictive Measures

Restrictive measures were imposed as a form of pressure alongside criticism and diplomacy in a number of the examples mentioned above, such as Côte d’Ivoire, Burma, Democratic Republic of Congo, Somalia and Sudan. The EU guidelines provide that restrictive measures/sanctions may be an effective means of promoting compliance with international humanitarian law, and that such measures should be considered against both state and non-state parties to a conflict, as well as individuals.\textsuperscript{96} The United Nations and increasingly the EU are often criticised for the ineffective use of sanctions over long periods of time with apparently few positive outcomes.\textsuperscript{97} The EU’s practice of autonomous sanctions, applied without a United Nations mandate, has evolved over more than two decades, although formal EU policy on sanctions only appeared in 2004. The general policy in relation to the adoption of autonomous sanctions is set out in the ‘Basic Principles on the Use of Restrictive Measures (Sanctions)’, which provides that the Council of the EU will impose autonomous EU sanctions in support of efforts to fight terrorism and the proliferation of weapons of mass destruction, and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance.\textsuperscript{98} The ‘Basic Principles’ recognise that sanctions should: be used as part of a comprehensive strategy rather than in isolation; be targeted for maximum impact on the intended addressee and minimum humanitarian effects for persons not targeted; be imposed where necessary against non-state actors; have clear objectives as defined in the enabling legal instruments; be regularly reviewed to indicate effectiveness and be lifted when objectives are met.\textsuperscript{99}

The EU can apply any measure or package of measures from the following: diplomatic sanctions, suspension of cooperation with a third country, boycott of sporting or cultural events, trade sanctions, financial sanctions, flight bans, and restrictions on admission to the EU. The Council of the EU has agreed on guidelines in an attempt to standardise and strengthen methods of implementation of restrictive measures, and provide standard wording and definitions for the relevant legal instruments.\textsuperscript{100}

\textsuperscript{96} Updated EU Guidelines (n 4) para 16(d).
\textsuperscript{97} For an outline of issues related to monitoring and compliance of UN arms embargoes in particular, see Brian Wood, ‘Strengthening compliance with UN arms embargoes – key challenges for monitoring and verification’, AI Index IOR 40/005/2006 (Amnesty International, March 2006).
\textsuperscript{98} Council of the EU, Basic Principles on the Use of Restrictive Measures (Sanctions), Document 10198/1/04 (Brussels, 7 June 2004) para 3.
\textsuperscript{99} Ibid.
\textsuperscript{100} Council of the EU, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Doc 15114/05 (Brussels, 2 December 2005).
guidelines imposes restrictive measures in order to ‘bring about a change in policy or activity by the target country, part of country, government, entities or individuals, in line with the objectives set out in the Common Position’.\footnote{Ibid, para 4.} The legal instrument adopting such measures may also mention incentives to encourage change in policy or activities, as long as such incentives ‘do not reward non-compliance’.\footnote{Ibid.}

In order to assess the effectiveness of restrictive measures it must be clear what the exact desired outcomes are. One issue that arises in relation to the imposition of sanctions is that the criteria seems to be serious and brutal repression, so sanctions may be effective more in terms of discontinuance or even punishment rather than preventing an escalation of violence or violations.\footnote{See Zeray Yihdego, ‘The EU’s Role in Restraining the Unrestrained Trade in Conventional Weapons’ 10(3) German LJ (2009) 294.} Another concern is that the practice of lifting sanctions when changes take place is inconsistent.\footnote{Ibid at 296: Yihdego gives the example of the EU lifting an arms embargo against Libya, in exchange for Libya agreeing to abandon its WMD programmes and to compensate the Lockerbie victims, with the apparent result of the EU squandering its human rights leverage.} Evaluating the effectiveness of sanctions in place may be challenging unless explicit targets are set out in the enabling legal instrument. A report issued by the Committee on Foreign Affairs of the European Parliament concluded that it was evident EU sanctions policy suffered from ‘excessive ad-hocism’.\footnote{European Parliament, Report on the evaluation of EU sanctions as part of the EU’s sanctions and policies in the area of human rights, Committee on Foreign Affairs, Rapporteur Hélène Flautre (15 July 2008), (2008/2031(INI)) 20.} The report is an evaluation of EU sanctions as part of the EU’s policy on human rights. In line with the EU’s annual human rights reporting, it could be expected that compliance with international humanitarian law would be assessed alongside human rights. International humanitarian law is only referred to, however, in relation to ensuring that the implementation of restrictive measures complies with ‘humanitarian international law [sic]’.\footnote{Ibid, p.8.} It would appear that there has been no similar assessment undertaken in relation to the impact of sanctions on compliance with international humanitarian law.

With respect to sanctions in place, either implementing UN Security Council Resolutions, or autonomous or additional sanctions of the EU, those relating directly or exclusively to non-compliance with international humanitarian law are relatively few in comparison with linkages to internal repression and in relation to terrorist groups. With regard to Bosnia Herzegovina, Croatia, and Serbia and Montenegro, restrictions were imposed against persons indicted by the ICTY, and those who helped such persons to evade
justice. Restrictive measures have been imposed on the Democratic Republic of Congo, including arms embargoes, freezing of funds and economic resources of certain persons, and restrictions on admission to the EU for certain persons.\textsuperscript{107} Targeted persons include those who had recruited children, committed serious violations of international law including targeting children or women, and those obstructing access to humanitarian assistance.\textsuperscript{108}

In Somalia, an embargo was imposed on the supply of arms, and the funds of persons and entities that threatened the peace, security or stability the country, or obstructed the delivery of humanitarian assistance, were also frozen.\textsuperscript{109} In the case of Sudan, the EU has in place certain restrictions on individuals who constitute a threat to stability in Darfur and the region, commit violations of international humanitarian law or other atrocities, and/or who are responsible for offensive military over flights in the Darfur region.\textsuperscript{110} Syria has also been the target of numerous EU sanctions, in response to the violent repression of demonstrations, and such measures include an embargo on arms and related material, an embargo on equipment which might be used for such repression, and restrictions on admission to the EU and freezing of the funds of certain individuals associated with the internal repression.\textsuperscript{111}

In a study on its sanctions policy, Joakim Kreutz has praised the EU for consistency of motivation, stating that sanctions ‘have been employed to influence conflicts, peace processes, support of terrorism, and other occasions but almost all observations carry one common denominator: The EU took action in situations where incidences or the threat of large-scale government violence directed against its own citizens were reported’.\textsuperscript{112} In the examples above, however, it is unclear exactly how the sanctions influenced the conflicts, and the specific conduct being targeted is not always clear. While some concerns clearly relate to violations of international humanitarian law, the law is seldom mentioned explicitly.\textsuperscript{113}

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\textsuperscript{110} See European Commission, Restrictive Measures (Sanctions) in force, measures adopted in the framework of the Common Foreign and Security Policy, \textless http://ec.europa.eu/external_relations/cfsp/sanctions/docs/measures_en.pdf\textgreater.
In relation to exerting more general economic pressure on third countries to encourage them to comply with EU aims and values, including compliance with international law, the EU is not averse to resorting to the furnishing of financial rewards and to imposing economic sanctions. While it would appear inconsistent for the EU to upgrade trade or bilateral relations with a country while simultaneously criticising it for violations of international humanitarian law, the exertion of negative economic pressure should only be considered an option in terms of its effectiveness and likelihood to achieve the desired aim – to put an end to violations. Financial rewards may be effective the promotion of human rights, but similar financial rewards may not be available or appropriate for parties embroiled in armed conflict. Economic pressure and sanctions, conversely, may have adverse humanitarian effects for the civilian population whose protection may be the objective. Sanctions, and the threat of sanctions, can be useful, however, both as a deterrent to, and as an incentive in achieving compliance. Guzman has explained that when violations are ongoing, sanctions can signal to the violating actor, and other actors, that the ‘sanctioning state will punish violations, but it can also encourage the violating state to bring its actions into compliance. Once compliance is re-established, the sanction is normally removed. Knowing this, the violating state has some incentive to come back into compliance’. The EU as a powerful economic actor has developed many instruments ‘between words and wars’ to ensure respect for international law, but the implementation of these instruments in a productive and just manner is a complex process.

117 For example the human rights conditionality associated with the process of accession to the EU, certain EU agreements, and in terms of the EU neighbourhood policy.
119 Guzman (n 89) 48.
3.2.5 Cooperation with International Bodies

Cooperation with other international bodies is a key part of the promotion of compliance with international humanitarian law by the EU, is a strength of the EU, and to a large degree is unavoidable in terms of the external relations and action of the EU. The EU guidelines state that where appropriate the EU should cooperate with the United Nations and relevant regional organisations in this context, and that EU Member States should also act in line with this objective in their membership of other organisations.\(^{121}\) The treaty-based role of the ICRC in promoting compliance with international humanitarian law is also recognised in the guidelines. EU cooperation with and support of in particular the Security Council, the Human Rights Council, the ICRC, the African Union and the International Criminal Court are significant in this respect. The EU as a donor and humanitarian actor can cooperate with the ICRC, the African Union and the International Criminal Court with respect to any action taken in furtherance of full compliance with, and enforcement of, international humanitarian law, and EU Member States, as members of bodies such as the Security Council, the Human Rights Council, and the International Criminal Court, can cooperate in the adoption of measures aimed at increased compliance with international humanitarian law. The EU cooperates with the African Union through political dialogues and crisis management operations, with the United Nations through the adoption of restrictive measures and also crisis management operations, with the International Criminal Court through advocacy and information sharing, and with the ICRC in relation to dissemination and training efforts.

3.2.6 Crisis Management Operations

The EU guidelines provide that the importance of both preventing and suppressing violations by third parties should be considered at the mandate drafting stage of EU operations, and that such consideration may include provision for the collection of information which may be of use in investigations of war crimes and for information sharing with the International Criminal Court.\(^{122}\) Whether or not consideration is given to this aspect in the mandate of the missions, the implementation of the guidelines should ideally be mainstreamed throughout the external action of the EU, including in its relations with parties to a conflict in the context of its crisis management operations, and indeed awareness of international humanitarian law

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\(^{121}\) Updated EU Guidelines (n 4) para 16(e).
\(^{122}\) Updated EU Guidelines (n 4) para 16(f).
by EU personnel has been said to be vital to the conduct of EU operations.\textsuperscript{123} EU crisis management operations can include: rule of law and capacity building missions; facilitation of agreements ending hostilities and ensuring compliance with such agreements; ensuring security of civilians, refugees, humanitarian workers and UN personnel; border monitoring missions; and efforts against piracy.\textsuperscript{124} There is scope for raising awareness of international humanitarian law and attempting to influence compliance with the parties concerned within all of these missions. A singular example of where this was explicitly recognised by the EU was in the context of a security sector reform mission in the Democratic Republic of the Congo, where it was provided that the mission must take care to ‘promote policies compatible with human rights and international humanitarian law, democratic standards and the principles of good governance, transparency and respect for the rule of law’.\textsuperscript{125}

The EU links its crisis operations with the protection of civilians, and has adopted revised Guidelines on the Protection of Civilians in EU CSDP Missions and Operations. These guidelines were developed in cooperation with the United Nations and the ICRC, and they provide practical guidance for the planning and conduct of EU missions, and highlight the need for the EU to take into account best practice identified elsewhere for the protection of civilians in the conduct of crisis management operations and peacekeeping.\textsuperscript{126} The EU also supports the mainstreaming of children’s rights into crisis management operation, integrating the protection of children affected by armed conflict into the planning and conduct of its operations.\textsuperscript{127} The Council of the EU adopted conclusions in 2009 in which it expressed its intention to redouble efforts to implement the guidelines on international humanitarian law, in ‘all relevant decision-making instances, in civilian and military missions, in other relevant offices and agencies, and by the special and personal representatives of the High Representative, as appropriate’.\textsuperscript{128}

The relevant links between crisis management and promotion of compliance with international humanitarian law can be illustrated through an example of the response to conflict in Georgia and South Ossetia in 2008. The EU has been involved in military, police


\textsuperscript{126} Statement by Peter Schwaiger 22 November 2010 (n 28).

\textsuperscript{127} Statement by Pedro Serrano 16 June 2010 (n 21).

\textsuperscript{128} Council of the EU, Council Conclusions on Promoting Compliance with International Humanitarian Law, 2958\textsuperscript{th} Foreign Affairs Council Meeting, (Brussels, 8 December 2009).
and rule of law missions in Georgia, the last of which could be perceived as a conflict prevention effort.\textsuperscript{129} Georgia was offered inclusion in the European Neighbourhood Policy in 2004, and the EU-Georgia Action Plan was adopted in 2006. Georgia was invited through the plan to ‘intensified political, security, economic and cultural relations with the EU, enhanced regional and cross border co-operation and shared responsibility in conflict prevention and conflict resolution’.\textsuperscript{130} The priorities for action included promotion of the rule of law, promotion of peaceful resolution of internal conflicts, and cooperation on foreign and security policy.\textsuperscript{131}

During the course of 2008, Russia had taken a number of steps to strengthen its relations with the authorities in South Ossetia and Abkhazia.\textsuperscript{132} A sequence of provocations between Georgia and Russia eventually culminated in the outbreak of armed conflict in August 2008 between the two nations over control of the territory of South Ossetia.\textsuperscript{133} Several hundred fatalities and the displacement of around 192,000 individuals resulted from the hostilities.\textsuperscript{134} After 5 days a ceasefire agreement was concluded with the support of the French Presidency of the Council of the EU.\textsuperscript{135} The Council of the EU declared that the ‘absolute priority’ was to end suffering, and it welcomed the agreement of the parties to six principles (known as the six-point agreement) on the basis of EU mediation efforts. The principles included the principle of free access to humanitarian aid, and opening of international talks on the security and stability arrangements in Abkhazia and South Ossetia.\textsuperscript{136} The Council of the EU declared it ‘essential’ that all parties undertake to respect international humanitarian law and to facilitate access for humanitarian assistance to all those affected without discrimination.\textsuperscript{137} The European Commission also reminded the parties of

\textsuperscript{129} See Frederik Naert, \textit{International Law Aspects of the EU’s Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights} (Intersentia 2010) 121.
\textsuperscript{131} Ibid.
\textsuperscript{134} Ibid.
\textsuperscript{135} Ibid.
\textsuperscript{136} Council of the EU, Council Conclusions on the Situation in Georgia, General Affairs and External Relations Meeting (Brussels, 13 August 2008) para 2.
\textsuperscript{137} Ibid para 4.
the need to respect international humanitarian law and the need to ensure humanitarian access.\footnote{European Commission on Russia/South Ossentia, Georgia Conflict (Brussels, 14 August 2008) <http://www.eu-un.europa.eu/articles/en/article_8083_en.htm>.
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The swift and robust reaction of the EU to the conflict was prompted by a number of factors, not least the proximity of the territories to the EU, the close relationship between the EU and the states involved, and important trading concerns and economic investments of the EU in the region. It is unlikely that the EU would or could react to many external conflicts within a five day period in such a focused and forthright manner, notwithstanding levels of violations of international humanitarian law. The statement of Ambassador Tagliavini reasoned that preventative diplomacy and crisis management didn’t succeed in preventing the escalation of conflict due to an erosion of agreed parameters, along with increasing disrespect for international commitments, and noted that in order to keep the peace ‘we do not need any new commitments or provisions, just those that already exist: they just need to be
respected'.\textsuperscript{143} This is relevant in terms of increasing attention on implementing and respecting the rules of international humanitarian law, along with the international rules on the use of force, within the context of crisis management and though other means, rather than expending energy and resources on amending and supplementing the existing rules.

The EU also expressed eagerness to launch an operation in Libya in response to the crisis in 2011, which was intended to underpin the mandates of UN Security Council Resolutions 1970 and 1973 in relation to the availability of humanitarian assistance and the protection of the civilian population.\textsuperscript{144} There was some hesitation, however, over the deployment of an EU military force to protect the humanitarian operation, and the UN ultimately did not request military support from the EU.\textsuperscript{145} The EU crisis management operations in the Democratic Republic of Congo and Georgia both explicitly incorporated considerations of compliance with international humanitarian law in their mandates. This approach could be expanded to include promotion of compliance as an element of every mandate whereby the mission takes place in a setting where international humanitarian law is applicable.

### 3.2.7 Individual Responsibility

The guidelines on international humanitarian law provide that the EU should ensure that there is no impunity for war crimes. It is argued in the guidelines that for the prosecution of war crimes to have a deterrent effect, they must be visible and should take place if possible in the country where the violations occurred. It is further provided that the EU should encourage third countries to enact domestic legislation to punish violations of international humanitarian law, and that support of the International Criminal Court and measures to prosecute war criminals should also be seen in this context.\textsuperscript{146} The EU can fight impunity by drawing attention to the need for individual responsibility for violations of international humanitarian law and accountability for war crimes in its public statements and political dialogues, by supporting fact finding missions and related investigations, and by encouraging domestic prosecution of war crimes, in addition to its support for international criminal tribunals and

\textsuperscript{143} Ibid.


\textsuperscript{146} Updated EU Guidelines (n 4) para 16(g).
the exercise of universal jurisdiction. This section offers some brief examples of the EU drawing attention to the need for accountability within the context of the other tools of promotion dealt with earlier in this chapter such as public statements and fact finding missions. Chapter four expands considerably on this initial discussion of accountability by exploring EU support for international criminal justice more generally, through its cooperation with the international criminal tribunals and the International Criminal Court, and its support for the exercise of universal jurisdiction.

Publicly demanding accountability and displaying the political will to back up such demands with action has the potential to introduce a deterrent factor into the equation for parties to a conflict, which may encourage them to moderate their behaviour. Regime theory places considerable value on the enforcement potential involved in individual responsibility:

Individual criminal responsibility helps deter disfavored conduct, because of its value-laden character as well as the concrete threat of prosecution. Deterrence of individual officials is especially appealing when the alternatives – such as forcible intervention – are costly and difficult to organize. Decentralized enforcement through national prosecute-or-extradite obligations initially enabled regime architects to utilize existing institutions when the creation of new centralized institutions was politically impossible.\(^{147}\)

A noteworthy example of EU support for individual responsibility for violations of international humanitarian law and accountability for war crimes is the uniquely swift and robust EU response to the conflict in Georgia. The European Parliament adopted a resolution shortly after the ceasefire demanding that an independent international investigation be urgently carried out in order to establish the facts and bring clarity to certain allegations, and urging Georgia and the Russian authorities to support and fully cooperate with the Office of the Prosecutor of the ICC as regards its investigation into the events and the attacks against civilians in order to determine responsibility and bring those responsible to justice.\(^{148}\) The Council of the EU, shortly thereafter, issued a decision commissioning an independent international fact-finding mission on the conflict. The aim of the fact-finding mission was to investigate the origins and the nature of the conflict in Georgia, with regard to international law, international humanitarian law and human rights, and the accusations made in that context including allegations of war crimes.\(^{149}\) The report of the mission found that there was


serious and concurring evidence to indicate that ‘ethnic cleansing’ had been committed against ethnic Georgians in South Ossetia, and that numerous violations of international humanitarian law were committed by Georgia, Russia and South Ossetia. The report also found that measures needed to be taken by all sides to ensure accountability and reparation for all violations, and that such accountability and reparation was necessary in order to address violations committed and defuse further resentment among the communities.

Intense fighting in Sri Lanka between the government forces and the LTTE in May 2009 prompted the EU to express its regret at the marked increase in violence, and to call for investigations and accountability, stating that those accountable ‘must be brought to justice’. The EU’s call for accountability and for all actors to be subject to an independent and credible inquiry was repeated some months later, when it was also declared that the EU ‘believes that accountability is integral to the process of reconciliation’. The EU issued a statement welcoming the appointment of a UN Panel of Experts on Accountability Issues in Sri Lanka in 2010, and urged full cooperation with the Panel by the Sri Lankan government, but had no part in its assignment. The Panel released its report in 2011, which indicated that serious violations of international humanitarian law had been committed by both parties to the conflict, some of which ‘would amount to war crimes and crimes against humanity. Indeed, the conduct of the war represented a grave assault on the entire regime of international law designed to protect individual dignity during both war and peace’. The High Representative, Catherine Ashton, issued a statement declaring the report an important development, and expressing the view on behalf of the EU that ‘an independent process to address these extremely serious allegations should contribute to strengthening the process of reconciliation and ensuring lasting peace and security in Sri Lanka’. The EU was quite consistent in its calls for investigation and accountability, and its public support for any

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150 Report of the IIFFMG (n 141), for the main findings on violations see 430-431.
151 Ibid 432-433.
152 Council of the EU, 2942nd General Affairs Council Meeting, Council Conclusions Sri Lanka (Brussels, 18-19 May 2009).
154 Council of the EU, Declaration by the High Representative Catherine Ashton on behalf of the European Union on the Appointment of a UN Panel of Experts on Accountability Issues in Sri Lanka, 10995/10 (Brussels, 1 July 2010).
156 Declaration by the High Representative, Catherine Ashton, on behalf of the EU on the Report of the UN Secretary-General Panel of Experts on Accountability in Sri Lanka 9926/11 PRESSE 127 (Brussels, 10 May 2011).
action in this respect, but its main role in relation to individual responsibility in this case was a declaratory and supportive one, rather than a leading or proactive one.

Post-election violence in Côte d’Ivoire also spurred the EU to advocate for accountability, although predominantly in support of the United Nations and the International Criminal Court, rather than independently. The European Council met shortly after the presidential election in late 2010, condemned the recourse to violence against civilians by the forces of Laurent Gbagbo (who were unwilling to accept the election of President Mr Alassan Ouattara), and recalled the ‘availability expressed’ by the International Criminal Court to prosecute those responsible for the violence.\(^{157}\) The Council of the EU later met and strongly condemned the ongoing violence against the civilian population, including violations of human rights, declaring that ‘those who perpetrate such violations will be held responsible for their acts’.\(^{158}\) The United Nations Security Council adopted a resolution in response to the ‘rapidly deteriorating post-electoral crisis’ facing the country, which stressed full support for the United Nations Operation in Côte d’Ivoire (UNOCI) to use all necessary means to protect civilians.\(^{159}\) The resolution also welcomed the decision of the Human Rights Council to dispatch an independent commission of inquiry to investigate serious violations of human rights, and called on all parties to cooperate with it.\(^{160}\) The EU welcomed this resolution and noted that the ‘effective implementation of resolution 1975 in Côte d’Ivoire marks an important juncture in highlighting the role of the UN regarding the protection of civilians in armed conflict’.\(^{161}\) Although the Security Council resolution had referred to serious violations of international humanitarian law, the EU adopted the more general language of the protection of civilians during armed conflict, and made no reference to compliance with or accountability for violations of international humanitarian law specifically.

The EU adopted a similar supportive role in relation to the Democratic Republic of Congo. The Office of the High Commissioner for Human Rights issued a report in 2010, documenting the most serious violations of human rights and international humanitarian law

\(^{157}\) European Council 16-17 December 2010, Conclusions, EUCO 30/1/10 REV 1, CO EUR 21/CONCL 5 (Brussels, 25 January 2011).

\(^{158}\) Council of the EU, 3065\(^{th}\) Foreign Affairs Council meeting, Conclusions on Côte d'Ivoire, 5888/1/11 REV 1 (Brussels, 31 January 2011) para 2.


\(^{160}\) Ibid para 8.

\(^{161}\) Statement on behalf of the EU by Pedro Serrano, Acting Head of the Delegation of the EU to the UN, at the Security Council Debate on Protection of Civilians in Armed Conflict (10 May 2011).
committed within the territory of the country over a ten year period (1993-2003). Catherine Ashton recalled the determination of the EU to support the prevention of crimes violating international humanitarian law, and the need to hold the perpetrators accountable. Adequate follow-up to the report was encouraged; in line with ‘efforts aimed at fighting impunity’, both in the country itself and the broader region, including ‘possible developments regarding transitional justice’. The Council of the EU also made accountability a priority in markedly demanding terms:

The Council calls on the Government of the DRC to ensure without exception that those responsible for violations of international law, including human rights and international humanitarian law, are held accountable. Timely vetting of FARDC commanders and soldiers is of crucial importance in this respect.

The European Parliament also consistently called for accountability for all perpetrators, and in particular for the Government of the Democratic Republic of Congo to cooperate with the United Nations and the International Criminal Court. The Government of the Democratic Republic of Congo has also been reminded by the EU Parliament of its pledge made on the 50th anniversary of independence to commit itself to strengthening the rule of law by ensuring that those responsible for violating international humanitarian law are held to account and prosecuted.

Finally, in relation to demands for individual responsibility the example of Libya must be mentioned. The initial public response of the EU to events in Libya, particularly the violent repression of demonstrations in early 2011, was relatively weak, with language becoming both stronger and more specific as the conflict progressed. Catherine Ashton received criticism for her relatively muted response to widespread violations of human rights and international humanitarian law as she urged authorities to ‘exercise restraint and calm’. Ashton and the EU were called upon to take responsibility for the prevention of war crimes in the country by taking action immediately at the Human Rights Council and at the Security Council.

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163 Declaration by the High Representative Catherine Ashton on behalf of the EU on the Office of the High Commissioner for Human Rights (OHCHR), Report of the Mapping Exercise (Brussels, 6 October 2010).
164 Council of the EU, 2971st Council Meeting, General Affairs and External Relations, 14658/09 (Brussels, 27 October 2009) [emphasis added].
167 Declaration by the High Representative Catherine Ashton, on behalf of the EU on events in Libya, 6795/1/11 PRESSE 33 (Brussels, 20 February 2011).
Council, rather than simply calling for the Libyan authorities to refrain from further violence:

Baroness Ashton’s call today for Libyan forces to exercise ‘restraint’ is entirely inappropriate. We’re dealing with the deliberate murder and massacre of hundreds of peaceful protesters. By signalling diplomatic caution in the face of a bloodbath – instead of urgency and action – the EU is failing the victims.169

The Security Council issued a statement calling on the Government of Libya to meet its responsibility to protect its population, including by respecting human rights and international humanitarian law.170 Ashton responded by welcoming this statement, supporting the call for a transparent and independent investigation into events in Libya, and notably strengthening the language relating to the EU’s rejection of impunity. The EU began to take practical steps to back up political statements with action: ‘the EU stresses that those responsible for the brutal aggression and violence against civilians will be held to account. The EU has decided to suspend negotiations with Libya on the EU-Libya Framework Agreement and is ready to take further measures’.171

The support of the EU for Security Council resolutions 1970 and 1973 was expressed at a United Nations open debate, and the EU in particular expressed appreciation for the ‘swift manner in which the ICC has acted in the situation referred to the Court’.172 The Council of the EU denounced violations of international humanitarian law committed in Libya in exceptionally stern and specific terms:

The Council denounces the continuing repression and grave violations of human rights and international humanitarian law against civilians by the Kadhafi regime including acts of sexual violence, the use of sea mines, use of cluster munitions, and shelling of humanitarian boats. Those responsible for these violations will be held accountable.173

The unusually strong and forthright response in these terms to violations of international humanitarian law was no doubt facilitated by the high level of consensus in the Security

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171 Declaration by the High Representative Catherine Ashton, on behalf of the EU on Libya (Brussels, 23 February 2011) [emphasis added].
172 Statement by Pedro Serrano on behalf of the EU, UN Security Council Open Debate on Protection of civilians in armed conflict (New York, 10 May 2011).
173 Council of the EU, Council Conclusions on Libya, 30914th Foreign Affairs Council Meeting (Brussels, 23 May 2011).
Council and the Human Rights Council on the situation. The rapid response and involvement of the International Criminal Court could also have bolstered the resolve of the EU to demand accountability, and to mention particular acts and particular individuals involved. The statements against impunity in relation to Libya were only a part of an overall assertive and comprehensive EU response to events in 2011, the force of which was unprecedented, even in comparison with the robust response to the conflict in Georgia.

### 3.2.8 Dissemination and Training

‘One of the worst enemies of the Geneva Conventions is ignorance’.174

Dissemination and training are oft-neglected aspects of the scholarship on international humanitarian law, but constitute essential elements of effective implementation. Active dissemination and appropriate operational training are key components in respecting and ensuring respect for international humanitarian law. The EU guidelines state that training is necessary to ensure compliance with international humanitarian law in time of armed conflict, and that training and education must be also undertaken in peacetime. It is suggested that the EU should consider providing or funding training and education in third countries, including within the framework of broader programmes on rule of law promotion.175 The EU has the capacity and resources to be an advocate for effective training and dissemination and to assist such activities in third countries, which can help to prevent widespread violations of international humanitarian law, and thus reduce the need for robust enforcement of the law at a later stage.

All parties to the Geneva Conventions have an obligation both during peace time and in times of armed conflict, to disseminate information regarding the rules of international humanitarian law, both to their armed forces and also to the general population. This obligation can be said to arise from the duty to respect and ensure respect for the Geneva Conventions, but is also set out in each of the four Conventions as follows:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population. Any civilian, military, police or other authorities, who in time of war assume responsibilities in

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175 Updated EU Guidelines (n 4) para 16(h).
respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.\textsuperscript{176}

Additional Protocol I provides that states undertake to disseminate the Geneva Conventions and the Protocol as widely as possible, and should ‘encourage the study thereof by the civilian population’.\textsuperscript{177} The authors of the ICRC Study on Customary International Humanitarian Law found that a number of military manuals also provide that states should make attempts to disseminate international humanitarian law among the civilian population and encourage the study of the law,\textsuperscript{178} and found that a customary rule has solidified that states must encourage the teaching of international humanitarian law to the civilian population.\textsuperscript{179} The responsibility for dissemination lies primarily with the state parties, but organizations such as the ICRC and the National Societies of the Red Cross and Red Crescent also assist in this respect, both being mandated to do so under their respective statutes.\textsuperscript{180}

Three reasons why dissemination of the law to the civilian population is important have been identified, as follows: firstly, as civilians are to benefit from the law, knowledge of both its protections and limitations is important; secondly, civilian knowledge of the principles and values of the law may increase compliance, to the extent that the civilian population has influence on the behaviour of the armed forces, whether by inducing restraint or fuelling violence; and thirdly, as civilians often become engaged in hostilities, their familiarity with the existence and content of the law could make a difference in terms of violations committed.\textsuperscript{181}

Even in countries that are not directly exposed to armed conflict, the population is often exposed to the gruesome violence that can be the result of widespread violations through coverage of conflicts in the media. An understanding of humanitarian law principles

\textsuperscript{176} Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), 12 August 1949, 75 UNTS 31, art 47; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), 12 August 1949, 75 UNTS 85, art 48; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), 12 August 1949, 75 UNTS 135, art 127; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), 12 August 1949, 75 UNTS 287, art 144.

\textsuperscript{177} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (8 June 1977) art 83(1).

\textsuperscript{178} For practice relating to Rule 143 see the online database of the ICRC: <http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter40_rule143>.


\textsuperscript{180} Statute of the ICRC, Art 4, Statutes and Rules of Procedure of the International Red Cross and Red Crescent Movement, art 3.

could aid their analysis and critique of events unfolding in various conflicts, and thus influence their reaction. If civil societies in EU Member States have a higher level of knowledge of the applicable law, or at least some degree of familiarity with its basic principles, they can pressure their government, or even the EU, to speak out on or react in more concrete ways to violations they see occurring. Tools and resources to support such public dissemination, particularly for young people, have been developed by the ICRC. An example of such is the Exploring Humanitarian Law (EHL) programme, which was established in 1999, and has been rolled out in a number of EU countries. It has been noted that the EU also made a Joint Pledge in 2007 which indicated that public dissemination and training, supported by effective enforcement, were crucial for improved compliance with IHL.

In non-international armed conflicts, dissemination to armed opposition groups can be crucial in terms of trying to limit violations. The rules cannot be applied and adhered to across the board unless they are known to the combatants on both sides of the conflict. Additional Protocol II has attempted to bring non-state actors into the fold by stating that the Protocol shall be ‘disseminated as widely as possible’, an obligation which also applies to those actors. The ICRC has called on parties to non-international armed conflicts to ensure dissemination of international humanitarian law, or to ‘allow or facilitate the ICRC efforts to do so’. The organisation has also made efforts to ‘inform the leaders of all armed groups of [certain] basic principles and call on them to enter into dialogue with their subordinates to discuss both the principles and the possibilities for their implementation and consequences for training’. The EU often calls on both parties to respect and ensure respect for international humanitarian law in non-international armed conflicts, but it could be more explicit in terms of requesting that non-state actors take responsibility for disseminating the principles to their members. It could also further support the ICRC in its initiatives, and potentially make similar attempts at dissemination while engaging with armed groups in third countries.

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184 In chapter one on the EU Guidelines. See EU Joint Pledge PO88 made at 30th International Conference of the Red Cross and Red Crescent (26–30 November 2007), Public Dissemination of and Training on IHL.
185 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609 (8 June 1977), art 19.
186 As noted in Dörmann (n 181) 233.
It has been argued that the basic ground rules of the law are ‘simple enough to be taught at any level’. The ICRC devised a scale of four ‘levels of sophistication’: elementary, average, good and expert, according to the level of knowledge required of each individual in accordance with their functions or position. Elementary knowledge of the principles of international humanitarian law are ‘satisfied by a small plastic card’, on which are printed the most fundamental rules for combatants. Dissemination by the EU in cooperation with the ICRC of even a basic level of the rules of international humanitarian law could potentially influence compliance, especially in relation to non-state actors who may not otherwise have access to such knowledge. The EU could explore new ways to approach such dissemination, following the examples and strategies of NGOs:

- Comic strips can also be used to reach both combatants and a greater public. A few years ago, the ICRC distributed comic strips on fundamental humanitarian rules to children in the Philippines, which were readily accepted and quickly found their way to their parents and other individuals, most notably guerrilla fighters … Other new technologies are now also being used in non international armed conflicts by insurgent groups or by human rights NGOs to influence public conscience: electronic mailing lists, websites, online training.

The EU can become engaged with best practice in this area in a number of ways. Firstly, it could ensure that its Member States are actively disseminating within their own militaries and populations, and support such work, either financially or though capacity building measures. It can also provide for information sessions and training within all EU bodies and staff who are likely to become engaged with issues relating to armed conflicts, and support ICRC efforts to engage the general public in international humanitarian law teaching through its various initiatives. As the EU is not engaged in extensive dissemination in third countries and insofar as this has not apparently been considered a priority, there is certainly also potential for the EU to do more with respect to this aspect of implementation, at least in terms of funding efforts in third countries and capacity building.

As regards training, two challenges in particular exist in attempting to foster compliance: ignorance of the law of armed conflict as contributing to an increase in violations; and the type of training delivered. In relation to the issue of ignorance, it has been

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189 Ibid
190 Ibid.
mentioned above that the rules cannot be applied unless they are known and also understood, and so the necessity of a thorough knowledge of the rules and principles, at least for senior officers and commanders, cannot be overstated. The importance of adequate training in international humanitarian law from the perspective of compliance has been explained in terms of the conduct of combatants:

The behaviour of individual combatants appears to be determined primarily by the actions of their leaders, by instruction and training in the appropriate cultural, social and military environment, and by acceptance of a minimum of discipline and hence a willingness to comply with certain rules.

It has also been highlighted that the ‘degree of importance attached to it by an armed force reflects the culture in, and leadership of, that force. It is a case of inculcating moral principles with a view to limiting the excessive use of violence and preserving peace’. Instruction in the basic rules of international humanitarian law is often treated as a ‘marginal’ issue, and it has been argued that:

Consequently, these rules of law are not as well known or understood as they should be by those who must apply them, especially members of the armed forces ... Indeed, it should not be viewed as a marginal matter but must be integrated into everyday military life.

How can training on the laws of armed conflict emerge from its relegation to the margins to become an integrated part of military training? One way is to ensure that the type of instruction delivered does not remain classroom-bound and confined to theory, but instead becomes an ongoing process which is integrated in a practical way throughout operational training. In many countries the emphasis is placed on theory rather than practical training exercises. Instruction can also be targeted to the functions of different units of the military. All soldiers should be familiar with the rules which are relevant and ‘important for carrying out the combat tasks falling to them by virtue of their rank and function’. The overall objective in international humanitarian law training should be, at the tactical level, ‘making correct and disciplined behaviour the reflex action in a particular situation’, and at the operational level, emphasis should be placed on the ‘automatic incorporation of the principles

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192 As Dörmann has stated, ‘it is not very likely that a body of law is being observed unless those whose duty it is to respect and apply it know it and are familiar with it’, Dörmann, (n 181) 228.
193 Klenner (n 187) 653.
195 Ibid, text to fn 36.
196 See Klenner (n 187) for a detailed explanation of the different possibilities.
197 Klenner (n 187).
198 Ibid.
of international humanitarian law into decision-making, planning, command and control processes. The objective is for leaders of all ranks to intervene immediately if the rules of international humanitarian law are violated’. 199

Without adequate training targeted at the right individuals, there will be limited knowledge of international humanitarian law and thus limited compliance with its rules. Without the right approach to training, forces’ knowledge of the law may be limited and difficult to apply in practice. The EU can encourage its Member States to improve their approach to instruction, as potential examples of best practice for other states to follow, and could offer assistance to other states to provide or improve training. The EU has launched military training, including international humanitarian law instruction, for the Somali security forces as part of a package of political, security, and development engagement, to respond to the situation in Somalia. The Security Council urged its member states, regional and international organizations to offer technical assistance for the training and equipping of the Somali security forces, in recognition of the importance of such development for long-term security. 200 In early 2010, the Council of the EU agreed to set up a military mission to contribute to training of Somali security forces. 201 The Council of the EU recognised that the training had to be carried out as part of a wider international effort, and ‘encompassing inter alia the vetting of trainees, the monitoring and mentoring of the forces once back in Mogadishu and the funding and payment of the salaries of the soldiers’. 202 The first training module, including operational training along with teaching on human rights and international humanitarian law, was completed in September 2010. 203

The importance of training and dissemination was also raised in the report of the EU-commissioned fact-finding report on the conflict in Georgia, among a number of recommendations provided in relation to improving compliance:

For IHL to be respected in time of armed conflict, the principles need to be familiar to everybody and the more specific rules known to those who will have to implement them in practice ... obviously, the most important target population are the arms-bearers (i.e. armed and police forces, militias, etc.). They must be properly instructed, and IHL requirements must be incorporated into their ‘rules of engagement’. 204

199 Ibid: see Klenner for a number of training principles or ‘best practice’ in training IHL.
204 Report of the IIFFMG (n 141) 434.
In terms of internal training for EU staff, international humanitarian law often does not apply to EU-led forces in European Security and Defence Policy operations, but is nonetheless ‘usually’ covered for those involved, ‘including to cover the possibility of escalation and to take into account the obligation of the parties to an armed conflict’.\footnote{Fredereick Naert, ‘The European Union Perspective’, in Gian Luca Beruto (ed) Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law: IHL Human Rights and Peace Operations (Sanremo, 4-6 Sept 2008).} International humanitarian law is mainly implemented through the planning documents and Rules of Engagement, which are adopted by political bodies within the EU on the basis of military expertise and legal advice.\footnote{Ibid.}

The EU could also attempt to raise the issue of training with non-state actors that it may have contact with in various third countries, and could also potentially have a role to play in ensuring sufficient regulation of private military companies operating in armed conflicts.\footnote{Dörmann (n 181) 234.} Concern has arisen surrounding the issue of providing legal advice or training to non-state actors involved in armed conflicts as a result of \textit{Holder v Humanitarian Law Project}, a case before the US Supreme Court, which criminalized various forms of ‘material support’ to certain prohibited groups.\footnote{US Supreme Court, \textit{Holder v. Humanitarian Law Project}, 561 US (2010).} Sassòli has questioned in this context that if ‘we refuse, for example, to engage Hezbollah in Lebanon or the Taliban in Afghanistan, how can we justify engaging the LTTE to the Government of Sri Lanka or engaging the FARC to the Government of Colombia? These governments would never accept that their opponents are ‘better’, more ‘serious’, or more willing to comply with rules than other armed groups’.\footnote{Marco Sassòli, ‘Engaging Armed Nonstate Actors with International Humanitarian Law’, (2008) 6(2) Canadian Consortium on Human Security 15, 17. Similarly, certain actors may be categorised in a certain way in an attempt to place them outside of the protections of international humanitarian law. See Dörmann (n 181) 247.} The attempt to marginalise and criminalize certain groups in this way should be challenged by the EU, whose preference is and should remain constructive engagement and capacity building through a managerial approach to compliance with respect to dissemination and training, over isolation and criminalization (of entire groups as opposed to individuals). Koh’s theory of obedience argues that rule-induced conduct will result when a party to a conflict ‘has internalized [a] norm and incorporated it into its own value system’.\footnote{Harold H Koh, as cited by Kal Raustiala and Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’ in Walter Carlsnaes, Thomas Risse, and Beth A Simmons (eds), \textit{Handbook of International Relations} (Sage 2002) 544.} Internalisation of humanitarian norms for both state and non-state actors is a necessary
function of a long term sustainable approach to improving compliance. This is achievable through participation with the transnational legal process, involving repeated interaction, interpretation, and internalisation, ideally with the relevant actors progressing from ‘one-time grudging compliance with an external norm to habitual internalized obedience’. Sustained attempts at increasing dissemination and improving training in international humanitarian law could assist such a process and thus become a core facet of the EU’s attempts to promote compliance with international humanitarian law.

### 3.2.9 Efforts against the Proliferation of Arms

The EU Member States collectively supply a large proportion of the world’s arms, and so are in a position to exert considerable influence on recipient countries if the political will exists. The EU guidelines refer to a Council Common Position which provides that any importing country’s compliance with international humanitarian law should be considered before licences to export military technology and equipment are granted. In terms of the supply and transit of arms, it has been noted that both arms supplying and transit states are often in a position to exert a measure of influence on recipients that are involved in a conflict, and that even arms recipients can exert influence on suppliers by refusing to purchase arms from certain suppliers. To refrain from transferring arms in certain situations may arguably be ‘expected of states in the exercise of their duty to ensure respect for humanitarian law’.

While it is difficult to identify the exact parameters of the positive aspect of the duty to ensure respect, the duty clearly encompasses an obligation not to support ongoing violations by directly supplying arms to the parties involved. The duty includes ‘continuous monitoring of violations of humanitarian law and the omission of any act which might support such violations, such as the delivery of weapons and relevant technological equipment to perpetrators of breaches of international humanitarian law.’ Once a supplying state is aware that the receiving state ‘systematically commits violations of international humanitarian law with certain weapons’, the state should deny the supply of such weapons,

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212 France, Germany, Italy, Sweden and Britain are reportedly among the top 10 largest arms suppliers, see Helen Hughes, ‘Europe’s Deadly Business’ Le Monde Diplomatique (June 2006) <http://mondediplom.com/2006/06/>.
213 Updated EU Guidelines (n 4) para 16(i).
215 Ibid.
even if they could also be used lawfully, as ‘once the violations are known, ongoing assistance is necessarily given with a view to facilitating further violations’. It may be difficult to assess the risk of transferring arms in the case of potential as opposed to ongoing violations, but at the very minimum ‘if serious and widespread violations of humanitarian law are already being committed in an ongoing armed conflict, supplied weapons will likely be misused, and they should hence not be transferred’. Concerns relating to the supply of arms were raised in a statement by Ambassador Tagliavini in relation to the conflict in Georgia, for example. Tagliavini noted that military support and provision ‘must remain within the limits set by common sense and due diligence’, and that suppliers must refrain from supporting any developments that would be ‘detrimental to stability in the region’. This simple logic, and the principle of due diligence could be applied in this way to many conflicts that the EU and its Member States have some leverage over.

The EU’s contribution to international efforts to combat the spread of arms is significant. The EU has supported in various ways three initiatives against arms proliferation - the 2001 Firearms Protocol, the UN Programme of Action on small arms of the same year, and the process leading to the adoption of an international arms trade treaty. The EU has also been supportive of the Convention on Cluster Munitions. The most significant of these is the strong EU support for the creation of a binding international instrument for the import, export and transfer of conventional arms, recognising the urgent need for such an instrument. The EU and its Member States have made a significant contribution to this process, and could be framed as some of the ‘main architect[s]’ of the international arms treaty process. The Council of the EU has avowed that it will support the adoption of an Arms Trade Treaty (ATT) through a number of activities, including supporting the preparatory process leading up to the UN Conference on the Arms Trade Treaty to ensure that it is as inclusive as possible, supporting UN Member States in developing national and regional expertise to implement

218 Brehm (n 214) 39.
219 Ibid.
220 For a discussion of the EU involvement in these various processes see Yihdego (n 103).
222 Ibid, at 300, citing the UK submission: GA Res 61/89, UN Doc A/RES/61/89 (Dec.18, 2006), for further details on responses of states including the composition of the Panel; Note by the Secretary General, UN Doc A/63/334 (26 August 2008).
effective arms transfer controls, and organization of a series of regional seminars on the process.\textsuperscript{223} The Council of the EU believes that a:

strong and robust Arms Trade Treaty should prevent conventional weapons from being used to threaten security, destabilize regions and states, violate international human rights law or international humanitarian law, undermine economic and social development or exacerbate conflict. An ATT should also prevent the diversion of conventional weapons to the illicit market.\textsuperscript{224}

The EU has also developed its own policy regulating arms exports, having adopted a legally binding Common Position defining common rules governing control of exports of military technology and equipment in 2008.\textsuperscript{225} The Common Position provides that Member States shall assess export licence applications against the eight detailed criteria of Article 2. According to this Article, Member States must, \textit{inter alia}, deny an export licence ‘if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law’; or ‘for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination’. The states must also take into account the record of the buyer country with regard to its compliance with its international obligations, including with the non-use of force and with international humanitarian law. The stringent requirements set out for Member States in decisions on granting their exports are admirable, and the Common Position greatly increased the scope of the previous Code of Conduct on Arms Exports, and ensured that Member States were under a clear obligation to conform to the new requirements.\textsuperscript{226} Some points of weakness remain nonetheless, as discretion on the granting of licences remains with individual Member States.\textsuperscript{227}

The EU has issued annual reports on arms exports by Member States for over a decade, which allows for a degree of transparency in the practice relating to granting of


\textsuperscript{224} Council Conclusions on the Arms Trade Treaty, 3026\textsuperscript{th} Agriculture and Fisheries Council Meeting (Brussels, 12 July 2010).

\textsuperscript{225} Council Common Position 2008/944/CFSP of 8 December 2008, defining common rules governing control of exports of military technology and equipment [2008] OJ L335/99. The Common Position was adopted after years of continuous criticism that the Code of Conduct on Arms Exports was not legally binding.

\textsuperscript{226} On the weaknesses of the Code of Conduct, see Kyrre Holm, ‘Europeanising Export Controls: The Impact of the European Code of Conduct on Arms Exports in Belgium, Germany and Italy’ (2006) 15(2) \textit{European Security}.

licences, and the impact of the pertinent policy. A number of challenges have been recognised in the content of the reports, and it would appear that there is scope for improvements in terms of consistency and further transparency in monitoring EU arms exports. Some concerns are as follows: while all Member States report, not all make full submissions; more information is given about licenses than actual exports, which makes it difficult to decipher whether arms exports actually took place; there is no systematic information provided on the end-users or end-uses for particular transfers, the country of destination is not always the final recipient; and also certain types of equipment may be deemed civilian products and thus are not included, while their final use may be military. In relation to implementation of the criteria provided by the Common Position, it has been noted that insufficient detail is reported to assess compliance and that in some cases national reports issued by EU States provide more detailed information in terms of the circumstances surrounding export licence denials. It is difficult to see how the Arms Trade Treaty can be an international success if the EU still faces such difficulties in terms of monitoring, transparency and reporting related to its own legislation.

In general, while EU policy and activity in this area is evolving and progressing in a positive direction, its main endeavours ‘regarding substantive restrictions and actions are, however, largely political and focused on illicit transactions’, and there also remain ‘serious questions of consistency, transparency and disparity in commitment’.

It has been argued in more general terms that Western states’ attempts at normative or ‘ethical foreign policy’ through the regulation of arms exports is ‘best understood in terms of organized hypocrisy – that is, inconsistent talk and action, arising from contradictory interests, obligations and incentives’. The area of arms transfers in particular has been identified as a key area where the disparity between the rhetoric of an ‘ethical foreign policy’ and state interests of economy and security becomes glaringly obvious.

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229 Holtom and Bromley (n 227) 14-15. These challenges were gleaned from a study focused on exports from EU Member States to Central Asia, however it would appear that their application has a more general scope.

230 Holtom and Bromley (n 227) 15.

231 Yihdego (n 103) 302.

232 Richard Perkins and Eric Neumayer, ‘The organized hypocrisy of ethical foreign policy: Human rights, democracy and Western arms sales’ (2010) 41 Geoforum 248. Perkins and Neumayer undertook empirical research on this issue, finding that the ‘geography of Western arms exports is closely aligned with self-interested, economically and geopolitically-important relational ties’, and is not greatly influenced by human rights abuses or other forms of repression, using human rights and democracy as indicators.

'reformed and rescaled their national interests and normative concerns such that they are willing to privilege the interests of distant strangers over conventional commercial and security imperatives'.  It must be considered whether there is some degree of organised hypocrisy, not only in terms of the EU and the proliferation of arms in the context of promoting compliance with international humanitarian law, but also in general, the disparity between the rhetoric of promoting and ensuring compliance for international humanitarian law and the overall actual practice of the EU. It is up to the EU and its Member States to ensure that their arms policies in particular, given the vast scope for influence and impact in this domain, do not represent such hypocrisy but contribute to genuine developments in ensuring greater compliance with international humanitarian law. Efforts against arms proliferation provide an example of a potential ex ante strategy, rather than the usual EU dependence on ex post strategies, to improving compliance. Removing or even reducing the arms available in a given situation establishes an obstacle which can reduce the possibility and occasion for violations, thus functioning as a form of prevention rather than response. The EU has an opportunity to bring its collective influence to bear on Member States who have a significant role to play in international arms transfers to regimes who systematically breach international humanitarian law.

3.2.10 Promotion of Compliance with International Humanitarian Law in the Context of Counterterrorism and the EU Temporary Commission on Rendition

The efforts of the EU in promoting compliance with international humanitarian law, and the disjuncture between the public efforts of the EU and the private actions of some EU Member States becomes relevant in the context of counterterrorism, although the issue is not directly addressed by the guidelines. The work of the ‘Temporary Commission on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners’ (TDIP/Temporary Commission), for example, made it abundantly clear that EU governments were involved in the practice of rendition, and as such had a measure of responsibility for those individuals, many of whom ended up in the Guantanamo Bay detention facility in Cuba. The EU may have lost significant credibility and thus leverage if it speaks out against certain

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234 Perkins and Neumayer, (n 232) 248.
violations of international law while prominent Member States are flouting those self-same rules with impunity – this operates the same for counterterrorism as it does for violations committed during armed conflicts by forces of the Member States, whether or not under the auspices of the EU.

It is possible that while the EU has made some very public efforts to combat violations in this area (such as the Joint Statement of the EU and the US), the EU could have been stronger in preventing the violations of international humanitarian law that occurred during the ‘war on terror’, perhaps for example by acting earlier on suspicions of rendition, and investigating allegations as soon as they emerged. The EU could also potentially have had a louder voice in preventing or mitigating the attempts made at undermining international humanitarian law, for example by publicly and repeatedly denouncing the blurring of lines between categorisation of combatants.

The discourse surrounding counterterrorism could also have taken attention and resources away from other areas, such as attempts to increase compliance with international humanitarian law internationally. The threat of ‘terrorism’ and the response to it has commanded ‘enormous intellectual and material investment from policy-makers, the security establishment, the emergency services, industry and commerce, the academy and the media. At the same time, the terrorism discourse … has emerged as one of the most important political discourses of the modern era’. This dominance could be at the expense of other important discourses that could affect a wider spectrum of issues and populations.

Compliance with international humanitarian law is present as a frequent, although not entirely prominent, thread through EU statements on counterterrorism measures. The ministers of the Council of the EU, for example, in relation to secret detention facilities, have reiterated their commitment to combating terrorism ‘using all legal means and instruments available’, and acknowledged the intention of the United States ‘to treat all detainees in accordance with the provisions of the Geneva Convention and the assurances about ICRC

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237 One reason that this ‘creative’ categorisation may damage compliance is that it is more difficult to engage with certain individuals or groups once they have been labelled as other than regular combatants, for example if they have been labelled ‘illegal combatants’ or ‘terrorists’, it may become almost impossible to engage in dialogue and influence them with regard to the laws of armed conflict. See US Supreme Court, *Holder v. Humanitarian Law Project*, 561 US (2010), where certain interaction with certain groups has been criminalised.

access. The existence of secret detention facilities where detained persons are kept in a legal vacuum is not in conformity with international humanitarian law and international criminal law.\textsuperscript{239}

The EU often, however, keeps the discussion to matters of human rights and domestic criminal law. The Temporary Commission set up to investigate the practice of rendition within EU Member States even urged the EU ‘to stress in its contacts with third countries that the appropriate legal framework for governing the international fight against terrorism is criminal law and international human rights law’.\textsuperscript{240} The EU discourse in relation to counterterrorism is in stark contrast to the United States discourse, as it avoids the war-based paradigm and refers to acts of ‘terrorism’ as criminal acts rather than acts of war, and to the ‘struggle’ or ‘fight’ against ‘terrorism’ rather than referring to any ‘war on terrorism’.\textsuperscript{241} While the more nuanced approach of the EU must be praised, if the EU speaks of human rights and criminal law, it can bring little to bear on those operating within a humanitarian law framework, within the context of counterterrorism.

Much criticism has also emerged on the reaction of the EU to ‘terrorism’ in terms of delayed action and disparate policy efforts. It took a significant amount of time for the EU to react in a concerted way – for example it was over two years after the events of September 11\textsuperscript{th} before the Council adopted the European Security Strategy.\textsuperscript{242} The European Counter-Terrorism Strategy that followed in 2005 stated four key objectives in the struggle: prevent, protect, pursue and respond. These would appear to represent a coherent response, and indeed perhaps clearer objectives such as these could help serve the EU’s policy on promoting compliance with international humanitarian law, in addition to more detailed guidelines. It has been commented that the objectives themselves, however, ‘maintained a high degree of “constructive ambiguity” that apparently served the more EU-sceptic position of its main proponent, i.e. of the UK’,\textsuperscript{243} and that the actual result was that the Counter-Terrorism

\textsuperscript{239} Council of the EU, Press Release 12255/06 (Presse 241), 2748\textsuperscript{th}/2749\textsuperscript{th} Council Meetings, General Affairs and External Relations, Conclusions ‘Fight against terrorism – Secret detention facilities’ (Brussels, 15 September 2006) 17.

\textsuperscript{240} European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)) P6_TA-PROV (2007)0032, para 233.

\textsuperscript{241} Jackson (n 238) 238-239. Jackson notes that while US texts ‘apply a ubiquitous war-based language, the EU exhibits a deeply embedded understanding of terrorism as crime and therefore requiring a response based on criminal justice’.


Strategy ‘did little more than to repackage and better publicly present the still incoherent and ill co-ordinated set of EU counterterrorism policies’. It is also revealing that many Member States, rather than bolstering the official EU efforts, ‘did not feel too strictly bound by the EU counter-terrorism framework, but cultivated their own bilateral relationships or made use of other informal groups ... even if this only aggravated long-standing co-ordination, competence and accountability problems in this “crowded policy space”’. This is certainly indicative of broader problems in terms of coherent action on particular policy fronts, and the potential for Member States to support EU policy directly rather than ‘going it alone’.

One facet of policy which seems to have emerged, in part at least, from the need to respond to pervasive threats such as ‘terrorism’, is the Instrument for Stability, launched in 2007 by the European Commission as a tool to respond, through capacity building and consultation with beneficiary countries, to ‘evolving and multi-faceted security threats and risks’. As the focus is on long term international, regional and local capacity building to respond to security threats, a familiar managerialist strategy, it could be argued that the Instrument for Stability has the potential to be of benefit in terms of ensuring respect for international humanitarian law, at least in a preventative way.

It has been praised in the sense that its ‘dual purpose – to anticipate or respond to political crisis, violent conflict or disasters – should allow the Instrument to play a major role in providing counter-terrorism assistance to third countries, including for prevention of radicalization’. These efforts in turn could prevent conflict escalating, and thus potentially prevent many violations of international humanitarian law, or allow a more holistic response to ongoing violations. Despite this glimmer of hope, however, it has been argued that essentially ‘the wider European contribution to the fight against international terrorism remained a symbolically highly contested issue which the EU failed to define authoritatively’. It must be questioned whether this delayed and somewhat ineffective response in the realm of counterterrorism could suggest the limited capacity of the EU to respond in terms of preventing and combating widespread violations of international humanitarian law in third countries, especially when

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244 Bossong (n 243) 40.
248 De Vries (n 242) 369.
249 Bossong (n 243) 39.
the former may be considered an internal and imminent security threat, while the latter may in some instances be perceived to bear no direct relevance, or at least no direct or immediate threat, to many EU Member States.

3.2.11 Humanitarian Aid and International Humanitarian Law

A real woman in a real conflict needs food as well as some means to stop combatants shelling her. If the combatants are taking some of the food aid, and perhaps even selling it to buy guns, there comes a time when the humanitarian agencies who provide that food aid must ask themselves whether it is doing more harm than good.  

Humanitarian aid is another area that must be considered in terms of attempts by the EU to promote compliance with international humanitarian law. Humanitarian aid is relevant to the promotion of compliance for a number of reasons. One of the links between the two is that the delivery of aid can have an impact on the perceived neutrality and impartiality of the donor. Aid should normally be delivered on an impartial needs-driven basis. This impartiality can become complicated in the throes of an armed conflict, however, and donors may well face difficult decisions about whether to deliver aid to individuals or groups who are involved in violations of international humanitarian law or in the commission of atrocities. The EU is one of the world’s foremost humanitarian aid donors. It promotes respect for and adherence to international humanitarian law and its assistance is based on the humanitarian principles of humanity, impartiality, independence and neutrality. It has been argued that donors and humanitarian agencies cannot, however, be neutral ‘about whether atrocities are good or bad; sometimes they should say that the combatants who commit them are the main cause of the suffering which they seek to relieve’. There is potential, therefore, for the humanitarian assistance of the EU to undermine its efforts to promote respect for and adherence to international humanitarian law, in times of armed conflict. One example is its reaction to ‘man-made’ humanitarian crises in places such as Sri Lanka, Gaza, Afghanistan, Yemen, DRC, Somalia and Sudan. The EU may be faced with situations where it will have

251 Collectively the EU provides the largest share of official international humanitarian aid. See The European Consensus on Humanitarian Aid: Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission [2008] OJ C25/1.
253 Bryer and Cairns (n 250) 367.
to prioritise between attempts to ensure respect for international humanitarian law, and attempts to support those very individuals and groups who may repeatedly violate the law.

Protection of humanitarian aid workers and the humanitarian space is crucial for the delivery of aid during an armed conflict.\textsuperscript{255} Humanitarian relief personnel and objects are protected under the Geneva Conventions and its Protocols.\textsuperscript{256} Sometimes the parties to the conflict will restrict the provision of humanitarian assistance increasing the suffering faced, for example as witnessed in Sri Lanka.\textsuperscript{257} Organisations attempting to deliver aid are faced with a ‘tightening of the humanitarian space by governments and non-governmental actors, who disregard even the most basic protection afforded under international humanitarian law.’\textsuperscript{258} VOICE, a network representing 86 European NGOs working in the field of humanitarian aid, has expressed concern at the ‘decline of humanitarian access and the shrinking of humanitarian space due to insecurity and/or to host government restrictions’.\textsuperscript{259}

The incidence of attacks on humanitarian aid workers is also thought to have increased,\textsuperscript{260} and the EU have repeatedly responded to and condemned such attacks.\textsuperscript{261}

Humanitarian aid can be a negative influence, sustaining a conflict rather than bringing it to an end, and can also sustain the parties to a conflict, where, in the case of ongoing violations, it can prolong the period of commission of such violations. It can therefore, under certain circumstances, cause a level of suffering that is ‘greater than the suffering which the aid is directly relieving’.\textsuperscript{262} Some of the challenges faced in the provision of humanitarian aid may be extremely difficult to avoid, as they are in some cases ‘inherent in the nature of current conflicts: for the civilian has become the target, and aid has become one of the resources which fuels the conflict’.\textsuperscript{263} If, in certain situations, aid fuels the conflict, and civilians being targeted are also the ones who need the aid, protection of civilians i.e. from violations of international humanitarian law, needs to be a key priority along with the secure delivery of aid. The EU will have to exercise a certain amount of discretion in certain

\begin{footnotesize}
\begin{enumerate}
\item[256] The relevant rules have also obtained customary status: see Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law: Volume I: Rules (CUP 2005), Rules 31-32.
\item[258] Annual Report on Humanitarian Aid 2009 (n 252) 5-6.
\item[260] Annual Report on Humanitarian Aid 2009 (n 252) 5-6.
\item[262] For examples of the abuse of aid, see Bryer and Cairns (n 250) 371-372.
\item[263] Ibid 371-372.
\end{enumerate}
\end{footnotesize}
armed conflicts to ensure that the aid it provides is not supporting and prolonging the conflict and ongoing violations within that conflict. This requires both close monitoring of where aid ends up and efforts aimed at preventing the diversion of aid from civilians to combatants.

Aid can also be a ‘fig leaf’ where the international community directs aid at a problem it is not interested in politically, or where it does not have the political will to resolve in another manner, as has been acknowledged by the European Commission.264 What the EU does with respect to its aid distribution in areas where armed conflicts are ongoing is thus relevant for the promotion of compliance with international humanitarian law. Aid is not a ‘solution to the flouting of humanitarian law’.265 The EU, as one of the largest humanitarian donors, needs to be aware whether aid alone is being used where other political and diplomatic and security measures are necessary. Aid should not be viewed as an alternative to protecting civilians from violence during armed conflicts, and the EU has an opportunity to ensure respect for the law and also provide humanitarian aid, and to move away from a situation where:

>a]id policy replaces foreign policy towards those countries in which donor governments perceive little geo-economic interest. Indeed, the deepest problem of humanitarian aid in internal conflicts is that it may let the ‘international community’ off the hook of its responsibilities to uphold international law.266

The relevant EU policy in this field is contained in the European Consensus on Humanitarian Aid, which represents best practice. It has been acknowledged in the European Consensus on Humanitarian Aid that humanitarian actors face a number of challenges, including an increasing tendency for international law to be ignored or blatantly violated:

The ‘humanitarian space’ that is needed to ensure access to vulnerable populations and the safety and security of humanitarian workers must be preserved as essential preconditions for the delivery of humanitarian aid, and for the European Union (EU) and its partners in the humanitarian field to be able to get assistance including protection to crisis-hit people, based on respect for the principles of neutrality, impartiality, humanity and independence of humanitarian action, enshrined in International Law, in particular International Humanitarian Law.267

The EU has stated in the European Consensus on Humanitarian Aid that it is ‘firmly’ committed to upholding and promoting the humanitarian principles of humanity, neutrality, impartiality and independence, as these principles allow for humanitarian work to be

264 Ibid 369.
265 Ibid 370.
266 Ibid 370.
267 European Consensus on Humanitarian Aid (n 251) para 3.
undertaken effectively.\textsuperscript{268} The EU also stated that it will advocate ‘strongly and consistently’ for the respect of international humanitarian law, and is committed to ‘operationalising’ the EU Guidelines in its external relations.\textsuperscript{269} It may be the case, however, that if and when it ‘strongly’ advocates for respect for international humanitarian law, its perceived impartiality and neutrality as a humanitarian donor may be viewed as compromised, as may its legitimacy as a normative actor in a position to influence the rule of law, from the perspective of the parties to the conflict. This may require some sensitive prioritisation and diplomacy, to allow the EU to remain both a ‘neutral’ donor, and in a position to criticise parties to a conflict for any ongoing violations of international humanitarian law. The ideal, of course, is that the two approaches to alleviating the suffering of civilians remain separate, but in terms of external perception this may not always be possible.

### 3.2.12 The Responsibility to Protect

Former Secretary General of the United Nations, Kofi Annan, issued reports in 1999 and 2000 outlining the core challenge to the United Nations in the next century: ‘to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand’.\textsuperscript{270} He questioned how the United Nations should respond to international crises if humanitarian intervention by military force was deemed unacceptable: ‘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?’\textsuperscript{271} In response to this challenge, the International Commission on Intervention and State Sovereignty (ICISS) was established. The Commission released their seminal report, ‘The Responsibility to Protect’, in 2001. The basic principle underlying the approach was that state sovereignty implied a responsibility to protect the people, and if a state was unwilling or unable to protect its population in circumstances of serious suffering, ‘the principle of non-

\textsuperscript{268} Ibid para 10.
\textsuperscript{269} Ibid para 16.
\textsuperscript{270} Annual Report of the Secretary General to the General Assembly, Press Release SG/SM/7136, GA/95/96 (20 September 1999).
\textsuperscript{271} Kofi A Annan, \textit{We the Peoples: the Role of the United Nations in the 21st Century} (2000) Section IV, para 217 [emphasis in original].
intervention yields to the international responsibility to protect’. 272 The responsibility to protect itself embraces three responsibilities: to prevent, to react, and to rebuild. 273

At the World Summit in 2005 the international community agreed upon the responsibility of each state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. 274 In 2009 the Secretary General of the United Nations delivered a report on how to implement the responsibility, and outlined three pillars of equal importance to the principle. The first pillar is the ‘enduring responsibility’ of the state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from incitement to such crimes, such responsibility deriving from the nature of state sovereignty and from the pre-existing legal obligations of states. 275 The second pillar is the commitment of the international community to assist states in fulfilling the responsibility, through regional and sub regional arrangements and cooperation, including involvement of civil society and the private sector. The third pillar is the responsibility of states to respond collectively and decisively when a state is ‘manifestly failing to provide such protection’. 276 This response could involve any of the range of tools available to the United Nations, such as pacific measures under Chapter VI, coercive ones under Chapter VII, and/or collaboration with regional and sub regional arrangements under Chapter VIII of the Charter. 277 Many of the measures and activities available to states to fulfil their obligation to ensure respect for international humanitarian law are similar to the activities required to prevent the commission of the crimes relevant to the responsibility to protect. For example, training and dissemination of international humanitarian law, and capacity building measures may influence compliance with the law and prevent war crimes. 278

Measures against the proliferation of arms are also considered a part of the ‘Responsibility to Protect’, including as part of ‘root cause’ prevention efforts. The Security Council has underlined the importance of addressing the root causes of conflict and the need to pursue effective prevention strategies. 279 Many of the prevention efforts outlined in the

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273 Ibid.
274 World Summit Outcome: Resolution Adopted by the General Assembly, UN GAOR, 60th Session, Agenda Items 46 and 120, UN Doc A/Res/60/1 (2005) para 138.
276 Ibid 9.
277 Ibid 9.
278 On the relationship between international humanitarian law and the principle of ‘R2P’, see Australian Red Cross, International Humanitarian Law and the Responsibility to Protect (2011).
report on the Responsibility to Protect are available and within the capacity and resources of
the EU, and already addressed in some way by the EU guidelines, and signify opportunities
for an *ex ante* approach to influencing compliance. In relation to third country militaries and
arms proliferation, for example, addressing the root causes of conflict could entail reforms to
the military and other state security services, which could involve ‘enhanced education and
training for military forces; reintegration of ex-combatants; strengthening civilian control
mechanisms ... and promoting adherence to arms control and disarmament and non-
proliferation regimes’. 280 The EU has publicly supported the emerging norm of
Responsibility to Protect from the outset; EU Member States were amongst the ‘most fervent
advocates’281 at the United Nations around the time of the World Summit. The European
Council reaffirmed the importance of the concept in 2005, and stated that it must be
implemented by the Security Council. 282 The Council welcomed the agreement reached at the
UN World Summit in 2005, in particular the welcoming the international endorsement of the
Responsibility to Protect, and declared that the Responsibility to Protect ‘will be an important
tool of the international community for addressing the worst atrocities’. 283

Criticisms levelled at the EU, however, consistently identify a ‘stark gap’284 between
declaratory practice and policy, and concrete delivery on promises made. A former EU
Commissioner for External Relations has been credited with stating that the capacity of the
EU to make policy promises is more impressive that its capacity to deliver on such
promises. 285 In relation to the protection of populations from genocide, war crimes, ethnic
cleansing, and crimes against humanity, prevention is stressed throughout the strategy set out
in the Secretary-General’s report on implementing the Responsibility to Protect. 286 Any of the
four specified crimes and violations contemplated could be committed in the context of an
armed conflict, and any of them could entail serious and/or widespread violations of
international humanitarian law. The report of the Secretary-General emphasises that the scope
of the responsibility should be kept narrow, while the response ought to be deep, ‘employing

280 ICISS Report (n 272) 23.
Brief No.10, Leuven Centre for Global Governance Studies 7.
283 General Affairs and External Relations Council, Council Conclusions on UN World Summit (Brussels, 7
for Security Studies (May 2005) 47, also cited in Damien Helly, ‘Africa, the EU and R2P: Towards Pragmatic
286 Along with the responsibility to react, and the responsibility to rebuild, the three elements of the
Responsibility to Protect, see Report of the Secretary-General, Implementing the Responsibility to Protect UN
the wide array of prevention and protection instruments available to Member States, the United Nations system, regional and subregional organizations and their civil society partners. The EU has acknowledged the importance of early prevention, and has recognised that the EU and other regional organisations have important contributions to make. In order to close the gap between policy and action, the EU has a ‘multitude of instruments’ at its disposal, including capacity building in conflict prevention, development and human rights, good governance and rule of law efforts, and judicial and security sector reform, which it can employ in an attempt to prevent the escalation of conflict and the commission of serious violations of international humanitarian law, potentially amounting to international crimes.

Many of the efforts undertaken by the EU and its Member States to ensure respect for international humanitarian law can also be viewed as measures of prevention in line with their Responsibility to Protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The EU has raised the principle of ‘R2P’ in statements relating to both Yemen and Libya, reminding the relevant authorities of their responsibility to protect their populations. Missions launched under the auspices of the EU’s Common Security and Defence Policy can also contribute to implementing two pillars of the ‘R2P’ doctrine, namely international cooperation and decisive response. The approach of the EU to resolving conflict has been described as a commitment to sustainable peace, which resolves ‘both the structural causes and violent symptoms of conflict’. Ian Manners has noted that the EU’s normative preferences for sustainable peace go beyond the traditional forms of development assistance and peacekeeping to include ‘global institution-building in areas such as human security and the right to protect (R2P); landmine, small arms and conflict diamonds conventions, and the International Criminal Court’. This comprehensive approach to the structural causes of conflict and to conflict prevention and mitigation of ongoing crises is commendable, but only useful if some or all of the efforts are effective in some way.

287 Ibid at 8.
288 Statement by Anders Lidén on behalf of the EU, UN General Assembly Debate on the Responsibility to Protect, 63rd Session, 97th Plenary Meeting, A/63/PV.97 (23 July 2009).
289 Ibid.
290 Council of the EU, 3082nd Council Meeting, Foreign Affairs, Conclusions on Yemen, 8741/1/11 REV 1 (Luxembourg, 12 April 2011); and Statement by the High Representative Catherine Ashton, after the meeting of the Contact Group on Libya, 5th May 2011, A 174/11 (Brussels, 5 May 2011).
292 Ibid 32.
### 3.3 Conclusion

From the foregoing discussion of the EU’s use of different means for influencing compliance with international humanitarian law, it is clear that very different tactics are employed by the EU with regard to different countries and conflicts. In relation to Yemen and Sri Lanka, there was much public criticism by the EU of violations, attempting to engage reputational concerns of the parties targeted, but an apparent lack of follow-up action by the EU in relation to accountability may have limited the deterrence potential of the public statements. In the case of Sudan a combined response of repeated public criticism and the long-term imposition of restrictive measures appear to have made little impact on the situation, and the ongoing response is focused on supporting the ICC in its work to foster accountability, and supporting African Union and United Nations peacekeeping forces. In this case there are no inducement factors available for the EU to present, and deterrent factors and the imposition of sanctions would not appear to have affected the decisions of the parties involved. Restrictive measures and repetitive public statements would appear not to be the most effective approach either in relation to Burma, and it remains to be seen whether the EU will support or fund a robust international commission of inquiry in relation to violations committed. The EU approached the situation in Somalia from a number of different avenues, and was in a position to contribute to the training of Somali troops, in an attempt to influence future compliance with international humanitarian law. This approach aims to influence the internalisation of norms, and also represents a potentially rewarding *ex ante* strategy.

One of the strongest and most rapid reactions to an escalation of conflict among this selection was in relation to Georgia, which was already very closely tied to the EU, territorially, politically and economically through the European Neighbourhood Policy. The EU response to Libya in 2011 was also strong, although the approach developed over a longer period, and in line with other international developments, such as resolutions of the Security Council. Achieving greater compliance in the situations highlighted above may require a complex deployment of a combination of tactics which attempt to influence the actors involved from a number of angles. In seeking to achieve such a result, the EU must accurately identify the prevailing conditions in each situation and respond with an appropriate combination of what have been termed the three main devices of social control – self-interest, legitimacy, and coercion – which incorporate both inducement and deterrent factors.²⁹³

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Aside from factors which can be harnessed to bring about improved compliance with the law, factors also arise which can independently affect the level of compliance for parties to an armed conflict, such as the nature of the conflict, the actors involved, the location where the conflict is being waged, and the power dynamics within the conflict. These factors may affect the extent to which the EU can bring influence to bear on the parties to a conflict, and which means may prove most effective. The level of impact of any measure or combination of measures is difficult to gauge, especially as attribution is complicated by the involvement of many different international and regional actors in attempts to prevent, mediate or otherwise influence the conflicts mentioned above, but it would appear that criticism and diplomacy will never alone have any great impact on compliance or on moving towards a process of accountability, and that other forms of persuasion and enforcement, or at least an indication that the EU are prepared to step up their response, are necessary for a comprehensive approach to ensuring respect for international humanitarian law in third countries. One of the disadvantages of international humanitarian law is the lack of a comprehensive or centralised supervisory system capable of scrutinising compliance, such as exists within UN human rights infrastructure, with its attendant monitoring, reporting and even individual complaint mechanisms for responding to violations. In the present context, where deterrence and available responses to violations are limited, enforcement of the law becomes even more important. Chapter four examines the record of the EU in terms of upholding the enforcement of international humanitarian law through its cooperation with and support of the mechanisms of international criminal justice.
Chapter 4:
The EU, International Criminal Justice and Universal Jurisdiction

‘Impunity is simply not an option’

4.1 Introduction

The previous chapter dealt with persuasion, diplomacy and various attempts to influence compliance with the laws of armed conflict. Many of these approaches focused on efforts to influence state and non-state actors in their commitment and adherence to international humanitarian law, some of which also included reference to accountability and individual responsibility for violations of the law. This chapter develops the discussion of EU support for individual responsibility through examining its engagement with international criminal justice. While the EU Guidelines on Promoting Compliance with International Humanitarian Law acknowledge that balancing the aims of establishing peace and combating impunity can be difficult in post-conflict situations, it is stipulated that the EU should ensure that there is no impunity for war crimes. The guidelines further highlight that the value of accountability also lies in deterrence:

To have a deterrent effect during an armed conflict the prosecution of war crimes must be visible, and should, if possible, take place in the State were the violations have occurred. The EU should therefore encourage third States to enact national penal legislation to punish violations of IHL. The EU's support of the ICC and measures to prosecute war criminals should also be seen in this context.²

The law can be enforced through various mechanisms of state responsibility, but also through individual criminal responsibility for violations. Individuals can be prosecuted at the national and international level for the most serious violations committed during armed conflict, those amounting to grave breaches, war crimes, and crimes against humanity.³ This chapter will explore the EU’s influence on the development of international criminal justice and its

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¹ Statement made on behalf of the EU in relation to the ad hoc tribunals, calling on all states to fulfil their international obligations by arresting and transferring the remaining indictees to the Hague and Arusha: Statement by Luís Serradas Tavares on behalf of the EU, 62nd Session of the UN General Assembly, 25th Plenary meeting, Agenda Items 74 and 75, A/62/PV.25 (15 October 2007). All websites in this chapter were last accessed 10 December 2010, unless otherwise indicated.
² Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) [2009] OJ C303/12, para 16(g).
³ As this study is not concerned with the internal promotion of international humanitarian law within the EU, this chapter will not look at enforcement of the law amongst EU Member States’ own forces.
contribution to the enforcement of international humanitarian law through its cooperation and comprehensive engagement with the ad hoc tribunals for Rwanda and the former Yugoslavia and the International Criminal Court (ICC), and its endorsement and facilitation of the exercise of universal jurisdiction within EU Member States.

The end of the Cold War and the ensuing proliferation of non-international armed conflicts prompted a number of new initiatives and institutions for the prosecution of violations of international humanitarian law, which include the ad hoc tribunals for the former Yugoslavia and Rwanda, the ICC and increased levels of attention towards universal jurisdiction. After the Cold War era, the

implosion of previously multi-ethnic societies, such as the former Yugoslavia and Rwanda, has led to gross violations of international humanitarian law on a scale comparable to those committed during the Second World War, which have shocked the conscience of the world. To be sure, the Cold War era witnessed many such excesses, but it is only now with the new 'harmony' among the Big Five, together with intense media coverage of such events, that unprecedented opportunities have been created for the prosecution and punishment of those responsible for serious violations of international humanitarian law.4

The EU’s support for these various mechanisms of enforcement began around a decade before its adoption of policy guidelines specifically referring to international humanitarian law, nevertheless the contribution of the EU in this area is significant, and its early interventions and ongoing support through financial, logistical, and diplomatic means continues to have an impact on the viability of these mechanisms. Without the success of the ad hoc tribunals in the development of international humanitarian law and international criminal law, the establishment of the ICC may have been more challenging. Similarly, without the encouragement by the ICC through the principle of complementarity for states to initiate their own investigations and prosecutions of serious violations of international humanitarian law and international criminal law, the practice could have faded into disuse, rather than be facilitated by the adoption of implementing legalisation. The ICC is also important in keeping the fight against impunity for international crimes on the international agenda.

4.2  **EU Support for the ad hoc Tribunals**

4.2.1  **The International Criminal Tribunal for the Former Yugoslavia**

The EU has supported international criminal justice since its revival in the early 1990s with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993\(^5\) and the International Criminal Tribunal for Rwanda (ICTR) in 1994.\(^6\) The ICTY was the first war crimes court created by the UN under Chapter VII of the UN Charter, and the first international tribunal focused on war crimes since the Nuremberg and Tokyo tribunals.\(^7\) Its purpose is indicated in the tribunal’s full title: the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. The approach of the EU in supporting the ICTY is principally different to that of the ICTR, for very practical reasons. Firstly, the EU’s geographical proximity to the Balkans, and hence to the conflict which flared up in the early 1990s, generated considerable interest and political investment in the tribunal, and secondly, the desire of the states of the former Yugoslavia to increase their political and economic proximity to the EU resulted in a great degree of leverage for the EU in influencing cooperation with the ICTY as the trials progressed.

The conflict in the former Yugoslavia in the early 1990s sparked ‘exceptionally broad activity on the part of the international community’, including the activity of regional organisations such as the European Union.\(^8\) This involvement further entailed an ‘unprecedented variety of activities which were meant to prevent the escalation of the conflict’.\(^9\) Patricia Sellers, former legal advisor to the *ad hoc* tribunals and former senior trial attorney at the ICTY, has explained this unprecedented attention and response in the following way:

> If you read Western newspapers on any given day, you will see more interest in Yugoslavia and Western countries in general. Although there’s been a war in Angola for the past twenty years, it doesn’t make the papers on a daily basis like Northern Ireland. Somewhere in the back of many Western minds, there is the idea that wars and genocide always happen in Africa and that is not news.

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\(^7\) The full title of the so-called ‘Nuremberg’ tribunal is the International Military Tribunal (IMT), convened in Nuremberg, Germany, in 1945; the official title of the ‘Tokyo’ tribunal is the International Military Tribunal for the Far East (IMTFE), convened in Tokyo, Japan, in 1946.
\(^9\) Ibid.
When you look at Yugoslavia, people were shocked that the war took place on European soil, where it wasn’t supposed to occur.10

European states were particularly concerned at the escalation of violence and the potential regional impact of the conflict, and the European Community was involved from the beginning, and continued its engagement with the establishment of a monitoring mission, and also through the initiation of the first Peace Conference on Yugoslavia.11 Indeed, the efforts undertaken by the European Community and its Member States, with the support of states participating in the Conference for Security and Cooperation in Europe (CSCE), were commended by the Security Council in 1991.12 These efforts included attempts to restore peace and dialogue through the implementation of a cease-fire, the sending of observers, the convening of the peace conference, and the suspension of delivery of all weapons and military equipment to Yugoslavia.13 Furthermore, the states of the European Community, along with the United States, invoked the Moscow Human Dimension Mechanism at the CSCE, with respect to Croatia and Bosnia and Herzegovina, which provided for the establishment of an ad hoc mission of independent experts to assist in the resolution of a specific ‘human dimension’ problem (human dimension refers to commitments undertaken in the field of human rights and democracy).14 Established only a year previously, this mechanism provided that if a participating state considered that a particularly serious threat had arisen in relation to the provisions of the CSCE human dimension, it may with the support of other states engage a number of CSCE rapporteurs to establish the facts, report on the situation, and give advice on possible solutions to issues raised.15

The rapporteurs under the Moscow Human Dimension Mechanisms delivered their report on Croatia in 1992. They reported the following:

It is beyond any doubt that gross violations of human rights and norms of international humanitarian law, including war crimes and crimes against humanity, have been committed in connection with the armed conflict in the former Yugoslavia. It is also common knowledge that every day atrocities continue to be

13 Ibid.
committed. The evidence is overwhelming and undeniable. The international community cannot allow this horrifying situation to persist.\textsuperscript{16}

The rapporteurs further declared their belief that under the prevailing conditions there was ‘no real possibility for an effective prosecution of war crimes and crimes against humanity at the national level’, and that while they were in favour of the establishment of an international criminal court, under the circumstances they would ‘strongly advise against waiting for such a court to be established before action is taken against serious criminal acts committed in connection with the armed conflict’.\textsuperscript{17} It was therefore decided that an \textit{ad hoc} international tribunal would be preferable, and it was proposed that a committee of experts from interested states be convened as soon as possible to draft a treaty establishing such a tribunal.\textsuperscript{18}

Around the time of the release of this report, the Security Council had requested that the Secretary-General urgently establish a Commission of Experts to analyse information with a view to making conclusions with respect to grave breaches and other violations of international humanitarian law committed in the territory of the former Yugoslavia.\textsuperscript{19} At this point the establishment of an \textit{ad hoc} tribunal was not on the agenda, and unanimous support from the European Community was not forthcoming.\textsuperscript{20} In early 1993, in response to a proposal from France,\textsuperscript{21} the Security Council adopted a resolution which decided that an international tribunal would be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia.\textsuperscript{22} The European Community, at the time, was limited in its political and diplomatic response to the situation, although its Member States contributed significantly to the establishment of the tribunal through the Peace Conferences, the CSCE, and the Security Council.\textsuperscript{23} The limitations for the European Community stemmed from the reality that there existed no common foreign policy at the time, an issue which was only solved in late 1993 with the entry into force of the Treaty of Maastricht, after the decision had been taken by the UN Security Council to set up a tribunal.

The EU’s most noteworthy contribution to the work of the ICTY, apart from significant financial and declaratory support, has hinged on conditionality for association and

\textsuperscript{16} Report: Rapporteurs (Corell – Türk – Thune) under the Moscow Human Dimension mechanism to Croatia: 30 September – 5 October 1992, 47.
\textsuperscript{17} Ibid, 35, 37.
\textsuperscript{18} Ibid, 41-42.
\textsuperscript{20} Schabas 2006 (n 14) 16-17, 20.
\textsuperscript{21} Ibid 20.
\textsuperscript{23} On the contributions of some EU Member States to the Peace Conferences see Nelaeva (n 10) 102.
accession to the EU for three of the states concerned: Croatia, Serbia, and Bosnia and Herzegovina. Aside from the general political, economic and institutional conditionality associated with all candidate countries, a further set of criteria as enshrined in the Stabilisation and Association Process (SAP) for South East Europe applies to the pertinent states.

The EU originally adopted a regional approach to the countries of South Eastern Europe in 1996 in the context of enlargement. A year later the Council established the political and economic conditions to be fulfilled by the countries concerned, and the motivations behind such relations:

In an effort to consolidate peace and stability in the region and to contribute to its economic renewal, the EU intends to develop bilateral relations with the countries of the region within a framework which promotes democracy, the rule of law, higher standards of human and minority rights, transformation towards market economies and greater cooperation between those countries.

While the conditionality attaches to respect for democratic principles, human rights, rule of law, respect for and protection of minorities, of particular interest here is the attention drawn to full cooperation with the ICTY:

To permit the beginning of negotiations, the following general conditions shall apply to all countries concerned: …

3. Compliance of the countries which are signatories of the GFAP with the obligations under the peace agreements, including those related to cooperation with the International Tribunal in bringing war criminals to justice

Specific conditions were included along with the general conditions alluded to above in relation to three Balkan states. The EU requested evidence that ‘the Government of Croatia is using its influence in bringing Bosnian Croat war criminals to justice before the International Tribunal’; from Bosnia and Herzegovina, it requested evidence ‘of cooperation with the International Tribunal, notably in bringing Bosnian war criminals to justice before the

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24 For a discussion on the effectiveness of political conditionality as used by the EU, see Judith Kelley, ‘International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions’ (2004) 58(3) Intl Organization 425-457; in relation to human rights conditionality see Manfred Nowak, ‘Human Rights “Conditionality” in Relation to Entry to, and Full Participation in, the EU’ in Phillip Alston, Mara Bustelo and James Heenan (eds), The EU and Human Rights (OUP 1999) 687-699.
25 The Stabilisation and Association Process (SAP) was launched at the Zagreb Summit in 2000, see <http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/sap/zagreb_summit_en.htm>.
27 Council conclusions on the principle of conditionality governing the development of the European Union's relations with certain countries of south-east Europe (1997), Bulletin of the EU 4-1997, Point. 2.2.1.
28 Ibid. The GFAP is the General Framework Agreement for Peace (1996) 35 ILM 75. The GFAP was initialed in Dayton (Ohio) on 21 November 1995 and signed in Paris on 14 December 1995 (Dayton Agreement).
Tribunal’; and from the Federal Republic of Yugoslavia (FRY, later renamed Serbia and Montenegro) evidence ‘that the government of FRY is using its influence in bringing Bosnian Serb war criminals to justice before the International Tribunal’. These criteria form part of the Stabilisation and Association Process (SAP) which regulates the relationship between the EU and the countries of South-Eastern Europe. This ‘ICTY conditionality’, while dominating the EU’s external relations agenda with the three states, has had varying degrees of success in terms of the enlargement process, and also in terms of securing arrests of the indictees, especially the high-profile suspects which became the main source of friction between the ICTY, the EU, and the states concerned. Pressure exerted by the EU on the states to cooperate with the ICTY was unwavering and at times intense. This hampered and delayed the accession process for the states involved, and the closer a state moved towards the accession process, ‘the greater the pressure on it to transfer indicted war crimes suspects to The Hague becomes, with ever more serious consequences for its failure to comply’.

It would appear that Croatia was the most successful of the three in cooperating with the ICTY and receiving the reward of accession negotiations which opened in 2005. Croatia’s path towards accession was not smooth, however, as the failure to deliver its remaining indictee, General Ante Gotovina, resulted in accession negotiations being suspended from March until October 2005, at which time the Chief Prosecutor of the ICTY, Carla Del Ponte, reported full cooperation. General Gotovina was opportunely arrested shortly thereafter. This turn of events came as part of a ‘wave of EU pressure for cooperation’ with the tribunal. Seemingly Serbia also reacted to EU pressure and stepped up efforts to turn over indictees: indeed by the summer of 2005 Belgrade had finally handed over most of its indictees to the tribunal or persuaded them to surrender, including Generals

29 Ibid.
30 Commission communication on the stabilisation and association process for countries of south-eastern Europe (1999), Bulletin of the EU 5-1999, Point 1.3.73. A series of conditionality reports have monitored compliance by the countries of South-Eastern Europe with these conditions; see generally <http://ec.europa.eu/enlargement/press_corner/key-documents/sap_en.htm>.
33 Ibid.
34 At time of writing Croatia retains the status of candidate country.
36 Croatia: opening of negotiations – Council Conclusions, Press Release, Council of the EU, 12514/1/05 REV 1 (Presse 241) (Luxembourg, 3 October 2005).
37 See Rangelov (n 32) 367.
38 Ibid 365.
Lukić and Pavković, ‘whom it had previously insisted on prosecuting in domestic courts’. The concerted pressure ostensibly affected the approach of the Serbian prime minister at the time, Vojislav Kostunica, who ‘abandoned years of virulent hostility to the tribunal’, and, along with his security chief, ‘[twisted] the arms of suspects to hand themselves over and make life easier internationally for Serbia’. Bosnia and Herzegovina also made progress at the time, and was rewarded for increased cooperation with the ICTY by the opening of Stabilisation and Association Agreement (SAA) negotiations in Sarajevo in November 2005:

Bosnia and Herzegovina’s co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY) has improved, as a result however of increased pressure by the international community. Republika Srpska has been showing a more co-operative attitude and has developed a policy encouraging voluntary surrenders. Since December 2004, fifteen indictees for Bosnia and Herzegovina-related war crimes have been transferred to The Hague.

At the opening of Croatia’s accession negotiations in 2005, the three highest-profile indictees remained at large - General Ante Gotovina of Croatia, and the Bosnian Serb leaders Radovan Karadžić and General Ratko Mladić. It is one indicator of the success of EU lobbying, or the forthright exertion of its influence through conditionality on potential candidate countries that all of these three have since been apprehended. The EU has, however, been criticised for its exclusive focus on cooperation with the ICTY as a means for improving the rule of law in the states of the former Yugoslavia. Its approach has been disparaged for being too narrowly-conceived to advance some of the aims of the EU and of international justice, and full regional cooperation, reconciliation and respect for the rule of law in the Balkans may not have been achieved as a result:

Ignoring domestic transitional justice processes has allowed the persistence of ethno-nationalist ideologies and denial of responsibility for war crimes, thus obstructing both the process of rebuilding the rule of law and international justice’s goal of facilitating lasting peace and reconciliation in the Western Balkans.

39 Ibid 367.
40 Ian Traynor, ‘Full House for The Hague’s War Crimes Unit’ The Guardian (9 June 2005). Traynor also noted that footage released around that time of Serbian paramilitaries summarily executing Muslim prisoners in Bosnia also changed attitudes, see also ‘Serbian Leader “Shocked” by Video’ BBC News (3 June 2005) <http://news.bbc.co.uk/2/hi/europe/4605223.stm>.
42 The EU was not the only actor on the scene. NATO, the US, and the Chief Prosecutor Carla del Ponte, among others, had a role to play in influencing cooperation with the ICTY. See Julie Kim, ‘Balkan Cooperation on War Crimes Issues: 2005 Update’, Congressional Research Service Report for Congress RS22097 (28 March 2005), and Julie Kim, ‘Balkan Cooperation on War Crimes Issues’, Congressional Research Service Report for Congress RS22097 (14 January 2008) <http://www.fas.org/sgp/crs/row/index.html>; see also Dobbels (n 31) 20.
43 Rangelov (n 32) 375.
The ICTY and the perceived political nature of international criminal justice also came under fire in 2000 as a result of the decision not to open a criminal investigation into NATO’s 1999 air campaign in the Federal Republic of Yugoslavia. Many EU Member States had been involved in the campaign, and there was widespread criticism over the decision not to investigate the alliance for its actions in the region.\(^1\) It is undeniable, however, that the work of the ICTY has advanced international humanitarian law,\(^2\) and has at the very least shed a spotlight on the importance of enforcing the law, and of criminalising serious violations of international humanitarian law and holding those most responsible to account. It may well be that the overwhelming focus on the ICTY to the detriment of other domestic transitional justice options was necessary to avoid blanket impunity for war crimes. The EU’s strong stance on conditionality clauses in this respect played an important part in coercing obdurate political leaders into fuller cooperation with the tribunal, and many important suspects were transferred to The Hague to face trial as a result. The former Chief Prosecutor, Carla Del Ponte has asserted that ‘90 percent of those in custody are there as a direct result of EU conditionality and that it has in recent years been the most effective tool to obtain the transfer of ICTY fugitives’.\(^3\)

Political conditionality for potential candidate countries was not the only support proffered by the EU to the ICTY, although, as a means of enforcing international humanitarian law such a unique opportunity to engage the relevant actors is significant. Other financial, diplomatic and operational support was consistently delivered by the EU. The EU has been of substantial financial assistance\(^4\) and has been a vocal supporter of the ICTY throughout its development. Antonio Cassese, President of the Tribunal at the time, expressed gratitude in 1996 to the EU for the ‘support for the International Criminal Tribunal which the Council unhesitatingly confirmed in such clear and uncompromising terms’\(^5\) in its Council


\(^2\) See Shane Darcy and Joseph Powderly (eds), Judicial Creativity at the International Criminal Tribunals (OUP 2010).


\(^4\) In 2000, for example, the EU made a contribution of up to EUR 1,482,313 in support of the ICTY Outreach Programme, the ICTY Library and a Project for Defence Counsel Training, see Press Release LM/P.I.S./547-e (The Hague, 7 December 2000) <http://www.icty.org/sid/7796>.

conclusions. The Council for General Affairs had agreed with Cassese ‘on the need to keep up pressure on all parties concerned to cooperate fully and unconditionally with the Tribunal on the basis of the commitments given under the peace agreements’.

The EU Presidency in 1997 also voiced its support, stating that cooperation with the Tribunal, ‘with a view to bringing war criminals to justice, is a basic condition for any progress in the development of bilateral relations in the areas of commercial exchanges, financial assistance and economic co-operation as well as contractual relations between the EU and the countries of the region’, sending an unequivocal statement of intent that has clearly been backed up by subsequent practice.

Along with this financial and diplomatic support, measures of operational cooperation were also adopted. The Council of the EU adopted a Common Position in 2003 which provided that Member States were to take the necessary measures to prevent entry into or transit through their territories of certain persons who were ‘engaged in activities which help persons at large continue to evade justice for crimes for which the ICTY has indicted them or are otherwise acting in a manner which could obstruct the ICTY’s effective implementation of its mandate’.

In addition to restricting admission to the EU of both indictees and their abettors, the EU through the adoption of further Common Positions froze all funds and economic resources belonging to indictees who remained at large, supplementing the measures recommended in UN Security Council Resolution 1503 (2003).

The EU and its Member States have a continuing role to play in supporting the work of the tribunal through supporting the completion strategy and its residual mechanisms.

The EU has also funded the War Crimes Justice Project (WCJP), which aims to facilitate the transfer of knowledge and materials from the ICTY to legal professionals in the former Yugoslavia. This initiative goes some way towards addressing criticisms of an overbearing focus on the ICTY to the detriment of local rule of law initiatives, and the EU has clearly

51 Common Position 2003/280/CFSP of 16 April 2003 in support of the effective implementation of the mandate of the ICTY, art 1.
found a way to continue its support in new and dynamic ways as the tribunal wraps up its work.

4.2.2 The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) has also enjoyed substantial financial and diplomatic support from the European Union, although in this case the ‘carrot’ of conditionality was not an option, and the geographical and political distance led to a lesser degree of involvement and influence in the operations of the tribunal. In 1994, the EU stressed the importance of bringing those responsible for grave violations of international humanitarian law and genocide to justice. The Council of the EU expressed its conviction that the establishment of an international tribunal was an ‘essential element’ to discontinue what it referred to as ‘a tradition of impunity’.

Strengthening regional capacity to prevent and solve conflict, specifically referring to the Organization for African Unity (now the African Union) and Africa’s civil wars, was recommended as part of a long-term approach to conflicts in the region. Regional stability and the utility of developing the capacity of the African Union to deal with conflicts have been important aspects of the response to the conflict in Rwanda and the work of the tribunal, linked to the EU’s promotion of the rule of law, good governance, human rights and democratization. The European Parliament expressed its dismay a year after the genocide that nobody had yet been tried or even charged for their part in the genocide of Tutsis and the mass murder of moderate Hutus in Rwanda.

A Joint Assembly of the EU and the African, Caribbean and Pacific (ACP) states rallied the support of the UN, EU Member States, and ACP states for the ICTR, in response to the financial, administrative and logistical difficulties which were preventing the tribunal from beginning its work proper, calling on the UN to provide the tribunals with the resources to complete its mission successfully, and calling on all EU and ACP states to cooperate fully with the tribunal, in particular by supporting it financially and by adopting the necessary

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56 Ibid.
57 Ibid.
59 European Parliament Resolution on the need to establish a permanent international court to try and punish war crimes and crimes against humanity and the operation of the ad hoc courts on the former Yugoslavia and Rwanda, [1995] OJ C249, P. 0154
internal legislation. The Council of the EU subsequently adopted a number of Common Positions which proclaimed support for the work of the tribunal, and repeatedly avowed to renew its efforts to ensure that all states would surrender to the tribunal those indicted for genocide and other serious violations of international humanitarian law. The Government of Rwanda was also urged to comply fully with its obligation to cooperate with the ICTR and to deliver all information requested by the ICTR regardless of the persons or institutions concerned. The EU has repeatedly extolled the work and value of the tribunal in various UN fora, and underlined the principles of accountability and rule of law which motivated its support, stating that through its work the tribunal has made a ‘substantial contribution to the replacement of a culture of impunity by a culture of accountability thus playing an important role in the process of national reconciliation in Rwanda and in the maintenance of peace and security in the region’. The EU further stated that both ad hoc tribunals contributed to the development of international criminal law, and that they ‘represent a cornerstone in the universal affirmation of the principle that, in the words of the Secretary-General, “there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law”’.  

4.2.3 The Completion Strategies and Residual Mechanisms of the Tribunals

The EU has also been an important supporter of the completion strategies of both the ICTR and the ICTY, which increasingly became the main focus and priority for both the United Nations and the EU in this context. A decade after the establishment of the ICTY, the UN Security Council adopted a resolution calling on states to intensify cooperation with and assistance of the tribunals, in line with their completion strategies. The resolution recognised that an ‘essential prerequisite’ to achieving the aims of the completion strategies

63 Statement by Aldo Mantovani on behalf of the EU, 58th Session of the UN General Assembly, 27th Plenary Meeting, Agenda Items 53 and 54, A/58/PV.27 (9 October 2003).
64 Ibid.
was full cooperation by all states, with special regard to securing the arrest of remaining indictees, and member states of the United Nations were urged to consider imposing appropriate measures against individuals and those assisting such individuals to evade justice.\textsuperscript{66} The ICTY was praised for its focus on the trial of the most senior leaders and those suspected of being most responsible for violations of international humanitarian law, and transferring less senior individuals, and those suspected of lesser responsibility, to competent national jurisdictions. The ICTR was also urged to model its strategy on that of the ICTY. Here, as elsewhere when implementation of the completion strategies is at issue, there is recognition that the strengthening of national judicial systems is a positive development which will contribute both to the completion of the work of the tribunals, but also to the rule of law in the long term. The international community was also called upon in this respect to assist domestic jurisdictions to improve their capacity to prosecute cases transferred from the ICTY and ICTR.\textsuperscript{67}

It would appear that, in addition to a normative interest in the rule of law and the potential for improving the domestic capacity for prosecution of violations of international humanitarian law, the enthusiasm of the EU for enforcement of the completion strategies, and their persistent requests to ‘make the proceedings even more efficient and expeditious’\textsuperscript{68} may also be linked to its financing of the institutions.\textsuperscript{69} As early as 2001, the EU was eagerly advocating the establishment of a strategy for the tribunals to ‘fulfill their tasks as soon as possible’.\textsuperscript{70} The EU reiterated the importance of this subsequent to the Security Council Resolution of 2003, and approved of the decision as provided in the resolution to split the positions of the prosecutor of the ICTY and of the ICTR with ‘a view to easing the prosecutorial workload in the implementation of these Tribunals' respective completion strategies’.\textsuperscript{71} The presidents and prosecutors of the tribunals were called on to ‘continue their co-operation in order to maximize the efficient use of the intellectual and financial resources of the two tribunals’, again with a view to completion dates.\textsuperscript{72} The EU also called on the

\begin{itemize}
\item[66] Ibid, Preamble.
\item[67] Ibid, art 1.
\item[68] Statement by Kirsti Lintonen on behalf of the EU, 61\textsuperscript{st} session of the UN General Assembly, 26\textsuperscript{th} Plenary meeting, Agenda Items 72 and 73, A/61/PV.26 (9 October 2006).
\item[69] Given that the EU’s support for the work of the Tribunals manifests itself both financially and politically, see Statement by Christiansen on behalf of the EU, 57\textsuperscript{th} Session of the UN General Assembly Fifth Committee, Items 124 and 125, A/C.5/57/SR.26 (18 November 2002).
\item[70] Statement by Michael Tilemans on behalf of the EU, 56\textsuperscript{th} Session of the UN General Assembly, Agenda Items 131-132, A/C.5/56/SR.33 (7 December 2001).
\item[71] Statement by Aldo Mantovani on behalf of the EU, 58\textsuperscript{th} Session of the UN General Assembly, 27\textsuperscript{th} Plenary Meeting, Agenda Items 53 and 54, A/58/PV.27 (9 October 2003).
\item[72] Ibid.
\end{itemize}
international community to fulfill its commitment to the work of the tribunals with the following:

Sufficient resources, cooperation, assistance and support of Member states are essential for the work of the Tribunals. It is crucial that States cooperate with regard to requests for access to archives and documents, and securing the appearance in Court of prosecution witnesses, and the arrest and transfer of indictees still at large.\(^{73}\)

The tribunals were praised for their efforts to transfer cases to national jurisdictions and their activities in relation to national capacity building, but were reminded to ensure that the domestic trials respected the necessary standards, a concern repeatedly aired in EU statements at the UN.\(^{74}\) Improvements were made in 2005 both by states in their cooperation with the tribunals, and the tribunals’ work to transfer cases to domestic jurisdictions.\(^{75}\) A significant improvement also came with the opening of the special War Crimes Chamber in the State Court of Bosnia and Herzegovina, which facilitated the transfer of cases from the ICTY. The transfer of cases from the ICTR was also a priority for the EU, which supported the goal of strengthening the domestic judicial system in Rwanda and improving its capacity to try cases transferred from the Tribunal.\(^{76}\) The EU recognised that cooperation with the tribunals from states also included the relocation of witnesses, those convicted, and those acquitted of violations of international humanitarian law.\(^{77}\) The ICTR was praised for its progress and achievements in moving towards completion after the President’s address to the Security Council in 2007, and a number of states including EU Member States were praised for cooperating in the aforementioned manner by either incarcerating convicted persons on their territory or concluding enforcement of sentence agreements with the tribunal.\(^{78}\)

Associated with the completion strategies of the tribunals is the need to address residual issues and the setting up of residual mechanisms, which requires continued assistance from the EU and other supporters. The functions that could be carried out by a

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73 Statement by Arjan Hamburger on behalf of the EU, 59th Session of the UN General Assembly, 53rd Plenary meeting, Agenda Items 50 and 51, A/59/PV.53 (15 November 2004).
74 Ibid. See statement by Lintonen on behalf of the EU (n 68): ‘efforts to enhance the administration of justice should never be made at the expense of due process and rights of the accused and rights of the victims’; see also Statement by Sanja Stiglic on behalf of the EU, Security Council: Reports of the ICTY and the ICTR (New York, 4 June 2008); see also in relation to this and other general concerns about the completion strategies: Daryl A Mundis, ‘The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals’ (2005) 99(1) AJIL 142.
75 As noted in the Statement by the United Kingdom on behalf of the Member States of the EU on the Report of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Plenary, New York (10 October 2005).
76 Statement by Luis Serradas Tavares on behalf of the EU (n 1).
77 See Statement by Lintonen on behalf of the European Union (n 68).
78 Statement by Luis Serradas Tavares on behalf of the EU (n 1).
residual mechanism include the trial of fugitives, the protection of witnesses, the supervision of sentences, the referral of cases to national jurisdictions; and claims for compensation.\(^{79}\)

This process is not only important with respect to the two tribunals, but it also informs the approach to the completion of the work of other similar \textit{ad hoc} courts, which also receive some support from the EU, such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon.\(^{80}\)

The President of the Security Council addressed the issue of residual mechanisms at the end of 2008, at which point all trial activities at first instance were supposed to have been completed in accordance with Security Council Resolution 1503 (2003). The need to establish an \textit{ad hoc} mechanism to carry out essential residual functions of the tribunals, including the trial of high-profile indictees still at large, was acknowledged, and a report from the Secretary-General on a potential residual mechanism was requested.\(^{81}\)

A group of NGOs working under the auspices of the European Parliament’s Sub Committee on Human Rights recognised that positive input from the EU and its Member States was crucial during the phase of residual issues, that together they ‘have a strong responsibility to ensure that the rule of law prevails over financial considerations when discussing completion, residual, and legacy issues’, and that EU Member States in particular needed to ‘actively complement the work of the tribunals, including investigating and prosecuting suspects who are found to be living on their territories and who are not extradited or who cannot be tried before the tribunals anymore, to ensure justice and accountability’.\(^{82}\)

The EU has welcomed the work of the tribunals and of the Security Council working group on the residual issues, and declared that it stood ready to work with the Security Council in finding the most appropriate and cost-effective solutions, which would ‘both address questions of practical nature as well as preserve the immense achievements of both Tribunals

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\(^{80}\) See Fidelma Donlon, ‘Report on the Residual Functions and Residual Institution Options of the Special Court for Sierra Leone,’ (16 December 2008) (SCSL Report); Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the ICTY and the ICTR and the seat of the residual mechanism(s) for the Tribunals, UN Doc S/2009/258 (21 May 2009); and the International Centre for Transitional Justice, ‘Closing the International and Hybrid Criminal Tribunals: Mechanisms to Address Residual Issues’ (Briefing paper, 1 February 2010).


\(^{82}\) REDRESS, FIDH and ICLS Foundation, ‘Background Paper: The Unfinished Business of the UN International Criminal Tribunals of the former Yugoslavia (ICTY) and Rwanda (ICTR): The future role of the EU and its Member States’ (2 April 2009).
and would secure their long-term legacy’. 83 When the EU proclaimed its priorities for the 64th General Assembly of the UN, it avowed that ending impunity for the most serious international crimes must remain on the UN’s agenda, and support was expressed for the completion strategies and residual issues of both the ad hoc tribunals under discussion, along with the SCSL. 84 It was noted that the ‘legacy and integrity of the work of the ICTY, ICTR and the SCSL following the completion of their activities must be preserved. The EU fully supports their completion strategies and the establishment of mechanisms to deal with the residual functions’. 85

In addition to its assistance in relation to residual issues and completion strategies, the preservation of the legacy and integrity of the tribunals is of significant importance for the EU, in recognition of their ‘pioneering role’ in the struggle against impunity and their ‘outstanding contributions’ to international humanitarian law and international criminal law. 86 The EU steadfastly supported the two ad hoc tribunals in a number of ways because they furthered the EU’s aims of accountability, strengthening the rule of law, fostering reconciliation in the respective territories, contributing to peace and security in the respective regions, and bringing those guilty of the most serious violations of international humanitarian law to justice. 87

Understandably, both tribunals have their shortcomings and their detractors, 88 and the supposed success of each depends on what the aims of these institutions are perceived to be. In relation to enforcing international humanitarian law, they have at the very least revived the practice of holding those most responsible for serious violations accountable, have developed many aspects of international humanitarian law, have ‘decisively contributed to the development of international law and legal practice’, 89 and have thus set the stage for the emergence of a permanent international criminal court.

83 Statement on behalf of the EU by Sanja Štiglic, Security Council: Reports of the ICTY and the ICTR, (New York, 4 June 2008).
85 Ibid, para 27.
87 See, e.g., Statement by Eduardo Ramos on behalf of the EU, 62nd Session of the UN General Assembly, Fifth Committee, 22nd Meeting, Agenda Items 138 and 139, A/C.5/62/SR.22 (13 December 2007).
89 Statement by Lintonen on behalf of the European Union (n 68).
Having witnessed the difficulties encountered by the ad hoc tribunals, the EU realised and reaffirmed the urgent need for a Permanent International Criminal Court. The European Commission provided the 1998 International Campaign for the establishment of an International Criminal Court (ICC) with a grant to support its activities, including the provision of infrastructure for Non Governmental Organisation (NGO) participation during the ICC Conference in Rome in 1998, and a project to ensure effective participation of NGOs from developing countries in the Rome Conference. The EU has repeatedly been said to have had a significant influence on the creation of the ICC, and to be at the ‘forefront of the efforts for the Court’s establishment, development and operation’. There is a high degree of consensus and commitment among EU Member States for the promotion of international criminal justice, and all EU Member States, except France, were included in the like-minded group of over 50 states who lobbied for the establishment of a strong and independent international court leading up to the Rome Conference. This like-minded group, while having no formal role at the conference, dominated the configuration of the conference, and held many key functions. While the EU itself did not have any formally constituted role in the negotiations, the European Council declared itself strongly in favour of a universal and effective international criminal court and was determined to achieve a successful outcome to the conference in Rome.

While there was generally a high level of consensus in establishing an international criminal court, it has been noted that there were indeed divergences, between the positions of various Member States, and indeed between the different institutions of the EU, on some details of its configuration. It has been noted that no common position was articulated before

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91 The UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court, often referred to as the ‘Rome Conference,’ took place from 15 June to 17 July 1998 in Rome, Italy.
92 EU Support for the establishment of a permanent International Criminal Court, IP/98/422 (Brussels, 12 May 1998).
94 Groenleer and Schaik (n 93) 977.
96 Cardiff European Council, Presidency Conclusions, SN 150/1/98 REV 1 (Cardiff, 15-16 June 1998) para 96.
the negotiations in Rome, and that the stance of Member States differed on issues such as the independence of the prosecutor, the role of the Security Council and the jurisdiction of the court over internal armed conflicts.\(^97\) France and the UK, both also permanent members of the Security Council, joined the rest of EU Members States towards the end of negotiations, having been placated in part by the inclusion of the authority of the Security Council to defer investigations or prosecutions, and an opt-out clause with regard to war crimes.\(^98\) It would also appear that prior to the negotiations in Rome, the European Parliament, representing the people of Europe, had a much more progressive stance on certain aspects of the functioning of the Court than the European Council, representing the governments of Europe.\(^99\) The European Parliament wanted a fully independent prosecutor who could, on his or her own initiative, initiate and conduct investigations, and it also wanted the ICC to not only protect victims’ interests, but also those of witnesses, and to maintain the highest respect for the rights of the accused and the suspects. These positions went slightly further than that of the European Council, were widely agreed upon at the negotiations, and were finally incorporated into the Rome Statute.\(^100\)

All EU Member States voted in favour of the Rome Statute at the end of the Rome Conference.\(^101\) Shortly after the Rome Conference, the EU expressed its extreme satisfaction with what had been accomplished, noted that the Rome Statute of the International Criminal Court represented a great achievement, and proclaimed that:

[a] major gap in the international legal order had been closed with the agreement on the creation of a permanent court designed to prosecute and try the perpetrators of heinous crimes … The purpose of the Court was not only to punish those who committed crimes but through its mere existence to deter individuals from committing crimes in the first place. The culture of impunity


\(^100\) Ibid.

\(^101\) While more than 160 governments participated in the Rome Conference, 120 nations voted in favour of the adoption of the Rome Statute, 7 nations voted against the treaty, and 21 countries abstained: Coalition for the International Criminal Court, History of the ICC <http://www.iccnow.org/?mod=rome>.
had to end. Indeed, the Court would add a new dimension to international relations by reinforcing individual accountability.\textsuperscript{102} The EU also stated that all Member States would try to proceed to ratification without delay.\textsuperscript{103} Ratification of the Rome Statute has been a key element of the EU’s work to promote the ICC, and the Court itself is viewed by the EU as an essential means of ‘promoting respect for international humanitarian law.’\textsuperscript{104} An EU Common Position on the Court was updated in 2003 following the entry into force of the Rome Statute. All Member States at this point had ratified the Rome Statute, and the EU remained convinced that universal accession to the Statute was essential for the full effectiveness of the Court.\textsuperscript{105} The European Union and its Member States committed themselves through the Common Position to raising the issue of the widest possible ratification of the statute and its implementation in negotiations and political dialogues with third states, groups of states and regional organisations.\textsuperscript{106}

The EU adopted a revised Action Plan to follow-up on the Common Position, focused on the coordination of EU activities, the universality and integrity of the Rome Statute, and the independence and effective functioning of the ICC. Of the three different aspects of the Action Plan, the EU’s approach to promoting the universality and integrity of the Rome Statute, particularly with regard to third countries, is most relevant in terms of the external action of the EU. The Action Plan elaborated on methods for achieving the objective of universal participation, noting that maximising the political will of third countries may be necessary, and that the realisation of this objective may include activating various means such as political dialogue, démarches or other bilateral means, statements in multilateral bodies including the UN, and support for dissemination of the rules and principles of the ICC.\textsuperscript{107} It was also recognised that where political will is not an obstacle to ratification, logistical assistance may be required, such as expert assistance, financial support or access to information and data. The Action Plan provided that efforts relating to the ICC should be mainstreamed throughout EU external relations, and that ratification and implementation of

\begin{footnotesize}
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  \item \textsuperscript{102} Statement by Ernst Sucharipa on behalf of the EU, Statement at the 53\textsuperscript{rd} Session of the UN General Assembly on the Establishment of an International Criminal Court, Item 153, A/C.6/53/SR.9 (4 November 1998).
  \item \textsuperscript{103} Ibid.
  \item \textsuperscript{105} Ibid, Preamble (7).
  \item \textsuperscript{106} Ibid, art 2.
  \item \textsuperscript{107} Council of the EU, Action Plan to follow-up on the Common Position on the ICC, Doc 5742 (Brussels, 28 January 2004), B (1)(ii) [hereinafter EU Action Plan 2004].
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the Rome Statute should be raised as a human rights issue in negotiations of EU agreements and in political dialogue with third countries, including in the context of development cooperation.\textsuperscript{108}

To further the aim of universal participation in the court, the EU also endeavours to include a clause supporting the ICC in agreements with third countries. The most successful example of such a clause, at least for the purposes of scope of influence, is contained in the Cotonou Agreement on development cooperation, which applies to 78 African, Caribbean and Pacific countries. The Cotonou Agreement was revised in 2005, and a provision on support for the International Criminal Court was inserted. The preamble of the agreement notes that the establishment and effective functioning of the court constitutes an important development for peace and international justice, and the pertinent Article, concerning peace building policies and conflict prevention and resolution, provides that the parties reaffirm their determination to share experience in the adoption of domestic legislation to facilitate ratification and implementation of the Rome Statute, and to fight against international crime in accordance with international law.\textsuperscript{109} The parties to the agreement also undertake to move towards ratifying and implementing the Rome Statute and related instruments. It was difficult to achieve consensus on the clause, and prolonged debate was required for the parties to find an acceptable version.\textsuperscript{110} It may be that the EU’s stance as a dominant partner in the negotiations affected the successful outcome.\textsuperscript{111} It has been argued that, in creating an obligation to fight against impunity, the clause in the Cotonou Agreement actually goes a step further than the Rome Statute.\textsuperscript{112} The Cotonou Agreement is significant because it is the only legally binding instrument containing such a clause,\textsuperscript{113} and as such it exerts a measure of pressure on the third countries concerned. It has been criticised, however, for only obliging parties to ‘take steps’ to ratify the Rome Statute, rather than providing a concrete obligation to ratify and implement it, and the related instruments mentioned in the provision aren’t

\textsuperscript{108} Ibid, B(3)(iii).
\textsuperscript{111} Ibid.
\textsuperscript{112} See Antoniadis (n 93) p24.
\textsuperscript{113} At time of writing, as noted in The European Union and the International Criminal Court (May 2010) 16 <ec.europa.eu/europeaid/infopoint/publications/.../74g_en-icc_en.htm>.
specified. The ICC clause is also not an ‘essential element’ of the agreement, and therefore
the EU could not suspend cooperation on the basis of a failure to take such steps as
stipulated, leaving the EU with little leverage to pursue its stated aim of broader
ratification.

Aside from the Cotonou Agreement, similar versions of the standard ICC clause as
enumerated in that instrument have been agreed to in Partnership and Cooperation
Agreements (PCAs), Trade Cooperation and Development Agreements (TDCAs) and
Association Agreements (AAs) with a number of third countries, and also in the context
of country-specific Action Plans within the framework of the European Neighbourhood
Policy. The EU mainstreams the ICC in its external policies with respect to certain regions.
A Joint Africa-EU Strategy was adopted in 2007, whereby both parties agreed to work
together on a global level for the promotion and protection of international humanitarian law,
committed themselves to fighting impunity in all its forms, and underlined that the
prosecution of the most serious crimes, especially crimes against humanity, war crimes, and
genocide, should be ensured by measures at both the domestic and international level.

The EU also has a strategy which serves as a framework for EU relations with Central
Asia in relation to human rights, the rule of law and good governance and defines the EU’s
priorities for the region. In acknowledgement that the region remains significantly
underrepresented in the court system, the EU’s objectives in partnerships with countries in
the region include ratification of the Rome Statute, and the EU and its Member States have
also expressed their determination to share their experience in the adoption of the necessary
legal adjustments required to accede to the Rome Statute with the Central Asian states.
Some concern has been expressed in European circles that such an approach to the ICC with
the region may hamper ‘fragile relations’, and hurt the EU economically. On the one hand,
it was noted, ‘it can be seen as a continuation of the stronger human rights push of EU
countries such as the UK, the Netherlands and Sweden’, but on the other hand, some EU

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115 Ibid.
116 Ibid. It has been noted, however, that the ‘clause in principle has and continues to only serve the purpose of
an “advocacy tool” and arguably has not been overly effective as it is difficult to implement’, Wouters and
Basu, (n 46) 20.
117 Council of the EU, The Africa-EU Strategic Partnership: A Joint Africa-EU Strategy, Doc 16344/07 (Lisbon,
118 See The European Union and the International Criminal Court (n 113).
119 The EU Strategy was updated in 2009: The European Union and Central Asia: The New Partnership in
120 Andrew Rettman, ‘EU keen to bring International Criminal Court to Central Asia’ EU Observer (14 June
officials reportedly ‘see the ICC move as window dressing to appease NGO criticism and let
the EU get on with the task of brokering new gas pipelines to Turkmenistan, Uzbekistan and
Kazakhstan’. The success of the EU in inserting ICC clauses in agreements and creating
consensus on the ICC in its regional strategies can only be reliably measured by ratification
of the statute or accession to the ICC by the third countries concerned, or at least a ‘softening’
of governments’ approaches towards the court over a protracted period of time. The results of
this approach, therefore, whatever the motivation, may only become apparent over time,
particularly with respect to Asian states whose relationship with the court is at early stages of
development.

The EU also promotes the work of the court in a more general way by publicly
supporting it through regular statements in UN fora. The priorities of the EU are decided
by the Council of the EU before each new session of the General Assembly, and since the
55th General Assembly almost every statement of priority has included support for
international justice, accountability, and the ICC. Specific statements on the work of the
court and on ratification and implementation are also often made by each consecutive
Presidency of the EU, before the Sixth Committee of the UN General Assembly, and
statements are also made in support of the annual reports of the ICC. The EU contributes to
debates before the Security Council, and raises the work of the court if relevant in the specific
case.

The EU also actively promotes specific policies in relation to the work of the court,
and issues detailed public statements on the situations before the court. EU Member States
were particularly active in rallying behind the adoption of UN Security Council Resolution
1593 (2005) on the referral of the situation of Darfur to the court by the Security Council,

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121 Ibid.
122 On the EU’s degree of influence at the UN in relation to human rights, see Karen E. Smith, ‘Speaking with
113; see also more generally, Jan Wouters, Frank Hoffmeister, and Tom Ruys, The United Nations and the
123 See, e.g., Statement by Carl Henrik Ehrenkrona on behalf of the EU, 64th Session of the UN General
Assembly, 29th Plenary meeting, Agenda Item 75, A/64/PV.29 (29 October 2009).
124 See, e.g., Statement by Dirk Jan Van Den Berg on behalf of the EU, 59th Session of the UN General
125 Statement by Jan Grauls on behalf of the EU at the 65th UN General Assembly, Plenary (28 October 2010)
126 Statement by Pedro Serrano on behalf of the EU, Security Council Debate on The Promotion and
Strengthening of the Rule of Law in the Maintenance of International Peace and Security, S/PV.6347 (29 June
2010). The EU also includes information on its support of the ICC in its Annual Human Rights Reports, see
‘Human Rights and Democracy in the World: Report on EU action July 2008 to December 2009’ (European
Commission, May 2010) 32.
with France leading the initiative by tabling a resolution.\textsuperscript{127} The EU Presidency issued a general statement taking note of the decision to issue an arrest warrant for President Al-Bashir of Sudan and reiterating its full support for the court and its ‘key role’ in the promotion of international justice,\textsuperscript{128} and the EU’s High Representative has drawn attention to the arrest warrant on occasions when the President was present on the territory of state parties to the Rome Statute, reminding them of their obligations under international law.\textsuperscript{129} The EU also spoke with a collective voice in reaction to the US opposition to the court, with some commenting that the robust strategy of the US resulted in better coherence in the EU’s position:

\begin{quote}
US opposition, increasingly fierce after the ‘unsigned’ of the Rome Statute … drove EU Member States closer together. The EU formulated strong statements and reacted in concert against the US to preserve the integrity of the ICC Statute … In fact, EU Member States seemed more willing to formulate common positions and undertake joint actions because of, rather than in spite of, the US (op)position.\textsuperscript{130}
\end{quote}

One example of this coherent action is the Guiding Principles adopted by the EU in an attempt to safeguard the integrity of the Rome Statute.\textsuperscript{131} The Guiding Principles were drafted to regulate arrangements between a state party to the Rome Statute and the United States, particularly concerning certain conditions to be respected by state parties if entering into bilateral non-surrender agreements with the United States.\textsuperscript{132} This instrument has reportedly been useful in protecting third countries from violating their obligations under the Rome Statute:

\begin{quote}
These guidelines have been met with great interest in third countries. They have demonstrated that the EU was politically determined to hold firm to its commitment towards the Court. The widespread dissemination of the ‘Guiding Principles’ has provided helpful arguments to governments, civil society organisations and academics. It has undoubtedly played a role in limiting the impact of the US campaign.\textsuperscript{133}
\end{quote}


\textsuperscript{128} Council of the EU, Declaration by the Presidency on behalf of the European Union following the ICC decision concerning the arrest warrant for President Al-Bashir, 7200/1/09 REV 1 (Brussels, 6 March 2009).

\textsuperscript{129} Statement by the spokesperson of HR Catherine Ashton on President Al-Bashir, A147/10 (Brussels, 22 July 2010) in relation to Chad; and, Statement by the spokesperson of HR Catherine Ashton on President Al-Bashir’s visit to Kenya, A169/10 (Brussels, 27 August 2010).

\textsuperscript{130} Groenleer and Schaik (n 93) 990.

\textsuperscript{131} General Affairs and External Relations, 2450\textsuperscript{th} Council session, External Relations, C/02/279, Annex to Council Conclusions on the International Criminal Court (Brussels, 30 September 2002).

\textsuperscript{132} In relation to the bilateral agreements of the United States, see Schabas 2007 (n 95) 28-29.

\textsuperscript{133} Speech by Benita Ferrero-Waldner, Commissioner for External Relations and European Neighbourhood Policy, on ‘The International Criminal Court, Transatlantic Relations and Co-operation with Third Parties to
It has been highlighted that these principles were intentionally addressed not only to EU Member States, but to all countries, particularly acceding, candidate and associated states, and that they indicate that respect for the integrity of the ICC ‘constitutes a fundamental element of the Union’s foreign policy’. Another example is the reaction of the EU against impunity for crimes potentially committed by peacekeepers through an automatic renewal of Security Council resolution 1422, as suggested by the United States. The EU declared that the inclusion of a new phrase renewing the resolution:

> cannot be interpreted as permitting the automatic renewal of that resolution without taking into account the specific conditions under which such a request is being made. The European Union firmly believes that an automatic renewal of that resolution would undermine the letter and the spirit of the Statute of the International Criminal Court.

The EU welcomed the compromise reached on the issue which avoided affecting the integrity of the Rome Statute while allowing peacekeeping operations to continue uninterrupted.

Both examples demonstrate potent EU external action in the face of opposition to the work of the court, and it has been noted that the EU response to these challenges has proven effective in ‘containing some of the potentially most damaging US policies to undermine the ICC’.

Sustained engagement with the work of the ICC has been achieved through participation in the Review Conference of 2010. The Conference also afforded the EU an opportunity to express its continuing support of the court, not only in its mission in fighting impunity and as a court of last resort, but also ‘as a catalyst of international criminal justice and preventing and deterring those crimes that undermine the very essence of humanity’.

The EU’s public support of the court and generalised promotion of its work, universality and

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134 Antoniadis (n 93) 651. There was criticism in some quarters that the EU needed to take more effective steps to combat immunity agreements, see Amnesty International, ‘International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements’, IOR 40/030/2002 (October 2002).


integrity has been relatively consistent, however certain episodes, along with an uneven contribution to different aspects of the court’s work, have exposed inevitable political rifts that can arise from the application as opposed to the idea of international criminal justice.

One example of a particular episode that has drawn criticism of inconsistency is the lack of coherent EU support for accountability with respect to the military operation in Gaza in 2008/2009, which may have hampered efforts for a referral to the ICC in relation to the alleged crimes outlined in the Goldstone Report, as explored in chapter five of this study.139 Another example is the debate surrounding the decision of the prosecutor of the ICC not to investigate crimes allegedly committed by the British army in Iraq, including wilful killing and inhuman treatment, because the acts supposedly did not meet the elusive gravity threshold.140 Both examples highlight the charge of selectivity and bias that is often associated with the practice of international criminal justice. The President of the ICC has identified three distinct ways in which states and other actors can contribute to the work of the court: broadening (increasing ratifications), strengthening (enhanced international cooperation) and deepening (empowerment of national jurisdictions).141 It has been argued that the EU has been effective to varying degrees with respect to these three approaches, that significant effort has been expended to broaden and strengthen the court, but that deepening of the system remains a significant challenge for the EU and other supporters of the court.142 The EU undoubtedly retains the ‘competence, instruments and capacity’ to bolster the work of the court and has become ‘an invaluable institutional partner’,143 but must take care to be consistent in its contribution to the three areas mentioned above in order to fully support the aims of the court in ending impunity, and avoid to the extent possible becoming embroiled in the political controversies surrounding particular situations.

4.4 The EU and Universal Jurisdiction

4.4.1 The Principle of Universal Jurisdiction

The ad hoc international criminal tribunals and the International Criminal Court have undoubtedly revived international criminal justice, but they have also reinvigorated the

141 See Mertens (n 114).
142 Ibid.
143 Wouters and Basu (n 46) 28.
exercise of universal jurisdiction in national courts in European and other states, and have also reignited the debates surrounding the exercise of such jurisdiction. The completion strategies of the ad hoc tribunals, for example, have created the possibility of cases being transferred, not only to the territory in which the crimes were committed, but also to third countries that can exercise jurisdiction over the crimes. Rule 11bis of the Rules of Procedure and Evidence of the ICTY, for example, permits a designated trial chamber to refer a case to a competent national jurisdiction for trial, if such state has jurisdiction and is willing and adequately prepared to accept such a case. It has been commented that in this respect the ICTY itself has ‘endorsed’ the exercise of universal jurisdiction.

The principle of complementarity included in the Rome Statute of the ICC also paves the way for the exercise of universal jurisdiction, as it provides that the court shall determine a case inadmissible if the case is ‘being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’. The principle does not limit itself to those states with territorial jurisdiction over the crimes, so the possibility arises that states in a position to exercise universal jurisdiction effectively may do so, and the ICC will not intervene. The option of referrals by the Security Council of situations to the ICC, provided for in Article 14 of the Rome Statute has also been said to constitute a type of universal jurisdiction as it requires no territorial or other jurisdictional link with a state party.

A key factor in the development of universal jurisdiction, before the creation of the international criminal tribunals, is the grave breaches regime contained within the 1949 Geneva Conventions and 1977 Additional Protocol I. Grave breaches are defined in Article 147 of the Fourth Geneva Convention as involving:

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144 ICTY Rules of Procedure and Evidence, as amended, Doc. IT/32/Rev.43 (2009), Rule 11bis.
146 Rome Statute of the International Criminal Court, 2187 UNTS 90 (entry into force 1 July 2002) art 17 (1)(a).
147 Ryngaert (n 145) 50. Ryngaert states that the adoption of the Rome Statute may prove a catalyst for universal jurisdiction, that the ICC may even encourage the practice to ease its caseload: see p51.
any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The parties to the Geneva Conventions and to Additional Protocol I undertake to ‘enact any legislation necessary to provide penal sanctions for persons committing, or ordering to commit’ grave breaches, and are under the obligation to search for persons alleged to have committed or ordered to be committed such breaches.\textsuperscript{150} The parties must bring such persons before its own courts, or can hand such persons over for trial to another High Contracting Party. The articles outlining the imposition of penal sanctions for grave breaches are considered the first conventional provisions for an ‘unconditional universal criminal jurisdiction’ applicable to all High Contracting Parties.\textsuperscript{151} Despite the fact that a number of suspected war criminals have been prosecuted on the basis of universal jurisdiction for grave breaches,\textsuperscript{152} the regime has its shortcomings\textsuperscript{153} and has not had overwhelming success as a means of enforcement within domestic jurisdictions. The introduction of universal jurisdiction over certain violations has, however, had a degree of influence:

The grave breaches regime of the 1949 Geneva Conventions, even if it existed only on paper for the first 45 years, also probably acclimatized states to the idea of treaty-based, mandatory universal criminal jurisdiction. In doing so, it likely eased the passage of the long procession of international criminal conventions adopted since the beginning of the 1970s, all bar four of which oblige states parties to empower their courts to entertain criminal proceedings on the basis of, inter alia, universal jurisdiction.\textsuperscript{154}

There is no unanimously accepted definition of universal jurisdiction and there is much debate and division over the precise nature of the jurisdiction. Jurisdiction itself refers to the powers to prescribe, adjudicate and enforce, and such powers are conventionally linked to state sovereignty.\textsuperscript{155} Universal jurisdiction ‘transcends’ such sovereignty, and typically

\textsuperscript{150} Arts 49, 50, 129 and 146 of the Geneva Conventions I to IV respectively.
\textsuperscript{152} See Jean-Marie Henckaerts and Louise Doswald-Beck,\textit{ Customary International Humanitarian Law, Volume II: Practice} (CUP 2005), Chapter 44(B) Practice Relating to Rule 157.
\textsuperscript{153} For example by not being applicable to non-international conflict, until linked to war crimes and codified in the statutes of the \textit{ad hoc} tribunals and the Rome Statute, see Yves Sandoz, ‘The History of the Grave Breaches Regime’ (2009) 7\textit{JICJ} 657, 676-678.
\textsuperscript{154} O’Keefe (n 151) 826.
\textsuperscript{155} Bassiouni (n 148) 89.
involves a state enforcing conduct which is prescribed under international law.\(^{156}\) For present purposes, the exercise of universal jurisdiction entails a state seeking to punish certain conduct irrespective of where the violations or crimes occurred, the nationality of the suspect, or the nationality of the victim. States acting in this way can be seen as a ‘surrogate for the international community’,\(^{157}\) and only exercise such jurisdiction over certain acts considered to be of concern to the international community, for example piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.\(^{158}\) It can be defined both negatively and positively:

Negatively defined, it means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit. Positively defined, a State exercises universal jurisdiction when it seeks to punish conduct that is totally foreign, ie conduct by and against foreigners, outside its territory and its extensions, and not justified by the need to protect a narrow self-interest.\(^{159}\)

It can refer either to civil jurisdiction or criminal jurisdiction, although it usually refers to the latter, and the focus here will be on universal criminal jurisdiction, as the exercise of universal jurisdiction with respect to the investigation and prosecution of international crimes such as genocide, torture, crimes against humanity, and war crimes is currently more relevant to enforcing serious violations of international humanitarian law.\(^{160}\) The continuing relevance of the principle of universal jurisdiction is due to the obvious limits of the \textit{ad hoc} tribunals, other internationalised courts and the ICC: they can try a limited number of individuals in a limited number of situations at any given time. With regard to the \textit{ad hoc} tribunals and other ‘hybrid’ courts they have temporal and territorial mandates which restrict their scope, and with regard to the ICC it must be remembered that not all states are party to the Rome Statute, which limits its relevance in a number of regions, notwithstanding the possibility of a Security Council referral.

\(^{156}\) Bassiouni (n 148) 96.
\(^{157}\) Bassiouni (n 148) 96.
\(^{159}\) Luc Reydams, \textit{Universal Jurisdiction: International and Municipal Legal Perspectives} (OUP 2005) 5.
4.4.2 EU Member State Practice: The Background

Member States of the EU have been involved in a number of situations where the exercise of universal jurisdiction over international crimes was attempted or initiated, and there has been a higher concentration of such cases in Europe than in any other region. The Pinochet example is one of the most notorious instances of an EU Member State exercising universal jurisdiction, not least because the case concerned a former head of state.\(^{161}\) Augusto Pinochet was arrested by British police at the request of Baltasar Garzón, a Spanish judge, based on his investigations which were initiated in 1996 after a complaint from private individuals regarding international crimes committed in Chile. Pinochet’s extradition to Spain, although authorised by the House of Lords in the UK, never went ahead due to his ill-health. The case undoubtedly set a precedent, however, and certainly attracted unprecedented attention to the practice of universal jurisdiction in European states. It has been noted that the case made the principle a reality, that ‘in the aftermath of the indictment and arrest of Augusto Pinochet, universal jurisdiction became far more than a theoretical concept; it became actionable law in Europe – primarily in the northern and western States’.\(^{162}\) Aside from the Spanish extradition request under universal jurisdiction, Belgium, the United Kingdom, France, the Netherlands, Germany, Austria and Denmark have all had cases on their territory based on the exercise of universal jurisdiction.\(^{163}\) Legal reform limiting the potential for the exercise of universal jurisdiction has also been part of the reaction to these initiatives in Belgium, the United Kingdom and Spain, notwithstanding EU policy encouraging the use of this form of jurisdiction in an effort to avoid impunity for international crimes.

4.4.3 EU Policy

At the time of the Pinochet case, the EU did not have a systematic approach to universal jurisdiction, did not take a position on its exercise one way or another, and it was left to Member States to decide on the scope and application of the principle, and indeed whether to apply it at all (aside from any specific treaty obligations which mandated it). The Member

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\(^{162}\) Ibid 932.

States retain a great level of discretion in relation to the invocation of universal jurisdiction and its scope, but have since been brought into an EU-wide framework of cooperation and assistance when investigating and prosecuting certain crimes, and have been strongly encouraged to do so where appropriate. In 2002, responding to an initiative of the Netherlands, the Council adopted a Decision which set up a European network of contact points in respect of persons responsible for genocide, crimes against humanity, and war crimes. The Decision acknowledged the work of the ad hoc tribunals in prosecuting those who had violated international humanitarian law, and committed genocide and crimes against humanity. The Council also recognised that the Rome Statute affirms the principle of accountability for serious crimes, that the effective prosecution of such crimes must be ensured by national measures with the support of enhanced international cooperation, and that the statute also recalls that it is the duty of every state to exercise its criminal jurisdiction over those responsible for such crimes.

A decision was made to set up a network of specialised contact points for direct communication regarding the investigation of the crimes of genocide, crimes against humanity, and war crimes, because individuals who were suspected of committing serious crimes were increasingly seeking refuge in EU Member States, and the investigation and prosecution of those crimes depended on close cooperation between the authorities involved. This decision recognised for the first time that there was a need for coordination and mutual assistance in the investigation of these crimes, and that the EU could not stay silent on the issue while all EU Member States had made a commitment through the Rome Statute to bring an end to impunity by exercising their jurisdiction where possible. At the same time of the adoption of the foregoing decision, a Framework Decision on the European arrest warrant and the surrender procedures between Member States was also adopted. The objective of this Framework Decision was to abolish the system of extradition between Member States and replace it with a new simplified system of surrender of suspected or sentenced persons.

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164 Initiative of the Kingdom of the Netherlands with a view to the adoption of a Council Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, 2001/C 295/05 [2001] OJ C295/7.
166 Ibid.
for the purposes of prosecution or execution of sentences.\textsuperscript{168} The offences which are covered by the Framework Decision include crimes within the jurisdiction of the International Criminal Court, and so could facilitate the surrender of individuals suspected of such crimes to states willing to exercise universal jurisdiction.

A further decision was adopted by the Council in 2003, the aim of which was to provide for increased cooperation between Member States for the investigation and prosecution of persons who have participated in the commission of genocide, crimes against humanity or war crimes, as defined by the Rome Statute, and who are on the territory of a Member State.\textsuperscript{169} The means of cooperation provided in the Decision require the following action of Member States:

- ensuring that their law enforcement authorities will be informed when suspicion exists that someone having committed the crimes above has applied for a residence permit;
- assisting one another in investigating and prosecuting the crimes and sharing information on suspects;
- setting up or designating specialist units within their law enforcement authorities with particular responsibility for investigating and where appropriate prosecuting the crimes in question;
- and coordinating ongoing efforts to investigate and prosecute, including with the assistance of designated Contact Points who should meet at regular intervals.\textsuperscript{170}

With the adoption of these decisions, the Council of the EU had begun to actively encourage Member States to comply with their obligations under the Rome Statute and to play their role in the fight against impunity for international crimes. They have the potential to greatly facilitate cooperation between EU Member States in the exercise of universal jurisdiction, and to increase the domestic capacity to investigate and prosecute international crimes. The decisions are significant in that they ‘reinforce a cooperative approach to fighting impunity for the most serious crimes’, and further ‘provide the means for each Member State to operationally fulfil their obligations as prescribed in the Rome Statute in addition to the EU’s Common Position objectives’.\textsuperscript{171} Invoking the principle of universal jurisdiction to prosecute international crimes is one area where the most effective external promotion by the EU and its Member States is to lead by example, and at the very least the EU has a responsibility to ensure that the territory of the EU does not become a safe haven for those who have committed serious violations of international humanitarian and international criminal law.

\textsuperscript{168} Ibid, Preamble para 5.
\textsuperscript{170} Ibid, arts 1-5.
\textsuperscript{171} Wouters and Basu (n 46) at 25, citing Mauro Politi and Federica Gioia (eds), \textit{The International Criminal Court and National Jurisdictions} (Ashgate 2008) 129.
4.4.4 Developments in EU Member State Practice and Legislation

The approach and the practice of Member States vary greatly in this arena, and many states have undergone major shifts both embracing and sidelining the potential of this mechanism of enforcement. Since 2000, there has been a notable increase in prosecutions under universal jurisdiction, mostly in Western EU states, and those in favour of the practice would argue that this increase indicates that the principle ‘is now a practical reality that is gradually being assimilated into the functioning of criminal law systems in parts of Western Europe’. Eminent scholars have also conversely, and convincingly, argued that the success of this approach to combating impunity has been, in reality, relatively modest, and that the principle has ‘given off more heat than light’. In any case, debates surrounding the issue generate considerable attention and the practice of EU Member States in attempting to prosecute those responsible for serious violations of international law by invoking this principle is relevant in terms of the overall influence of the EU in the area of enforcement.

Some Member States had already begun domestic initiatives or had suitable legislation for the investigation and prosecution of the crimes before the EU became engaged with the matter, some adopted either practical or legislative changes around the time of the adoption of the 2002 decision, for example setting up specialised units for dealing with international crimes, and in some countries ‘judicial activism’ or apparent enthusiasm for applying the principle of universal jurisdiction resulted in subsequent pressure to limit the scope of its application. The seemingly progressive and proactive approach of Belgium and the United Kingdom in relation to universal jurisdiction, for example, inspired optimism before the key Council Decisions. Belgium’s relevant legislation, implementing its obligations under the Geneva Conventions and Additional Protocols of 1977, the ‘Act Concerning Punishment for Grave Breaches of International Humanitarian Law’, came into force in 1993, and was amended in 1999 to allow for universal jurisdiction over genocide and crimes against humanity, further implementing international obligations of the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute. A police

172 HRW 2006 (n 163) 3.
175 See HRW 2006 (n 163).
176 Kaleck (n 151) 932.
unit was created in 1998 to deal exclusively with international crimes, pre-empting similar initiatives elsewhere in the EU.\(^{177}\) The Belgian Code of Criminal Procedure also permitted victims to request the initiation of criminal investigations on the basis of universal jurisdiction, and it was this combination of specific legislation combined with the granting of rights to *parties civiles* to request investigations, that put Belgium at the forefront even before the EU started encouraging and coordinating activity.

Optimism about the potential for practice in this area also ‘flourished’ in the United Kingdom following the arrest of Pinochet in 1998.\(^{178}\) The Geneva Conventions Act had authorized jurisdiction over certain war crimes, including grave breaches of the four Geneva Conventions in the United Kingdom since 1957.\(^{179}\) The Criminal Justice Act of 1988 implemented the Convention against Torture and allowed courts to exercise universal jurisdiction over torture, and the International Criminal Court Act of 2001 granted jurisdiction over war crimes, crimes against humanity and genocide.\(^{180}\) United Kingdom legislation also provided for private individuals to request an arrest warrant directly from a district judge if the police refused to investigate a particular complaint.\(^{181}\) While the legislation looked favourable in terms of using universal jurisdiction to prosecute those suspected of committing international crimes, the practice has been mostly unsuccessful, and the response to such practice in both countries put the legislation in jeopardy as is discussed further below.

Activity in relation to the domestic investigation and prosecution of international crimes has increased in a number of countries since the Council Decisions, some examples implementing direct proposals and/or instructions of the Council. In Germany, specific legislation came into force just weeks after the first Council Decision regarding cooperation through the mechanism of Contact Points in 2002, with the adoption of the Code of Crimes against International Law, which gave German courts authority to exercise universal jurisdiction over war crimes, crimes against humanity, and genocide.\(^{182}\) The existing criminal code in Germany already gave jurisdiction over genocide and those international crimes

\(^{177}\) HRW 2006 (n 163) 11.

\(^{178}\) Kaleck (n 151) 940.

\(^{179}\) See HRW 2006 (n 163) 93, see also UK Geneva Conventions Act 1957, section 1.


\(^{181}\) Ibid.

which Germany was obligated to prosecute under its treaty obligations. The federal prosecutor in Germany maintained full discretion over investigations and prosecutions under the new Code of Crimes against International Law (which could be challenged by appealing before district courts). While the legislation changed in Germany, no specialized units or mechanisms to deal with universal jurisdiction cases were set up, and so it has been indicated that as a consequence the ‘the prospects for the effective exercise of universal jurisdiction laws are likely to be quite poor’.

In Denmark and the Netherlands, specialized departments were established to review asylum and visa applications which contain information suggesting involvement in international crimes, and specialised units were also set up within the police or prosecution departments. In Denmark, the Special International Crimes Office (SICO) was established in 2002 and is responsible for legal proceedings concerning international crimes where the suspect is a resident of Denmark. Norway, while not an EU Member State, is very closely tied to the policy and practices of the EU, and it set up a new unit for international crimes within its National Criminal Investigation Service in 2005, seemingly in response to suspects leaving Denmark for Norway following the former’s establishment of its specialized unit. In the Netherlands, a specialised war crimes team had been set up in 1998, but was restructured following evaluation in 2002 and became part of the Dutch national crime squad, and was also integrated into the Dutch prosecution services. In 2003 the Netherlands adopted the International Crimes Act which authorised the Dutch courts to exercise universal jurisdiction over genocide, war crimes and crimes against humanity where the perpetrator is present in the territory (for crimes committed after entry into force of the act). All of these developments since early the 2000s, combined with the three EU decisions aimed at facilitating cooperation, ostensibly improved the potential for Member States to investigate and prosecute individuals suspected of committing war crimes and other international crimes.

While examples such as those above point to the provision of increased attention and resources for the exercise of universal jurisdiction, some countries have also witnessed or are considering significant restrictive steps in the area, limiting the potential for the exercise of

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183 HRW 2006 (n 163) 63.
184 Kaleck (n 151) 951.
185 HRW 2006 (n 163) 12.
186 Ibid 6.
188 As noted in HRW 2006 (n163) 82.
189 Ibid 73.
190 Ibid 71.
this principle. Belgium is notorious for its volte face in this respect. Belgium was able to exercise universal jurisdiction under its ‘Act concerning Punishment for Grave Breaches of International Humanitarian law’, which entered into force in 1993 and, in 1999, was amended to include universal jurisdiction over crimes against humanity and genocide. The Belgian Code of Criminal Procedure allowed victims to request the initiation of a criminal investigation based on the principle of universal jurisdiction, a mechanism that became very important for victims and NGOs in Belgium. A number of high profile investigations created controversy around the Act and the related mechanism, and an amendment to the act in 2003 removed the right of victims to initiate a prosecution under universal jurisdiction, and immunity provisions were introduced. The Act was finally repealed in August 2003, although the main substantive provisions of the Act were introduced into the Belgian criminal code. In Spain, judgments issued in 2003 and 2004, in what is known as the Guatemalan Generals case, also placed restrictions on the practice of universal jurisdiction through a narrow interpretation of its application in the Spanish system, which required a link between the crime, the victims or the offender and Spain. The Spanish Constitutional Tribunal reversed this decision in September 2005, however, leaving the prospect of further cases involving this form of jurisdiction open.

The United Kingdom also reacted to what was perceived in certain quarters as an overly political use of universal jurisdiction. In 2005, an arrest warrant was issued following a request from a UK law firm for retired Israeli general Doron Almog. His arrest was sought for alleged participation in grave breaches of the Geneva Conventions in Gaza. In the event, Almog arrived in the UK but did not disembark from the plane, and so was never arrested. Apologies were issued to Israel following the incident, and changes to restrict universal jurisdiction were considered as a result. A new Police Reform and Social Responsibility Bill was presented to the UK Parliament in late 2010, which introduced the requirement that the consent of the Director of Public Prosecutions must be obtained before an arrest warrant can be issued on the application of a private prosecutor in relation to any offences over which the

192 HRW 2006 (n 163) 37.
195 Kaleck (n 151) 941.
UK has asserted universal jurisdiction.\textsuperscript{196} The bill, which became an Act of Parliament in late 2011, adds a political dimension to the decision to issue such warrants in the future, and limits the potential for private individuals to request warrants.

Vocal criticism of the application of universal jurisdiction in both Belgium and the United Kingdom has emanated in particular from Israel.\textsuperscript{197} Criticisms have labelled the use of such jurisdiction against Israeli officials and former officials as abusive and as a form of ‘lawfare’.\textsuperscript{198} Israel would appear to perceive itself as a primary target of such ‘lawfare’, whereby law is used or misused as a ‘substitute for traditional military means to achieve military objectives’, and, furthermore, by democratically unaccountable actors who seek to ‘subvert a country’s foreign policy and interfere with diplomatic relations’.\textsuperscript{199} The selective nature of the practice, both in relation to the cases chosen and the judicial systems utilized, the latter of which is often referred to as ‘forum shopping’,\textsuperscript{200} has aroused accusations of harassment,\textsuperscript{201} hounding,\textsuperscript{202} legal acrobatics,\textsuperscript{203} and as being essentially ‘sanctimonious and disingenuous’.\textsuperscript{204} Concerns that universal jurisdiction can be abused by those with a ‘particular axe to grind’,\textsuperscript{205} are not entirely unfounded. Certainly consistent practice may be ultimately unattainable, and a measure of caution and a reasonable approach to attaining consensus on the scope and breadth of the principle is warranted, but the invocations of ‘inquisitions and even witch-hunts’\textsuperscript{206} and such histrionics would appear somewhat excessive in this context. It is unlikely that national judges and states would instigate such tribulation and risk their diplomatic standing unless there was a reasonable amount of evidence available to indicate the commission of international crimes, and the only real consequence in some

\textsuperscript{196} Details on the Bill are available at <http://services.parliament.uk/bills/2010-11/policereformandsocialresponsibility/documents.html>.
\textsuperscript{198} Herzberg (n 197).
\textsuperscript{199} Ibid 2. See also Letter from Daniel Ayalon, Ambassador of Israel, to Nicholas Burns, Under-Secretary for Political Affairs, U.S. Department of State (6 Feb 2006) <http://ccrjustice.org/files/Israeli%20ambassador's%20letter.pdf>.
\textsuperscript{200} Herzberg (n 197) 41.
\textsuperscript{201} Ibid 41.
\textsuperscript{204} Ibid 7.
\textsuperscript{206} Henry Kissinger, ‘The Pitfalls of Universal Jurisdiction’ (2001) 80(4) Foreign Affairs 86.
cases for such suspects may be a certain curtailment on international travel.\textsuperscript{207} In any case, the political aspect of exercising universal jurisdiction in both Belgium and the UK was not neutralised through the legislative changes; rather the capacity for political decisions and the discretion surrounding these cases has been transferred from private parties or victims to the public prosecutors and attorney generals, following public controversy and diplomatic pressure from the nation states of the suspects involved.

4.4.5 The Response of the African Union to the exercise of Universal Jurisdiction

[L]ately, some in the more powerful parts of the world have given themselves the right to extend their national jurisdiction to indict weaker nations. This is total disregard of international justice and order. Where does this right come from? Would the reverse apply – such that a judgment from less powerful nations indicts those from the more powerful? This is mere arrogance which simply has to be resisted.\textsuperscript{208}

Diplomatic tension has arisen in the exercise of universal jurisdiction not only between EU Member States asserting such jurisdiction and the nation state of the suspect, such as arose between Belgium, the United Kingdom and Israel, but also between the EU itself and the African Union, following a number of cases which increased the sensitivity of some African nations towards the use of this form of jurisdiction. The issuance of a number of arrest warrants in Spain for Rwandan nationals accused of international crimes and the subsequent investigations under the principle of universal jurisdiction in 2008 in particular increased tension between the EU and the African Union.\textsuperscript{209} Andreu Merelles, an investigative judge of the Spanish Audencia Nacional (National High Court) issued an indictment in February 2008 charging 40 Rwandan nationals, including current or former military officials and members of military groups with crimes including war crimes, genocide, and crimes against humanity, over a period of 12 years, from 1990 to 2002.\textsuperscript{210} The investigations were originally based on complaints from the families of nine Spaniards who were killed, harmed or disappeared.

\textsuperscript{207} The travel limitation is mentioned as a form of ‘punishment’ by both Morrison and Weiner (n 203) 10; and Henry J Steiner, ‘Three Cheers for Universal Jurisdiction – Or is it Only Two?’ (2004) 5 Theoretical Inquiries in Law 199, 218.


\textsuperscript{209} See in general Julia Geneuss, ‘Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction’ (2009) 7 JICJ 945, 946. Previous to this, a number of warrants for Rwandan nationals were also issued in France, in 2006 by Judge Brugière, also causing controversy and resulting in Rwanda breaking its diplomatic ties with France, but based on the passive personality principle rather than on universal jurisdiction, as noted by Geneuss fn 1, see also Vanessa Thalmann, ‘French Justices Endeavours to Substitute for the ICTR’ (2008) 6 JICJ 995.

\textsuperscript{210} Commentator, ‘The Spanish Indictment of High-ranking Rwandan Officials’ (2008) 6 JICJ 1003.
during the period covered, but the indictment was expanded to include crimes committed against Rwandan and Congolese nationals, based on universal jurisdiction.\textsuperscript{211} The indictment prompted harsh criticism from the Rwandan government, and the dissatisfaction spread to the African Union. Paul Kagame raised the issue of universal jurisdiction before the UN General Assembly in 2008, stating that:

> It is important that this tool is not abused by powerful nations extending their jurisdiction over weaker countries. If unchecked, one can only imagine the legal chaos that would arise, should every judge in any country decide to apply local laws to other sovereign states. The United Nations has a duty to ensure that universal jurisdiction serves its original goals of delivering justice and fairness – as opposed to abuse.\textsuperscript{212}

A report of the Commission on the Use of the Principle of Universal Jurisdiction by some non-African States was submitted the same year, which considered the concept and practice of universal jurisdiction, and in particular whether and to what extent the concept had been abused by some non-African States, with a particular focus on the jurisprudence of the Belgian and Spanish courts.\textsuperscript{213} The Assembly of the African Union then considered the findings of the report and issued a decision in July 2008.\textsuperscript{214} The Assembly resolved that the abuse of the principle ‘is a development that could endanger international law, order and security’, that the abuse of the principle by judges from non-African States against African leaders, in particular concerning Rwanda, ‘is a clear violation of the sovereignty and territorial integrity of these States’, and that such indictments ‘have a destabilizing effect that will negatively impact the political, social and economic development of States and their ability to conduct international relations’.\textsuperscript{215} The decision requested that the matter be tabled before the UN Security Council and the UN General Assembly, that an urgent meeting be called between the African Union and the European Union to discuss the matter, and that all UN Member States impose a moratorium on executing the warrants until all legal and political issues were ‘exhaustively discussed’ between the African Union, the European Union and the United Nations.\textsuperscript{216} A Joint Communiqué was issued at the 11\textsuperscript{th} AU-EU Ministerial Troika meeting resolving to set up a technical \textit{ad hoc} expert group to clarify the

\textsuperscript{211} Ibid.
\textsuperscript{215} Ibid, para 5.
\textsuperscript{216} Ibid paras 6-8.
perspectives of both regional organisations on the principle, and to report to the next meeting.\textsuperscript{217}

The AU-EU Expert Report on the Principle of Universal Jurisdiction was issued in April 2009. The aim of the expert report was to foster better mutual understanding between the EU and the African Union regarding the exercise of universal jurisdiction, through issuing recommendations to the parties concerned.\textsuperscript{218} The recommendations included the following:

- that all states should strive to end impunity for genocide, crimes against humanity, war crimes and torture, and prosecute those responsible (R1);
- that African States should be encouraged to adopt legislative and other measures aimed at preventing and punishing those crimes (R2);
- that Member States of the AU and EU which have persons suspected of international crimes within their custody or on their territory should promptly institute criminal proceedings against these persons, unless they decide to extradite them either to the ‘territorial state’ or the suspect’s or victim’s national state (R4);
- that when exercising universal jurisdiction states should bear in mind the need to avoid impairing friendly international relations (R6);
- that AU Member States should consider establishing contacts with Eurojust and the AU Commission should consider cooperating with the EU network of contact points on genocide, crimes against humanity and war crimes (R15-16);
- and that the relevant EU bodies should assist AU Member States in capacity building in relation to the investigation and prosecution of international crimes (R17).

The recommendations successfully addressed many of the concerns of both parties, and can be seen as an ‘operational attempt to bridge possible gaps between the African and European countries in their approaches to universal jurisdiction’.\textsuperscript{219} A ‘cautious and cooperative exercise of universal jurisdiction’ is advocated by the experts,\textsuperscript{220} including a preference for territorial jurisdiction and for information sharing between the state exercising jurisdiction and the state of the suspects and/or victims.

The report, however useful for easing tensions between the EU and the African Union, did not end debate on the contentious issue, and in late 2009 the representative of Rwanda introduced a draft resolution on the scope of universal jurisdiction before the Sixth Committee of the General Assembly.\textsuperscript{221} The Resolution was adopted by the General Assembly shortly thereafter, requesting that the Secretary-General invite states to submit

\textsuperscript{217} The Troika meetings were held on 16 September 2008 in Brussels, and 20-21 November 2008 in Addis Ababa, see Council of the EU, The AU-EU Expert Report on the Principle of Universal Jurisdiction, 8672/1/09, REV 1 (Brussels, 16 April 2009).
\textsuperscript{218} Ibid para 46.
\textsuperscript{219} Geneuss (n 209) 947.
\textsuperscript{220} Ibid 961.
\textsuperscript{221} For a summary of work of the 64th Session of the Sixth Committee, see <http://www.un.org/en/ga/sixth/64/UnivJur.shtml> accessed 10 January 2011; the Draft resolution is ‘The scope and application of the principle of universal jurisdiction’, A/C.6/64/L.18 (6 November 2009).
information and observations on the scope and application of the principle. The Report of the Secretary General was issued in July 2010 and represents the most complete survey of governmental perspectives on the principle publicly accessible to date. The Report includes comments and observations from thirteen EU Member States. It is likely that the political and selective nature of the exercise of universal jurisdiction will continue to create controversy between states, and especially between EU Member States who have become relatively active in this area in the past decade or so (particularly with regard to cases concerning African nationals), and AU Member States who have so far never exercised such jurisdiction. The exercise of universal jurisdiction is an example of decentralized enforcement, and such an approach to the enforcement of international law inevitably presents ‘classic collective-action problems’:

Few states are materially affected by atrocities committed abroad, so few governments have incentives to prosecute offenders, even if they could obtain jurisdiction. Politically, the benefits of prosecution are limited; the costs may be significant. Material resources are also limited, and governments may choose to devote them to more immediate concerns. Some states may simply be incapable of mounting prosecutions. In spite of the efforts of human rights groups, then, national prosecutions have been few in number and narrowly targeted.

This evokes the notion of self-interest or rational choice theory in relation to the enforcement of international law. States will weigh the costs, including reputational costs, associated with attempting to prosecute the nationals of another state, against the reputational and other benefits that may accrue from attempting to enforce the law.

Ultimately, the controversy ignited by the actions of certain European judges resulted in a constructive debate, and the EU and its Member States can now carefully consider the perspectives offered by both the African Union in the expert report, and by many more states in the Secretary’s General report, when deciding how to approach the application of the principle of universal jurisdiction. The commitment of the EU to ending impunity and to enforcing violations of international humanitarian law, however, warrants both the continued inclusion of the principle in what is often referred to as the ‘toolbox’ of post-conflict and transitional justice options and support for the exercise of universal jurisdiction when appropriate in the practice of Member States.


4.5 Conclusion

It would appear that promotion of international criminal justice is a particular strength of the EU in terms of enforcing international humanitarian law, and it is an area where the rhetoric of the EU, at least in relation to the ICTR, ICTY and ICC is adequately reflected in practice for the most part. It is also an area where, unlike many areas related to influencing international humanitarian law, standard clauses or conditionality may work as an inducement factor in relation to ratifying statutes or turning over fugitives suspected of war crimes. The EU is arguably the most important regional organisation in terms of support for international criminal justice, given its considerable financial, logistical, and diplomatic support for ad hoc courts and tribunals, the International Criminal Court, and the exercise of universal jurisdiction over international crimes, as demonstrated in this chapter. All of the examples of international criminal justice discussed above afforded the EU an opportunity to enhance its reputation and credibility as a normative international actor through its external relations, but the closer the EU is identified with the various mechanisms, the more exposed it can become in terms of risking its legitimacy when controversies arise in relation to those areas of enforcement.

The ad hoc tribunals of the former Yugoslavia and Rwanda both received considerable funding and support from the EU, and the former benefitted greatly from the EU’s exertion of pressure on certain states to arrest suspects, while the latter benefitted from the assistance of certain EU Member States who incarcerated convicted persons or concluded enforcement of sentence agreements. The EU also offered its support for the completion strategies and residual mechanisms of both tribunals, and has supported a number of other ad hoc and hybrid institutions. Some of the drawbacks and failures of these institutions, however, may in turn come to be associated with the EU. The very creation of the ICTY, for example, has been perceived as a result of the failure for Europe to react effectively to the outbreak of conflict in the Balkans. The failure to hold NATO to account for alleged war crimes also threatened the credibility of the tribunal, and assisted claims of ‘victor’s justice’ and selectivity (with a pro-Western bias),224 in enforcing international humanitarian and

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international criminal law, which in turn could affect the legitimacy of the EU as a promoter of international criminal justice.

The International Criminal Court has also benefitted from a close relationship with the EU, to the extent of having the advantage of a cooperation agreement between the parties.\textsuperscript{225} It greatly benefits the ICC to have such a strong regional partner, especially in the face of forthright opposition from the US and certain African nations. The EU has been given occasion to actively engage with the international struggle against impunity by supporting the court on a number of fronts. The opposition of the US to the ICC in fact afforded the EU a unique opportunity to identify itself as a normative actor in contrast to the US position. Sibylle Schiepers has argued that this construction of the EU identity evolved around three areas: EU multilateralism versus US unilateralism, EU defending international law versus US jeopardising international law, and further highlighted the EU’s reliance on diplomatic means of power as opposed to the US dependency on military tools.\textsuperscript{226} Thus while the court benefitted from EU support, the EU also benefitted from its engagement in terms of improvements in its perceived image and identity as a normative international actor. The ICC was also supposed to have avoided some of the legitimacy deficits that the \textit{ad hoc} tribunals had suffered from, and had been instilled with structurally inherent legitimacy in terms of who established the court (a broad grouping of states rather than the Security Council), and in terms of the principle of legality (only crimes committed \textit{after} entry into force of the Rome Statute were considered).\textsuperscript{227} Unfortunately, the charge of selectivity and a somewhat imperialistic approach to international criminal justice has not disappeared with the era of the ICC. The controversies surrounding the alleged crimes committed in Gaza and in Iraq, and the failure for either situation to be investigated by the court will cause many to question the credibility and independence of the court, and the justification behind its selectivity.\textsuperscript{228} As the EU is closely aligned with the court, this may in turn affect the credibility of the EU as an actor in this respect. Anderson has also questioned the exact nature of the attempts to ‘universalise’ international criminal law and human rights, and concluded that if it is not precisely what is sometimes charged – that the ICC is a court aimed at Africa and Africans – international criminal law and the ICC are efforts to


\textsuperscript{228} For a discussion of some of the legitimacy issues associated with the current prosecutorial strategy, see Victor Peskin, ‘Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan’ (2009) 31(3) \textit{Human Rights Q} 655.
address the ‘unstable’ world, a service which the ‘stable’ provide to the ‘unstable’, even if we politely and politically call it ‘universal’. 229

Similarly, while the EU attempts to persuade certain countries to ratify and implement the Rome Statute, such as ACP countries through the Cotonou Agreement, similar ICC clauses are not included in its agreements with other, more powerful countries, such as China, Russia, or the US. This differentiated treatment implies a double standard and raises questions around the legitimacy of the EU as a consistent normative actor. 230 It is also inconclusive as yet whether the promotion of international criminal justice through diplomatic channels and by inserting additional clauses in some agreements, especially with respect to countries which seek to gain from closer relations with the EU and are willing to pander to their requests at least superficially, is merely a form of tokenistic promotion, or whether it will actually influence and facilitate the internalisation of the norm of accountability throughout radically different societies around the world.

In relation to EU support for the third mode of international criminal justice discussed, universal jurisdiction, it should be borne in mind that it is highly controversial, both in theory and in practice. The EU should facilitate the capacity of EU Member States to exercise universal jurisdiction where appropriate, but it may not be appropriate for the EU to get involved on a political or diplomatic level with individual cases in what is already a charged and contentious area. The exercise of universal jurisdiction, or at least the domestic investigation and prosecution of certain crimes under an appropriate form of jurisdiction, can be seen as a form of deepening support of the International Criminal Court. The motivation of certain states to exercise universal jurisdiction may come from the reality of victims or suspects present on the territory, from an unwillingness to be or to be perceived as a ‘safe haven’ for war criminals, or from a commitment to ending impunity despite any connection to the crimes committed, all of which are justifiable reasons and have little to do with ‘settling political scores’, 231 as is sometimes charged. The practice of universal jurisdiction is also an area where the dynamics of international relations comes into play, to the extent that it has been stated that one of the ‘great challenges’ of international law is to reconcile the objectives of accountability for gross violations of human rights and international humanitarian law with stability in international relations. 232

230 Mertens (n 114) 15.
231 Jalloh (n 222) 2.
232 Donovan and Roberts (n 160) 162.
Overall, the promotion of international criminal justice can lead to enhanced enforcement of international humanitarian law, but unless it also leads to increased levels of deterrence, it may not have an impact on compliance during armed conflicts. It has been charged that international criminal law itself might undermine compliance during armed conflicts, for example, by eroding reciprocity and taking the focus away from the social organisation of groups and group conduct in favour of an exclusive concern around individual conduct, and so the EU’s involvement in the project of international criminal justice might even counteract its other efforts to promote compliance. Just as the counterterrorism discourse may have distracted from improving the system of international humanitarian law, as discussed in chapter three, perhaps the overwhelming focus on international criminal justice detracts from trying to affect compliance before or during the commission of violations, rather than addressing violations after all the damage has been done. While there will always be disagreements over the perception of certain conduct on the battlefield, international criminal justice is a much more politicised project, and compliance with international humanitarian law would not appear to have the same international relations implications that international criminal justice does. In order for both the EU and for international criminal justice to retain credibility and legitimacy, they must consistently apply the principle of accountability, and avoid a situation where the project becomes an ‘instrument of hegemony for powerful states’:

It is reasonable to assume that the progressive internalization of international criminal justice will gradually spread from the periphery to the center and give rise to a more inclusive universal framework, possibly through a widely ratified ICC statute together with vigilant and invigorated national or foreign courts. If the international community is to move beyond the currently fragmented assortment of jurisdictions to a coherent system of justice, a great burden falls on the shoulders of influential states to set a fitting moral example.

The EU and its Member States may have to tread carefully in this area of enforcement, and use their ‘soft power’ only when and where appropriate. A degree of cooperation and assistance between EU Member States is, however, imperative for the successful investigation and prosecution of certain crimes, and some would argue that the EU should go further in ensuring adequate coordination, for example by: increasing the involvement of

233 Anderson (n 229) 340-343, and 346-349.
Europol and Eurojust;\textsuperscript{235} by increased harmonization of the divergent procedural and jurisdictional regimes in Member States;\textsuperscript{236} by taking a more proactive approach with certain members of the Security Council with regard to the ratification of the Rome Statute;\textsuperscript{237} and by learning lessons from the coordinated approach to transnational crimes such as terrorism.\textsuperscript{238} The implementation of these recommendations would all assist in the development of the EU’s strategy for supporting international criminal justice. There is no doubt that the investigation and prosecution of violations of international humanitarian law will continue to be of utmost importance for enforcing the law. It has been affirmed that despite the many difficulties and controversies encountered the most effective way to enforce international humanitarian law is the prosecution of offenders in national or international jurisdictions, and that ‘the rule of international humanitarian law depends on its enforcement through the prosecution and punishment of its offenders’.\textsuperscript{239} Whatever developments may ensue as the EU deepens its engagement with the enforcement of international humanitarian law through international criminal justice; its contribution to date as an international organisation has been exceptional.

\textsuperscript{235} Ryngaert (n 145) 72.
\textsuperscript{236} Ibid 76.
\textsuperscript{237} Wouters and Basu (n 46) 28.
\textsuperscript{239} Cassese (n 4) 17.
Chapter 5:

A Lost Opportunity? The EU’s Response to Violations of International Humanitarian Law in Gaza

‘The European Union has never and will never let the Palestinian people down’

Javier Solana

‘There is no country outside the European continent that has this type of relationship that Israel has with the European Union. Israel, allow me to say, is a member of the European Union without being a member of the institutions’

Javier Solana

5.1 Introduction

The United Nations has a long history of invoking Common Article 1 of the 1949 Geneva Conventions in an attempt to involve third states in the endeavour to ensure respect for international humanitarian law in the context of the conflict in the Middle East. The European Union has more or less consistently supported this application of international law. The EU has expressed this through repeatedly calling for the parties to respect international humanitarian law, and through engaging in political dialogue in an attempt to ensure respect. Towards the end of the Cold War, the EU was even taking the lead in seeking to apply this approach. The European Council met in Dublin in 1990 and adopted a declaration which referred to the obligation on parties to the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War to respect and to ensure respect for its provisions. The European Council highlighted that its Member States had persistently called on Israel to adhere to its obligations towards the Palestinian population protected by that convention, and observed that Israel had notably ‘failed to do so in a number of important areas’. The United States, however, took the lead in initiating a peace process in 1991, and these efforts ‘were

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1 Address by EU High Representative for CFSP, Javier Solana, submitted to the 19th Arab League Summit, (Riyadh, 28 March 2007) Doc S117/07. All websites in this chapter were last accessed 28 April 2011, unless otherwise indicated.

2 Address by EU High Representative for CFSP, Javier Solana, at the Presidential Conference (Jerusalem, 21 October 2009).


5 Statement by Mr Enrique Baron Crespo, President of the European Parliament, on the Results of the European Council in Dublin 25 and 26 June 1990, SN 60/190, Annex V: Declaration on the Middle East.

perceived as requiring the suspension of any further discussion of efforts to enforce international law as the appropriate mechanism for protecting Palestinian human rights and promoting conflict resolution’.\(^7\) Thus, from relatively early on, deference to the United States and sensitivity towards the peace process expressed through sidelining calls and avoiding measures to ensure respect for international humanitarian law was the approach of the EU, despite prior signals to the contrary. This shift marked a movement away from a response centred on legal obligation and accountability for violations of international humanitarian law, to a response which prioritized facilitation of the peace process as the foremost concern for all parties involved.

This approach, combined with prioritization of maintaining close diplomatic and economic relations with Israel, is illustrated in this chapter through an exploration of the response of the EU to a particular crisis in the course of the protracted conflict: the military operation known as Operation Cast Lead which took place in 2008. This particular situation was selected, not only because of the close relations between the EU and both sides of the conflict, but also because it held the potential for the EU to invoke all of the means of action set out in the EU guidelines and therefore to uphold its commitment to promote compliance with international humanitarian law in an exceptionally visible way. A background to relations between the EU and both Israel and Palestine is initially provided, to establish the legal and policy context, and the deteriorating humanitarian situation in Gaza leading to the military operation is also described as it is relevant to the impact that the operation had on the population of Gaza. The uneven response of the EU and its Member States to both the operation itself, and to the investigation of the crisis and to the Goldstone Report is then detailed. Consideration is finally given to the opportunity presented to the EU to influence the situation in Gaza through the flotilla incident, which drew attention back to the ongoing humanitarian situation, the ongoing character of the violations of international humanitarian law and the lack of accountability therein.

5.2 **Background to EU and Israel/Palestine Relations: Legal and Policy Basis**

In 1995 Israel signed two important instruments which established the present framework for EU-Israel relations. The Barcelona Declaration established the Euro-Mediterranean

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\(^7\) Welchmann (n 4) 180. It is often argued that the continuing peace process is an intentional strategy to avoid legal obligations, for a critique see e.g., Guy Ben-Porat, *The Failure of the Middle East Peace Process? A Comparative Analysis of Peace Implementation in Israel/Palestine, Northern Ireland and South Africa* (Palgrave 2008).
Partnership for political, economic and social cooperation between the fifteen existing EU Member States and fourteen non-member countries in the Mediterranean region, including Israel. In the realm of the political and security partnership established, the parties pledged to promote and strengthen the peace, stability and security of the Mediterranean region. The parties undertook in this context to: act in accordance with the United Nations Charter and the Universal Declaration of Human Rights, along with other obligations under international law; develop the rule of law and democracy; fulfil in good faith the obligations they have assumed under international law; and respect the equal rights of peoples and their right to self-determination.8

The legal framework for current bilateral relations between the EU and Israel was established by the Association Agreement signed in Brussels in 1995.9 The aim of the Agreement was to provide the framework for political dialogue and facilitation of the development of close political relations between the parties and to encourage regional cooperation with a view to increased economic and political stability.10 Article 2 of the instrument provides that relations between the parties shall be based on respect for human rights and democratic principles, which ‘constitutes an essential element’ of the Agreement.11 This clause raised the hopes of human rights organisations, which recognised and continue to highlight the potential for activating this conditionality in response to human rights violations, and the European Parliament adopted a resolution calling on the Commission and the Council to suspend the Association Agreement in 2002 on this basis, a call which went unheeded.12 Interestingly, it has been noted that a number of European parliamentarians sought clarification at the time of the adoption of the agreement on whether the respect for human

10 Ibid, Article 1.
11 Ibid, Article 2. Article 2 operates in conjunction with article 79, which allows for suspension of part or all of the Agreement.
rights in the clause envisaged inclusion of respect for international humanitarian law, a query which remains unresolved.\textsuperscript{13}

The ties between the EU and Israel increased with Israel’s inclusion in the European Neighbourhood Policy, launched in 2004, which was developed to facilitate closer economic integration and political cooperation between the EU and the non-member countries involved.\textsuperscript{14} The policy is intended to build on a mutual commitment to the common values of democracy, human rights, rule of law, good governance, market economy principles and sustainable development.\textsuperscript{15} The European Neighbourhood Policy became ‘activated’ for Israel with the adoption of the bilateral Action Plan. The Action Plan sets out a set of agreed priorities in greater detail than the Association Agreement, and sets out a timeframe for progress to occur.\textsuperscript{16} Amongst these priorities are enhanced political dialogue and cooperation, based on shared values including human rights and efforts to resolve the Middle East conflict, and increased economic integration.\textsuperscript{17} While recognising the right of Israel to self-defence, the Action Plan notes the necessity of adherence to international law, and the ‘need to preserve the perspective of a viable comprehensive settlement, minimising the impact of security and counter-terrorism measures on the civilian population, [facilitating] the secure and safe movement of civilians and goods, safeguarding, to the maximum possible, property, institutions and infrastructure’.\textsuperscript{18} The promotion of joint cooperation on areas such as the fight against impunity for perpetrators of genocide, war crimes and crimes against humanity was also agreed upon.

Regular progress reports on the implementation of the policy and the Action Plan are produced by the Commission, including coverage of political dialogue and cooperation, and regional and international issues.\textsuperscript{19} The adoption of the Action Plan signalled a thawing of relations between the EU and Israel, which had previously suffered a measure of decline due to the collapse of the negotiations in early 2000 and the second intifada, and made apparent the EU intention to upgrade relations in line with the earlier Essen conclusions of 1994.\textsuperscript{20}

\textsuperscript{13} Welchman (n 4) 187. See Select Committee on Foreign Affairs, First Report, Appendix 7: Memorandum submitted by the Centre for International Human Rights Enforcement, <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmfaff/100/100ap08.htm>.


\textsuperscript{15} Ibid.


\textsuperscript{17} For a full list of priorities, see Action Plan, ibid.

\textsuperscript{18} Ibid.


European Council in Essen had declared that ‘Israel, on account of its high level of economic development, should enjoy special status in its relations with the European Union on the basis of reciprocity and common interests. In the process regional economic development in the Middle East including in the Palestinian areas, will also be boosted’. Eran has identified a number of factors which resulted in this ‘profound change of direction’ in EU-Israeli relations, including the unilateral disengagement of Israel from the Gaza Strip, the agreement to allow an EU monitoring mission at the Rafah Crossing (EUBAM Rafah), the agreement to allow the EU to provide assistance to the Palestinian Authority in the form of a police assistance mission (EUPOL COPPS), and the involvement of EU Member States in the United Nations Interim Force in Lebanon (UNIFIL). It has been indicated that particularly the latter three EU engagements in monitoring and other assistance missions indicated a ‘softer’ and more engaged approach towards the EU’s involvement in the Middle East, and that Operation Cast Lead was a decisive turning point in terms of suspending the positive development of relations between the two parties.

The Palestinian Authority is also a partner in the European Neighbourhood Policy and concluded an Action Plan to enhance economic and political cooperation with the EU in 2005, the implementation of which in part was intended to assist fulfilment of provisions of the Interim Association Agreement which forms the legal basis of the relationship between the parties, and was signed by the Palestinian Liberation Organisation on behalf of the Palestinian Authority. The Interim Association Agreement on trade and cooperation was intended to fulfil a number of aims, including establishing a comprehensive dialogue, strengthening economic relations, contributing to the economic and social development of the occupied Palestinian territory, and encouraging regional cooperation with a view to

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22 See Eran (n 20) 59.
26 See Eran (n 20) 59-60.
consolidating economic and political stability. The agreement includes a human rights clause similar to that of the EU-Israel Association Agreement:

Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the universal declaration on human rights, which guides their internal and international policy and constitutes an essential element of this Agreement.\(^{29}\)

The European Commission – Palestinian Authority Joint Committee, along with four sub-committees, one of which deals with human rights, good governance and the rule of law, meets regularly to discuss implementation of the Agreement and the Action Plan.

The EU is active in a wide range of fields in the occupied Palestinian territory, including humanitarian aid, justice, governance and rule of law, agriculture, health, civil society, and education. Some of the priorities included in the Action Plan are: to facilitate efforts to resolve the conflict and to alleviate the humanitarian situation; to enhance political dialogue and cooperation based on shared values; and to strengthen the rule of law and respect for human rights.\(^{30}\) The European Commission prepares progress reports to track the implementation of the Action Plan, as is the case with Israel. The Commission noted that in 2008 both political reform and institution building, along with the situation regarding human rights suffered setbacks as a result of the factional divide between the West Bank and Gaza.\(^{31}\)

A ‘dramatic regression’ in the development of the private sector in Gaza was also witnessed, due to the blockade, with the overall economic growth in the occupied Palestinian territory remaining ‘anaemic’.\(^{32}\) It was recognised that the situation facing the impoverished population in Gaza was exacerbated by the military action, which ended the year ‘with one of the gravest chapters in the Israeli-Palestinian conflict’.\(^{33}\)

The EU works with the Palestinian Authority to realise the objective of a two state solution with a democratic, viable Palestinian state living side-by-side in peace with Israel.\(^{34}\) The EU’s policy on the broader situation in the Middle East has been outlined through a number of public declarations which cover various aspects of the conflict, such as the right to security and existence for all states in the region, including Israel, and the recognition of the

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\(^{29}\) Ibid, Article 2.

\(^{30}\) EU-Palestinian Authority Action Plan (n 27).


\(^{32}\) Ibid.

\(^{33}\) Ibid 3.

\(^{34}\) For information on the relations see: <http://ec.europa.eu/delegations/westbank/eu_westbank/political_relations/index_en.htm>.
legitimate rights of the Palestinian people,\textsuperscript{35} support for the creation of a viable and sovereign Palestinian state,\textsuperscript{36} and details of the final status solution, such as acceptable borders.\textsuperscript{37} The European Security Strategy provides that resolution of the conflict is a strategic priority for Europe, and is key to solving the broader issues in the Middle East.\textsuperscript{38} The Strategy commits the EU to remaining engaged and willing to commit resources to the problem until it is solved – and the solution envisaged is the two state solution.\textsuperscript{39} The EU supported the Roadmap for Peace\textsuperscript{40} as part of the so-called ‘Quartet’ of the European Union, the United States, the Russian Federation and the United Nations, and also provided support for the Annapolis Process which was intended to accelerate implementation of the commitments made in the Roadmap for Peace.\textsuperscript{41} The Middle East Peace Process remains a top priority for the EU and it continues to engage with the parties involved and third parties on both practical and political levels to move towards a lasting solution.\textsuperscript{42}

5.3 The Humanitarian situation in Gaza Prior to Operation Cast Lead

Prior to the military strikes named ‘Operation Cast Lead’ launched by Israel in late 2008, the humanitarian situation in Gaza had been deteriorating for a number of years. Three notable events had significantly changed the political landscape: Israeli disengagement from Gaza, the end of Ariel Sharon’s role in the Israeli government, and the election of Hamas.\textsuperscript{43} The former two events will not be discussed at length here; however the disengagement of Israel is relevant in relation to the applicability of international humanitarian law. There is debate as to whether the unilateral disengagement resulted in an ‘unoccupied’ Gaza, although as the borders and sea remained under Israeli control, for the purposes of international humanitarian law there is general consensus that Israel continues to be an occupying power with regard to


\textsuperscript{39}Ibid.

\textsuperscript{40}See <ww.un.org/media/main/roadmap122002.pdf>.

\textsuperscript{41}The EU also adopted an Action Strategy for the Middle East Peace Process in 2007.

\textsuperscript{42}See, e.g., European Council Declaration on the Middle East, Annex 3, Brussels European Council 11 and 12 December 2008 Presidency Conclusions 17271/1/08 REV 1 (Brussels, 13 February 2009).

The international boycott of the Hamas government, who were democratically elected in the Palestinian Legislative Council elections in January 2006, resulted in a rapid decline of the economy.

A few days after Hamas defeated Fatah in the Palestinian Parliamentary elections, the Quartet met to deliberate and decide on their joint reaction to this unanticipated outcome. The Palestinian people were congratulated on a free and fair electoral process, but the Quartet also stated their view that all members of the future Palestinian government were to be committed to nonviolence, recognition of Israel, and acceptance of previous peace agreements and obligations. The Council of the EU later expressed grave concern that the new Palestinian government had not committed itself to fulfilling these three conditions, and it indicated that it would review its direct assistance to the government in line with the Quartet’s stance. The Council also called on Israel to desist from any action contrary to international law, and to take steps to improve the humanitarian situation of the Palestinians, including a resumption of tax and customs transfers withheld. Although direct assistance to Hamas was halted by the EU as part of the Quartet approach, the EU continued to deliver funding to Palestinians through a number of channels. EU financial assistance in this respect is multifaceted, as it is delivered through a number of organisations and institutions, and is delivered for humanitarian and development objectives, along with security objectives. In order to bypass Hamas while also attempting to avert a humanitarian disaster in Gaza, however, the European Commission, in collaboration with the World Bank, was required to create a Temporary International Mechanism (TIM) through which funds were channelled to the occupied territory.

Despite this endeavour to offset the negative consequences of the international boycott of the Hamas government, the humanitarian situation remained dire. Many analysts and scholars have criticised the boycott for being both illogical, in terms of lacking a sound

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49 Since 2008 the TIM has been replaced by PEGASE, for details see <http://eeas.europa.eu/occupied_palestinian_territory/tim/index_en.htm>.
legal basis for demanding recognition of Israel from a non-state entity, and counterproductive and ‘extremely short-sighted’, from the perspective of increasing local support for Hamas rather than diminishing the group’s power, among other reasons.\textsuperscript{50} Richard Falk has surmised that it is a ‘bitter irony that Hamas was encouraged, especially by Washington, to participate in the elections to show its commitment to a political process (as an alternative to violence) and then was badly punished for having the temerity to succeed’.\textsuperscript{51} It has also stood out as an exceptional situation whereby the occupied population or parts thereof are boycotted rather than the occupying force or government being the target of such sanctions.\textsuperscript{52} A leaked End of Mission report by a senior United Nations official and envoy to the Quartet concluded that the three principles or conditions ‘effectively transformed the Quartet from a negotiation-promoting foursome guided by a common document (the Road Map) into a body that was all-but imposing sanctions on a freely elected government of a people under occupation as well as setting unattainable preconditions for dialogue’.\textsuperscript{53} It has been noted that these were not conditions of the Quartet at all, but rather principles which the United States and the EU only were bound by because of domestic anti-terror legislation.\textsuperscript{54}

As discussed in chapter three, restrictive measures have been imposed by the EU on a number of occasions, in relation to different conflicts. The EU can choose from a range of measures to influence compliance with international law, and restore peace and security, including diplomatic, financial and trade sanctions; suspension of cooperation with a third country; boycott of sport and/or cultural events; flight bans; and restrictions on admission to the EU. The Guidelines on Promoting Compliance with International Humanitarian Law stipulate that the use of such measures may be an effective means of promoting compliance, and should therefore be considered against both state and non-state parties to a conflict.\textsuperscript{55} While EU policy thus explicitly allows for the imposition of restrictive measures, in this case neither party to the conflict was subjected to sanctions on the basis of contravening


\textsuperscript{52} See Gideon Levy, ‘Boycotting the Boycotters’ Haaretz (16 May 2010).

\textsuperscript{53} Alvaro de Soto, End of Mission Report (n 50) para 50.

\textsuperscript{54} Ibid para 79.

\textsuperscript{55} Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) [2009] OJ C303/12, para 16(d).
humanitarian law principles, but rather a non-state party was subjected to sanctions essentially on the basis of the domestic law of EU Member States, which prohibited contact and cooperation with any group on the list of ‘terrorist groups’. The boycott of Hamas is also considered to have encouraged a certain approach of the Israeli Defence Forces to the military operations in Gaza. This approach was notably less constrained than that of the Lebanon conflict in 2006, in anticipation of a higher level of tolerance, and the possibility must be borne in mind that: ‘[t]he political echelon deciding on Operation Cast Lead was correct in assuming that the international community would demonstrate a greater level of tolerance for Israel’s conduct given that it was fighting an organization boycotted and criticized by European nations, the United States, and most Arab governments’.

Aside from the EU’s part in the boycott of Hamas, another avenue of involvement put a certain strain on the legitimacy of the EU’s contribution to alleviating the humanitarian crisis unfolding in Gaza, and its upholding of the principles of international humanitarian law. The objective of the EU Border Assistance Mission (EUBAM Rafah) was commendable: giving the Palestinians a measure of control over the Rafah crossing into Egypt for the first time, supervised by a neutral third party. Javier Solana had high expectations of the potential of the mission for humanitarian progress, capacity building and cementing the rule of law in Gaza:

The opening of Rafah is a great opportunity, it is a turning point. For the first time, Palestinians assume the responsibility to manage external borders. It is one important step towards eventual statehood ... The opening of Rafah is a welcome opportunity to improve living conditions for Palestinians ... Today's events provide us with a chance to turn Gaza disengagement into a real opportunity to relaunch the peace process. Let us build on this positive momentum.

The practical reality of the mission, however, left a lot to be desired. While the EU was in a position to monitor the management of the border crossing under a degree of Palestinian control, that was always ultimately at the discretion of the Israeli security forces, which could, and did, impose closures on the border at any time desired, without consultation with the other parties. This facilitation and virtual acquiescence to Israel’s closure policy at such a crucial juncture in humanitarian terms, along with the EU’s considerable financial

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contribution to the reconstruction of civilian infrastructure destroyed by Israel, has unfortunately led to the EU being perceived as a ‘subcontractor for the occupation’.\textsuperscript{60} Israel, as the occupying power in Gaza,\textsuperscript{61} has a number of responsibilities under humanitarian law to ensure the well-being of the population. The occupying power has the duty to ensure, to the extent possible, the supply of food and medical supplies to the population, and to ensure and maintain the medical and hospital establishments and services.\textsuperscript{62} International humanitarian law also demands that relief schemes shall be facilitated by all means at the disposal of the occupying power, although it is stressed that any relief consignments shall ‘in no way relieve the occupying power’ of the duties referred to directly above.\textsuperscript{63} The closure and blockade of Gaza has been interpreted by many as a form of collective punishment on all of the inhabitants of Gaza, and therefore a violation of Israel’s obligations under international humanitarian law.\textsuperscript{64} Article 33 of the Fourth Geneva Convention provides that no one protected by that convention ‘may be punished for an offence that he or she has not personally committed’ and that collective penalties are prohibited. Collective punishments are also prohibited under customary international humanitarian law.\textsuperscript{65} While Israel seeks to defeat the military wing of Hamas, it cannot do so at the expense of the entire population of Gaza, through closing borders and blocking humanitarian aid.

The Head of the Office for the Coordination of Humanitarian Affairs (OCHA) in Jerusalem has underlined that although humanitarian aid itself might be neutral, its effects may not:

Contrary to most perceptions, aid is neither necessarily positive nor benign. Pouring this magnitude of aid into a conflict without either the structure of a peace agreement or a solid analysis of its impact is comparable to speeding along a road at night without headlights. Continued aid in the absence of a serious examination of donor responsibilities, the obligations of the occupier

\textsuperscript{60} David Cronin, ‘Call to Halt EU Trade with Israel’ \textit{International Press Service} (Brussels, 1 September 2007), citing Eoin Murray of Trocaire, see <http://ipsnews.net/news.asp?idnews=39109>.


\textsuperscript{62} Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), 12 August 1949, 75 UNTS 287, arts 55 and 56.

\textsuperscript{63} Ibid, arts 59 and 60.


and aid’s overall impact could undermine the prospects for a peace agreement in the future.\textsuperscript{66}

The difficult balancing act required of the EU in both promoting respect for and adherence to international humanitarian law, while simultaneously basing its humanitarian assistance on the principles of impartiality, independence and neutrality was explored in chapter three, and the situation in Gaza most clearly illustrates the dilemmas involved. It may be that the EU, in ambitiously attempting to achieve too much simultaneously – deepening relations with Israel, a developed role in the peace process, humanitarian and capacity building support for the Palestinians, and all of this within the margins of international law – is in essence achieving very little of each of these stated aims. The hesitancy of the EU to react firmly to violations of international law, while maintaining its status as the biggest donor to the Palestinians,\textsuperscript{67} has both ‘reduced EU leverage and Israeli incentives’\textsuperscript{68} and has also resulted in a ‘\textit{de facto} pattern of accommodation’\textsuperscript{69} of the very violations it condemns in public statements.

The continuation of EU humanitarian aid did little to ameliorate the situation in Gaza as the flow of aid was cut off externally by Israel. Israel classified the Gaza strip as ‘hostile territory’ in 2007 and severely restricted the movement of both goods and people, in a further attempt to exert pressure on Hamas.\textsuperscript{70} It has been noted that the boycott, combined with the use of sanctions, particularly Israel’s suspension of the transfer of Palestinian Authority tax revenues, and closure policies pushed Gaza and the occupied Palestinian territory as a whole to the ‘humanitarian and economic brink, setting off alarm bells from UN agencies, the World Bank and international Non-Governmental Organisations’.\textsuperscript{71} The European Commissioner for Development and Humanitarian Aid, Louis Michel, referred to the ‘growing humanitarian tragedy in Gaza’, noted that the security situation had forced the suspension of all relief projects in the area, and stated that the warring parties must respect


\textsuperscript{67} The overall EU assistance to the Palestinian people, including humanitarian and non-humanitarian assistance makes the EU the single biggest donor, see Statement by João Salgueiro on behalf of the EU, 62\textsuperscript{nd} Session of the General Assembly, Agenda Item 71, Safety and security of humanitarian personnel and protection of United Nations personnel; Assistance to the Palestinian People (New York, 17 December 2007).

\textsuperscript{68} Nathalie Tocci, ‘Firm in Rhetoric, Compromising in Reality’ (2009) 8(3-4) \textit{Ethnopolitics} 387, 393.

\textsuperscript{69} Agnès Bertrand-Sanz, ‘The Conflict and the EU’s Assistance to the Palestinians’, in \textit{European Involvement in the Arab-Israeli Conflict} (EU Institute for Security Studies 2010) 43.


\textsuperscript{71} Euro-Mediterranean Human Rights Network (EMHRN), \textit{Active but Acquiescent: The EU’s Response to the Israeli Military Offensive in the Gaza Strip} (Brussels, May 2009).
the principles of international humanitarian law and do everything in their power to facilitate safe humanitarian access.\textsuperscript{72} The Commissioner said that he was appalled at the ongoing situation in Gaza which prevented humanitarian staff from assisting people in ‘desperate need’, and called for a ‘humanitarian truce’.\textsuperscript{73} The EU strongly condemned the killing of two United Nations staff in Gaza in June 2007, and reaffirmed that international humanitarian law ‘urges all parties to allow full, unimpeded access by humanitarian personnel to civilians in need of assistance’.\textsuperscript{74} The EU consistently pointed to the illegitimacy of the blockade and of preventing humanitarian assistance:

In the current situation, there is a real risk that Gaza will begin to look like a citadel under siege, where the civilian population is trapped and even basic needs cannot be met. Humanitarian aid is neutral. It does not seek to confer any advantage on any party or imply any form of political recognition. There are no grounds for a blockade of humanitarian aid.\textsuperscript{75}

The Quartet also repeatedly expressed urgent concern over the dearth of essential services and access for aid and over the continued closure of crossing points given the dire impact on the economy and daily life in Gaza.\textsuperscript{76}

The decision to reduce the supply of electricity in particular provoked accusations of violations of international humanitarian law, including Article 55 of the Fourth Geneva Convention relating to the basic needs of the population, Article 69 of Additional Protocol I, and the customary prohibition on collective punishment.\textsuperscript{77} A case known as the \textit{Gaza Fuel and Electricity Case} was taken to the Israeli Supreme Court in response to the reduction in supply, and in relation to the obligations of Israel with regard to the humanitarian needs of the population in Gaza.\textsuperscript{78} The case ultimately hinged on whether Israel remained the occupying power, and the court unconvincingly and ambiguously argued that Israel was no

\begin{footnotes}
\item[72] Louis Michel expresses concern over Growing Humanitarian Tragedy in Gaza, Press Release IP/07/827 (Brussels, 14 June 2007).
\item[73] EU Commissioner Louis Michel, calls for a humanitarian truce in Gaza (Brussels, 15 June 2007) [\texttt{http://www.europa.eu.int/articles/fr/article_7111_fr.htm}].
\item[74] Statement by Michael von Ungern-Sternberg on behalf of the EU, UN Security Council Debate on the Protection of Civilians in Armed Conflict, S/PV.5703 (22 June 2007).
\item[75] EU Commissioner Louis Michel renews call for immediate humanitarian access to Gaza, Press Release IP/07/944 (Brussels, 26 June 2007); see also: Statement by João Salgueiro on behalf of the EU, UN Security Council Debate on the Situation in the Middle East, including the Palestinian Question, S/PV.5736 (29 August 2007); see also Council of the EU, 2824\textsuperscript{th} General Affairs and External Relations Meeting (Luxembourg, 16 October 2007).
\item[76] Statement by Middle East Quartet, SG/2132, PAL/2087 (New York, 23 September 2007).
\item[77] Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), 12 August 1949, 75 UNTS 287, art 55; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 69; Henckaerts & Doswald-Beck (n 65).
\item[78] \textit{See Bassiouni Ahmed et al v Prime Minister} (Judgment) HCJ 9132/07 (30 January 2008).
\end{footnotes}
longer the occupying power but somehow retained an unspecified degree of responsibility towards the population of Gaza. As Shane Darcy and John Reynolds have observed, the court thus concocted ‘a halfway house of obligations that are more onerous than those legally required of an enemy belligerent under humanitarian law, but less so than those that bind an occupying power’. Even though the court seemingly went to great lengths to avoid acknowledging that Israel was bound by the laws governing belligerent occupation, it held, unlike the EU which avoided specifics insofar as possible, that a positive obligation existed for Israel to provide a minimum level of supplies to Gaza, perhaps in an attempt to defend its reputation to the extent possible and avoid international outrage.

In all of its public statements, the EU went to lengths to appear even-handed in relation to the parties involved, avoiding the explicit condemnation of specific acts as violations of international humanitarian law, but rather on occasion euphemistically expressing misgivings about the approach of Israel to combating Hamas in Gaza. Javier Solana, for example, following a meeting with Israeli Foreign Minister Tzipi Livni, mildly remarked that while the EU offered its ‘full solidarity’ with Israel in its efforts to fight terrorism, sometimes the EU does ‘not agree 100% on exactly how to combat it’. Another equivocal remark was issued in response to the reduction of Gaza’s essential fuel supply by Israel:

While condemning the unacceptable and continued attacks on Israel's territory and recognizing Israel's legitimate right to self defence, the EU underlines the need for carefully weighing the negative impact of such measures on a civilian population already living under very difficult conditions.

All parties were urged in the same statement to ensure full and secure access for all humanitarian personnel and goods as required by principles and practices of international humanitarian law, but again no direct link is mentioned between this requirement and the careful consideration requested. Leaked documents have since revealed that some of the ‘careful weighing’ involved in aspects of the blockade were how to ensure that the people of

79 Ibid, para 12. Shany, agreeing with the court that Gaza is unoccupied, has attempted to shore up the dearth of legal reasoning through further unconvincing postulations, see Yuval Shany, ‘The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouuni v. The Prime Minister of Israel’ (2009) 42 Israel L Rev 101.
80 Darcy and Reynolds (n 44) 232.
81 As noted ibid 235.
82 Summary of remarks by Javier Solana, EU High Representative for CFSP, following his meeting with Israeli Foreign Minister Tzipi Livni, Press Release S238/07 (Jerusalem, 3 September 2007).
Gaza went hungry without starving them completely and how to keep Gaza ‘on the brink of collapse’. 84 Despite recognition that neither the blockade, the decision to stop the provision of fuel, nor the increasing military strikes on Gaza were going to prevent the rocket attacks, 85 no action was taken to intervene, and the escalation of violence and deterioration of the humanitarian situation continued unabated.

The disproportionate nature of certain conduct was raised on numerous occasions, but initially the overall blockade was not characterised as a disproportionate action, or framed as collective punishment by the EU:

Stopping all acts of violence and terror among the parties is of the utmost importance for the peace process to succeed. The European Union remains concerned by civilian casualties occurring during Israeli incursions into Palestinian areas. The European Union strongly condemns the firing of rockets by Palestinian militias into Israeli territory. While recognizing Israel's right to self-defense, the European Union calls on Israel to exercise utmost restraint and underlines that action should not be disproportionate or in contradiction with international law. 86

Unfortunately, due to the paucity of negative consequences for Israel in ignoring the numerous declarations and entreaties, little progress was made on easing the blockade, and the EU expressed its concern for the surge in violence in early 2008 87 without instigating any tangible measures to counteract the ominous developments. This would appear to be a manifest example where the use of ex ante means and strategies of improving compliance with international obligations may have prevented an increase and multiplication of violations at a later stage. Despite clear signs that the protracted blockade, in itself a violation, would likely give rise to an escalation of violence along with further violations of the law, the EU patiently awaited the outbreak of conflict so that it could turn to ex post strategies once breaches had increased.

The Presidency of the Council of the EU expressed concern at the escalation of violence in March 2008, condemned recent incidents of disproportionate use of force by the

87 Statement by Sanja Štiglic on behalf of the EU, UN Security Council Debate on the situation in the Middle East, including the Palestinian Question, S/PV.5824 (22 January 2008).
Israeli Defense Forces against the Palestinian population in Gaza and urged Israel to exercise maximum restraint and refrain from all activities that endanger civilians, recognizing that such activities are contrary to international law. The Slovenian Presidency also condemned the firing of rockets into Israel, and rejected ‘collective punishment of the people of Gaza’. In November of that year, the European Commissioner for External Relations and European Neighbourhood Policy, Benita Ferrero-Waldner, called both on Israel to re-open the crossings in Gaza to ease the dire humanitarian situation and on all parties to exercise restraint. The parties were reminded that international law required the provision of access to essential services such as electricity and clean water to the civilian population and urged that ‘[r]ecent infringements of the calm agreed in June must not lead to a renewed cycle of violence’. It is interesting to note that during the crucial period of 2006-2008, when the humanitarian situation was worsening and violence was escalating, the EU was preparing to upgrade its economic and trade ties with Israel while boycotting Hamas, notwithstanding apparent violations of international humanitarian law being committed by both parties.

5.4 Operation Cast Lead and the EU Response

Hamas announced the end of a truce with Israel in late December 2008, declaring that Israel had frequently breached agreements by imposing a blockade and engaging in military strikes on Gaza. Prior to the truce, there had been a marked increase in the number of mortar attacks and rockets fired by Hamas in 2008 overall, in comparison to previous years. These rockets indiscriminately and deliberately targeted civilians living inside Israel, with an estimated 800,000 individuals living and working within their range. The rockets have hit many Israeli cities and towns, including Sderot, Ashkelon, Netivot, and, from late 2008 onwards, for the first time, longer-range rockets reached the cities of Beer Sheva and Ashdod, almost 40 kilometres inside the Green Line (1949 armistice line) between Gaza and Israel. The deliberate targeting of civilians is a serious violation of international humanitarian law,

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89 Ibid.
91 Statement of the EU at the 8th Meeting of the EU-Israel Association Council (Luxembourg, 16 June 2008).
92 See ‘Rockets Fired as Gaza Truce ends’ The Guardian (20 December 2008).
95 Ibid.
violating the most basic principle of distinction, which requires that parties to a conflict must at all times distinguish between civilians and combatants. The parties must also distinguish between civilian objects and military objectives. Both of these rules are customary,\(^96\) and intentionally directing attacks against civilians or civilian objects constitutes a war crime under the Rome Statute of the International Criminal Court.\(^97\) In addition to the deaths and injuries (suffered on both sides of the border),\(^98\) and damage to property which occurs as a result of the attacks, psychological trauma is a significant factor for those living close to the border with Gaza:

The problem for most people was not being hit, but the fear, uncertainty and stress. More than 800,000 Israelis were under threat because for the first time the [rockets] had a range of up to 35 kilometers. You had to plan your daily life by considering how long it would take you to get to a bomb shelter from every point on your route.\(^99\)

The extent of rocket fire, however, after the establishment of a ceasefire in June was almost negligible – having dropped to ‘almost zero’ for a period of four months, until an Israeli operation in early November, killing six Palestinians, provoked a response.\(^100\) The resumption of rocket attacks was followed by the Israeli military launching a military offensive in the Gaza Strip beginning on 27 December, codenamed Operation Cast Lead. The operation was ostensibly embarked upon not as an initial response to the latest attacks but as a ‘last resort’ to counter the continued ‘brutal, deliberate and planned rocket fire’.\(^101\) The stated aim of the incursion was to end rocket attacks into Israel originating from Gaza, from Hamas and associated armed groups.\(^102\) The Israeli deaths in 2008 prior to the military operation do not facilitate an argument of proportionate response or of self-defence by Israel. There were three deaths of Israelis by rocket attacks\(^103\) compared to a reported 1,315 deaths

\(^96\) Henckaerts & Doswald-Beck (n 65) Rules 1 and 7.
\(^98\) HRW Report (n 94) 18-19.
\(^99\) Ibid, telephone interview with Yonatan Yagodovsky.
in Gaza during Israel’s military operation of 22 days duration,\textsuperscript{104} which even in that short period exceeded the entire death toll of Israeli victims of Palestinian violence over the preceding decade.\textsuperscript{105}

It has been cogently argued that the operation was not a response in self-defence against the rockets, but rather constituted an operation which had been meticulously planned for up to six months, and had as its aim not only the discontinuation of rocket attacks and the destruction of Hamas, but also included the objectives of ‘striking hard at Gaza before Obama took office, influencing in Kadima’s favor the Israeli domestic elections that were about to take place, restoring confidence in the IDF after its failures in the Lebanon War of 2006, and sending a message to Iran that Israel would not hesitate to use overwhelming force whenever its interests dictated and without restraint’.\textsuperscript{106} These assorted aims do not sit well with the avowed justification of self-defence in retaliation for rocket attacks. Constructivists would argue that the existence of legal obligations, such as those found in international humanitarian law, ‘for most actors in most situations, translates into a presumption of compliance, in the absence of strong countervailing circumstances’.\textsuperscript{107} It would appear that in this situation, considering the multiplicity of objectives involved, and the compelling motivations for Israel to pursue its aims in violation of international norms if necessary, that such strong countervailing circumstances existed.

The Presidency of the Council of the EU, which was held by France at the time, issued a declaration expressing concern at the escalating violence and condemning both the rocket strikes from Gaza and the Israeli air raids and calling for their immediate end.\textsuperscript{108} The commitment of the EU to full respect of international humanitarian law under all circumstances was reaffirmed, and the opening of all border crossing points was urged. The relevant EU representatives then met on 30 December to discuss the situation and decide on

\begin{itemize}
\item \textsuperscript{104} See Progress Report Israel (n 19).
\item \textsuperscript{105} Which has been reported as 1,204, see ‘Victims of Palestinian Violence and Terrorism since September 2000’ (n 103).
\item \textsuperscript{107} Abram Chayes and Antonia Handler Chayes, \textit{The New Sovereignty: Compliance with International Regulatory Agreements} (Harvard University Press 1995) 8.
\end{itemize}
their response. The EU called for an immediate and permanent ceasefire, an end to rocket attacks and an end to military action, immediate humanitarian action, and a stepping up of the peace process.

EU Member States were distinctly divided in their reactions to the crisis. States including Germany, Italy, and the Czech Republic were quite sympathetic to Israel, placing responsibility squarely on Hamas and categorising Israel’s action as self-defence. German Chancellor Angela Merkel, for example, stated that responsibility for the offensive lay ‘clearly and exclusively’ with Hamas. The Czech Republic, having just taken over the reins of the Presidency of the Council of the EU from France, declared the incursion as ‘defensive, not offensive’, perhaps a somewhat hasty conclusion from which a number of EU governments immediately distanced themselves. This pronouncement was tentatively tempered by a follow-up communiqué which added that ‘even the undisputable right of the state to defend itself does not allow actions which largely affect civilians’. Irish and Swedish foreign ministers were less sympathetic to Israel, the former condemning the airstrikes as ‘offensive operations’, and the latter criticising Israel’s policy of isolating the Gaza Strip and describing the airstrikes as a ‘serious continuation of the escalation of the tension’.

The European Commissioner for Humanitarian Aid issued a statement emphasizing that one and a half million people ‘are crammed into an area that is just over one percent the size of Belgium. They rely on supplies from outside for their survival’. It was underlined

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109 The relevant representatives being: The Foreign Ministers or their representatives of the Member States of the EU, the High Representative for the CFSP and the European Commission.
111 ‘Federal Minister Steinmeier is Concerned about the Situation in the Gaza Strip’, Federal Foreign Office (Germany, 27 December 2009); ‘Minister Frattini on the Gaza Strip Crisis’, Ministry of Foreign Affairs (Italy, 27 December 2008); ‘Czechs, Next EU President, Defend Israeli Strikes’, Reuters (30 December 2008).
112 ‘Merkel Blasts Hamas for Middle East Violence’ Spiegel (29 December 2011) <http://www.spiegel.de/international/world/0,1518,598724,00.html>.
that the EU’s humanitarian aid is delivered impartially to those most in need in line with the principles of international humanitarian law, and that ‘[b]locking access to people who are suffering and dying is also a breach of humanitarian law’. The United Nations Human Rights Council issued a resolution in mid-January, reaffirming that each party to the Fourth Geneva Convention is under an obligation to respect and to ensure respect for the obligations arising from that Convention and making a number of demands relating to the cessation of military attacks and lifting of the siege to allow humanitarian access in accordance with Israel’s obligations under international humanitarian law. A decision was also reached to dispatch an independent international fact-finding mission. The EU Member States involved in the special session abstained, considering the resolution to have addressed only one party to the conflict, and stating that some legal terms were used ‘without full evidence of whether definitions were met’.

Despite concerted efforts and visits by various representatives to the region, the EU was unsuccessful in negotiating a ceasefire, and ultimately the two parties unilaterally and separately declared ceasefires. On 17 January 2009, Israel declared its unilateral ceasefire, supported by the United States, and Hamas declared its own ceasefire through Egyptian and Turkish mediation. Six European heads of state converged on Jerusalem a day later (purportedly the largest contingent of world leaders to visit Israel since the funeral of Prime Minister Yitzhak Rabin in 1995) to discuss the prevention of arms smuggling into Gaza. There was no discussion of arms exports into Israel, or of any of the international humanitarian law concerns raised by the military incursion such as proportionality, the use of certain types of weapons, and the targeting of international institutions. The meeting signalled a gesture of solidarity and support from Europe, and it was recognised that the six world leaders ‘dropped everything to come here and express their support for Israel’s security.

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117 Ibid.
119 Ibid.
124 See Eran (n 57).
125 Cronin has commented that if ‘gestures of solidarity were required, it was surely the beleaguered residents of Gaza that were most deserving of them’: David Cronin, Europe’s Alliance with Israel: Aiding the Occupation (Pluto Press 2011) 19.
That’s not something that happens every day’. 126 This generous gesture towards Israel was expressed immediately after a conflict in which reportedly over 1,315 Gazans were killed, of which 415 were children and 110 women, over 5,500 individuals were wounded, and 14 Israelis were killed.127

The Council of the EU, shortly thereafter, welcomed the cessation of hostilities in the Gaza Strip, and called on all parties to make the ceasefire permanent through the full implementation of Security Council Resolution 1860.128 The resolution had called inter alia for an immediate ceasefire; the unimpeded distribution of humanitarian assistance; condemned all violence and hostilities directed against civilians; encouraged intra-Palestinian reconciliation; and called for urgent efforts by the parties and the international community to achieve a comprehensive peace based on two democratic states. The Council of the EU viewed the most urgent issues as the halting of rocket launches into Israel, the opening of the Gaza crossings, and the creation of a mechanism to stop arms smuggling into the Gaza Strip.129 Accountability for violations of international law was not included in this list of priorities, but the EU did clarify the following:

The European Union deeply deplores the loss of life during this conflict, particularly the civilian casualties. The Council reminds all parties to the conflict to fully respect human rights and comply with their obligations under international humanitarian law and will follow closely investigations into alleged violations of international humanitarian law. In this regard it takes careful note of the statement by UNSG Ban Ki-moon to the Security Council on 21 January.130

The UN Secretary General Ban Ki-moon had addressed many aspects of the conflict, including the demand that where there are allegations of international humanitarian law violations, there should be thorough investigations, full explanations and where required, accountability. The Council, rather than supporting this call for accountability, merely took ‘careful note’ of his statement. The Guidelines on Promoting Compliance with International Humanitarian Law commit the European Union to ensure that there is no impunity for war crimes, and they recognise that, for a deterrent effect to be viable, the prosecution of such crimes should be visible and take place in the state where the violations occurred where

126 Lefkovits (n 123).
127 Progress Report Israel (n 19).
129 Ibid.
130 Ibid, para 3.
possible.\textsuperscript{131} The guidelines also mention the EU’s support of the International Criminal Court and other measures to prosecute war criminals in this context. The Czech Presidency of the EU in March of that year did raise the issue but went no further than reminding the parties again of their obligations under international humanitarian law, stating that the EU would closely follow any investigations into alleged violations.\textsuperscript{132}

Two distinctive features of this particular military operation afforded the EU unique opportunities to react in a more coherent and forceful way to violations of international humanitarian law than it had previously.\textsuperscript{133} The first notable feature is the timing, and the second is the nature and circumstances surrounding the operation. Upcoming elections in Israel resulted in Kadima seeking to gain popularity, and a handover period in the United States presidency resulted in an unusual silence from the usually vocal actor.\textsuperscript{134} As a result of the particular timing of the assault, the EU could have taken the opportunity to be the most prominent voice regarding the military attack, taken a principled stance on the motivations and responsibility behind the attack, and led the way in terms of response to violations by both parties. Instead it blundered among differing opinions between Member States, reminiscent of the response to the Iraq invasion, and simply waited until the United States was ready to take the lead again.\textsuperscript{135} The second feature which drew much criticism is the issue of sealed borders during a conflict. The EU had repeatedly urged Israel to open the crossings between Gaza and Egypt, but at no point were restrictive measures or the potential of suspension of agreements subject to conditionality clauses mentioned, or even implied in public statements. Many have held that Operation Cast Lead was the first instance whereby civilians were trapped inside a war zone, with no possibility of seeking refuge. The ICRC noted with regret that for the duration of the military operation over a period of 22 days, ‘nowhere in Gaza was safe for civilians’.\textsuperscript{136} The Special Rapporteur on the situation of human rights in the Palestinian territories, Richard Falk, issued a report on the operation which concluded that:

In unprecedented belligerent policy, Israel refused to allow the entire civilian population of Gaza, with the exception of 200 foreign wives, to leave the war zone during the 22 days of attack that commenced on 27 December. As the

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\item \textsuperscript{131} Updated EU Guidelines (n 55) para 16(g).
\item \textsuperscript{132} Statement by Martin Palouš on behalf of the EU, UN Security Council Debate on The situation in the Middle East, including the Palestinian Question, S/PV.6100 (25 March 2009).
\item \textsuperscript{133} See Cronin (n 125) 16-17.
\item \textsuperscript{134} ibid.
\item \textsuperscript{135} See Muriel Asseburg, ‘EU Crisis Management in the Arab-Israeli Conflict’, in European Involvement in the Arab-Israeli Conflict (n 69) 77.
\end{itemize}
United Nations High Commissioner for Refugees stated on 6 January 2009, Gaza is ‘the only conflict in the world in which people are not even allowed to flee’. All crossings from Israel were kept closed during the attacks, except for rare and minor exceptions ... This condition was aggravated by the absence of places to hide from the ravages of war in Gaza, given its small size, dense population and absence of natural or man-made shelters.\(^{137}\)

Richard Falk concluded that international humanitarian law had not explicitly anticipated such treatment of civilians in a conflict but suggested that an investigation into such practice, which could potentially be defined as an ‘inhumane act’, might determine whether a crime against humanity had been committed in this context.\(^{138}\) Falk considered whether the intrinsic nature of the military operation was likely to generate war crimes.\(^{139}\) The confinement of the civilian population made the principle of distinction, for example, difficult to uphold:

Confining the civilian population to the war zone also makes it more difficult, if not impossible, to sustain consistently the distinction between military and civilian targets, in combat situations. It also complicates an assessment of claims made by Israel that Hamas used civilians as human shields, and used civilian sites such as schools and mosques from which to engage resistance. If civilians could not leave the war zone under such crowded conditions, some degree of intermingling would necessarily occur, especially in life and death situations.\(^{140}\)

The actions of Israel during the operation had no serious impact on the state’s official relations with the EU. Despite the peculiar timing of the incursion, combined with the unprecedented nature of the conflict as described above, there were no real consequences for Israel’s considerable relations with the European Union.

### 5.5 International Fact-Finding: the Goldstone Report

The President of the United Nations Human Rights Council established an international and independent Fact Finding Mission with a mandate to investigate violations of international human rights law and international humanitarian law ‘that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after’.\(^{141}\) The report of the Fact Finding Mission, known as the Goldstone Report, was released in September 2009,

\(^{138}\) Ibid, para 19.
\(^{139}\) Ibid, see paras 8-10.
\(^{140}\) Ibid, para 24.
and it found that violations of international humanitarian law had been committed on both sides, although significantly more so by Israel.\textsuperscript{142} Palestinian armed groups involved in the firing of rockets and mortars into Israel were found to have violated the principle of distinction, both in relation to the civilian population and to civilian objects in southern Israel. Where the mortars were fired into civilian areas, such action would constitute deliberate attacks against the civilian population, and as such constitute war crimes.\textsuperscript{143} The report failed to determine definitively whether civilian objects such as mosques or hospitals were used for military purposes, or whether the armed groups had failed to minimize the risk of harm to civilians during hostilities.\textsuperscript{144}

The violations of international humanitarian law allegedly committed by the Israeli forces included failure to take reasonable precautions to avoid or minimize loss of civilian life, extensive targeting of civilian objects, including attacks on two hospitals and on the al-Maqadmah mosque, eleven incidents of direct and intentional attacks against the civilian population with lethal outcome, and a violation of the obligation to allow free passage of humanitarian goods.\textsuperscript{145} Grave breaches found to have been committed included the grave breach of extensive and wanton destruction of property not justified by military necessity, and the grave breach of wilfully killing and wilfully causing great suffering to protected persons.\textsuperscript{146} The rapporteurs found evidence of the war crimes of: extensive and wanton destruction in connection with a flourmill and with a chicken farm, the use of Palestinian civilians as human shields, the use of treatment amounting to intimidation and terror in the context of arbitrary and prolonged detention.\textsuperscript{147} The report also found widespread use of collective punishment and collective penalties, and suggested that the crime against humanity of persecution could be considered by a competent court.\textsuperscript{148}

Given the widespread occurrence of violations, mainly by Israeli forces but also by Palestinian armed groups, it would appear that the inverse of the process of internalization, whereby states and groups internalize norms which leads to increased obedience, has occurred. In the present context, this is often referred to as brutalization, whereby armed

\textsuperscript{143} Ibid para 1950.
\textsuperscript{144} Ibid para 1953.
\textsuperscript{145} Ibid. In relation to precautions, see paras 1919-1920; in relation to attacks on hospitals see paras 624-629 and 648-652; on the mosque see paras 838-841; in relation to direct and deliberate attacks against civilians see para 43; in relation to supply of humanitarian goods see paras 72 and 1318.
\textsuperscript{146} Ibid. See para 1935, and para 842.
\textsuperscript{147} Ibid. In relation to the flourmill see para 931; chicken farm see para 961; use of human shields see para 1105; intimidation and terror see para 1171.
\textsuperscript{148} Ibid see paras 1331-1335.
groups, state forces, and even civil society internalize the violation of certain norms as the accepted culture and practice. One example of this is the normalisation of the use of human shields, which had been referred to as the ‘neighbour procedure’ when used in the West Bank, and when subsequently implemented in Gaza was casually referred to as the ‘Johnnie procedure’. Another example is the Dahiya doctrine, an approach which was originally taken by the Israeli forces in Lebanon in 2006, whereby disproportionate force and extensive destruction was intentionally wrought, and was then developed and implemented as a military strategy in Gaza. Similarly, the widespread use of rocket fire on civilian territory in southern Israel by armed Palestinian groups demonstrates the dire lack of internalization of basic humanitarian norms and principles. If there was intention by both sides to commit widespread violations of international humanitarian law at the outset, it is also difficult to avoid a measure of realist argument that the actions were governed to a significant degree by a rational choice, or a calculation of interests, rather than being guided by any normative authority, and in this respect levels of compliance could be considerably difficult to influence.

The Goldstone report ultimately concluded that investigations and, where appropriate, prosecutions of those suspected of serious violations of international humanitarian law were necessary, and that states have a duty to investigate allegations of such violations. It also addressed the issue of a referral to the UN Security Council, the International Criminal Court and the exercise of universal jurisdiction as potential remedies. The recommendations of the Mission were endorsed by the Human Rights Council in October 2009, unsupported by any EU Member State, and, shortly thereafter, the General Assembly issued a resolution calling for independent investigations into the allegations outlined in the Goldstone Report. When the report was considered by the General Assembly in November 2009, only five EU Member States supported a resolution that gave Israel and the Palestinians three months to undertake independent and credible investigations into serious violations of international humanitarian and human rights law committed during the conflict in Gaza. The lack of support for accountability in this instance stands in stark contrast to the EU’s commitment and struggle against impunity as explored in chapter four, and presents itself as an exception

149 Ibid para 1925.
150 Ibid para 1194-1197 and 1213.
153 UN Doc A/Res/64/10 (2009).
to the general rule deduced in that chapter that a particular strength of the EU is in fact promotion of accountability for violations of international humanitarian law and for international criminal justice in general.

A more united form of EU support, however, came half a year later, albeit from only one EU institution. The European Parliament, in the face of much opposition and lobbying to prevent any public support of the Goldstone recommendations, adopted a non-binding resolution in support of the Goldstone Report, where it noted that the EU’s action at the international level must be guided by strict respect for international law. The resolution further stressed that: ‘respect for the rule of law is a fundamental value both within the European Union and in its relations with third countries and parties’, underlined that the ‘responsibility and credibility of the European Union and of its Member States require the investigations to be monitored fully’, and urged the EU and its Member States to consider the outcomes of follow-up investigations and of the implementation of the Goldstone Report. The overall EU response appears to be inconsistent with EU policy and practice in relation to fact finding commissions, whereby the EU guidelines on international humanitarian law advocate drawing on the international humanitarian fact-finding commission (IHFFC) where appropriate. In the absence of this mechanism functioning, the EU has in practice previously set up its own independent fact finding commission in relation to the conflict in Georgia.

The Goldstone Report recommended that the Security Council call on both the Israeli authorities and the relevant authorities in the Gaza Strip to undertake independent investigations into the allegations of serious violations of international humanitarian and human rights law as reported by the Fact Finding Mission. If the relevant authorities failed to conduct such investigations appropriately, the Mission recommended that the matter be referred after a six month period to the prosecutor of the International Criminal Court by the UN Security Council. It was recommended that the Security Council consider the situation, and, ‘in the absence of good-faith investigations that are independent and in conformity with international standards’, undertaken by either the authorities in Israel and/or the appropriate

157 Ibid.
158 Updated EU Guidelines (n 55) para 15(a).
159 Report of UNFFM Gaza (n 142) para 1969.
160 Ibid.
authorities in Gaza, acting under Chapter VII of the Charter of the United Nations, should refer the situation in Gaza to the Prosecutor pursuant to article 13(b) of the Rome Statute. In relation to Gaza, the Mission requested that the prosecutor of the International Criminal Court make the required determination as to the declaration provided by the government of Palestine as expeditiously as possible, as required by ‘accountability for victims and the interests of peace and justice in the region’. States parties to the Geneva Conventions were also addressed by the Mission, who recommended that such states should initiate criminal investigations in their national courts, under the principle of universal jurisdiction, where sufficient evidence of the commission of grave breaches of the conventions exists.

The European Union recognised that independent investigations into the alleged violations as requested by the report had not been launched by either party to the conflict in 2009. In 2010, both the General Assembly and the Human Rights Council repeated their earlier requests for impartial investigations into allegations. The General Assembly follow-up resolution garnered increased support from EU Member States, and no EU Member States voted against the resolution: a warmer EU reception than the first resolution, although still short of full consensus or a coherent position. Some observers have linked the EU’s modified voting strategy to the Dubai passport incident in which Israel was implicated, rather than as a result of any principled stance based on international law. The Human Rights Council established a Committee of Independent Experts to ‘monitor and assess’ any investigations undertaken by either side to the conflict. The Committee found that unsatisfactory and insufficient investigations had been undertaken on both sides, and its mandate was later renewed by the Human Rights Council, rather than supporting a referral to the International Criminal Court, which many NGOs and interest groups had requested.

Despite the typically solid support of the EU for the work of the International Criminal Court and for ending impunity in relation to international crimes, neither the EU nor its Member States presented any public support, or indeed a united position, for either a Security Council
referral to the International Criminal Court\textsuperscript{171} or the exercise of universal jurisdiction\textsuperscript{172} in relation to alleged crimes committed during Operation Cast Lead, notwithstanding the complex jurisdictional questions raised by both options for accountability. If neither the ICC nor other forms of accountability are viewed as a real threat by Israel, due to a lack of forthright support by the EU for such mechanisms, and due to seemingly unconditional support from the United States for Israel, an incentive is removed for Israeli forces to refrain from committing war crimes, if the perception prevails that impunity is protected.

Although the EU’s relations with both Israel and Palestine are multifaceted and complex, in this particular instance promoting the rule of law was not a key driver in its response to the conflict between the parties. The EU as a whole shied away from strong condemnations of violations of international humanitarian law and demands for accountability, in favour of a sharp focus on access for humanitarian aid, secure borders and a way to move the peace process forward. The EU did temporarily suspend its upgrading of relations with Israel as a result of the offensive, but was careful not to frame the suspension as any form of punishment. The suspension was rather portrayed as a generous gesture because Israel was too preoccupied with other matters, and that it was merely an issue of timing.\textsuperscript{173} The EU made clear that it remained committed to advancing relations, but noted that the ‘situation on the ground was not conducive to the resumption of the upgrading process’.\textsuperscript{174} The humanitarian support given by the EU is substantial, but as former European Commissioner Chris Patten has commented, ‘writing cheques for Gaza is easy. Politics is the tricky bit’\textsuperscript{175}

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\textsuperscript{172} See, eg, regarding new legislation in the United Kingdom to make it more difficult to obtain an arrest warrant, ‘Arrest Warrants for Alleged War Crimes’ The Guardian (2 December 2010). In relation to the potential for universal jurisdiction, and also for upholding third state responsibility in the context of the Geneva Conventions, see Litigating Palestine: Holding Israel Accountable in the Courtroom (Al Majdal, Spring-Summer 2009).
\textsuperscript{173} See, e.g., Rosemary Hollis, ‘The basic stakes and strategy of the EU and Member States’, in European Involvement in the Arab-Israeli Conflict (n 69) 37.
\textsuperscript{174} Progress Report Israel (n 19) 2.
\textsuperscript{175} Chris Patten, ‘Writing cheques for Gaza is easy. Politics is the tricky bit’ The Guardian (27 January 2009).
\end{flushleft}
5.6 Reigniting Debate over the Blockade: the Flotilla Incident

A convoy of civilian ships carrying humanitarian aid attempted to travel to Gaza in late May 2010 and was intercepted by Israel, resulting in the deaths of nine civilians and injuries to numerous others. This reignited the debate over the continuing blockade in Gaza. The EU responded immediately and issued a call for a full investigation into Israeli attacks on the convoy. The EU High Representative for Foreign Affairs and Security Policy Catherine Ashton declared that:

The EU deeply regrets the loss of life during the Israeli military operation in international waters against the Flotilla sailing to Gaza and offers its condolences to the families of the victims. The EU condemns the use of violence that has produced a high number of victims among the members of the flotilla and demands an immediate, full and impartial inquiry into the events and the circumstances surrounding them.

Ashton stated that the EU did not accept the policy of closure, and that it was unacceptable and ‘politically counterproductive’. Predictably, the European Parliament resolution went even further, condemning the attack as a breach of international law, insisting that accountability be upheld, and expressing the conviction that there is ‘an urgent need for a comprehensive reshaping of EU policy towards the Middle East to perform a decisive and coherent political role, accompanied by effective diplomatic tools [ ... and considering] that this should extend to all EU policies; including, among others, trade and development policies’. The European Parliament has a greater degree of latitude in its pronouncements than the Council or the Commission, and it may be a more accurate reflection of the views of the general public in EU Member States, given that it is composed of directly elected MEPs rather than of government ministers. In any case, the EU was less divided in relation to an inquiry into the flotilla incident than it had been in relation to the Fact Finding Mission into Operation Cast Lead, and Ashton supported the announcement by United Nations Secretary-

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176 See, e.g., Agnès Bertrand-Sanz, ‘The Conflict and the EU’s Assistance to the Palestinians’ in European Involvement in the Arab-Israeli Conflict (n 69) 49.
177 Declaration by High Representative Catherine Ashton on behalf of the EU on the Israeli military operation against the Flotilla (Brussels, 31 May 2010).
178 Ibid. See also, EU Council Conclusions on Gaza, 3023rd Foreign Affairs Council meeting (Luxembourg, 14 June 2010).
General Ban Ki-Moon of an international inquiry into the Gaza-bound flotilla incident.\textsuperscript{181} Perhaps in response to the relatively unified international outcry surrounding the Flotilla debacle,\textsuperscript{182} Israel partially eased the blockade, without lifting it completely.\textsuperscript{183} The European Commission reported that while a ‘slightly wider range’ of goods and materials were admitted into Gaza, there was no ‘significant’ improvement overall.\textsuperscript{184}

Ashton later expressed satisfaction that the EU maintained a common position at the 15\textsuperscript{th} Session of the Human Rights Council, on both ‘potentially divisive resolutions’ relating to the flotilla incident and the Goldstone Report.\textsuperscript{185} Nevertheless, all of the ‘split votes’ of the EU at the Human Rights Council have been in relation to the Goldstone report and the flotilla incident, previous to which all EU Member States were ‘remarkably united’ in their voting before the United Nations body.\textsuperscript{186} This demonstrates clearly the potential for this conflict to ‘divide and inflame’\textsuperscript{187} opinion and strategy at the European level. In 2011, at the 16\textsuperscript{th} session of the Human Rights Council, a resolution was adopted in relation to accountability for alleged violations committed in Gaza, and EU Member States neglected to support the attempt to advance action in relation to this issue.\textsuperscript{188} The Human Rights Council had urged that the General Assembly submit the report to the Security Council for its consideration and appropriate action, including referral of the situation to the International Criminal Court.\textsuperscript{189} It was around this particularly sensitive time that an article by Goldstone appeared in the Washington Post, remarking that Israeli evidence which had emerged since publication of the report may have influenced the findings in relation to intentional policy of targeting civilians.

\textsuperscript{181} Statement by the spokesperson of HR Catherine Ashton in support of UN international Gaza flotilla probe, A152/10 (Brussels, 3 August 2010). The report was released in September 2011; see Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011); but was subject to much criticism for its legal analysis: see, e.g., Daragh Murray, ‘The UN Palmer Inquiry and Israel’s Attack on the Mavi Marmara’ (7 September 2011), <http://www.jadaliyya.com/pages/index/2564/the-un-palmer-inquiry-and-israels-attack-on-the-ma> accessed 10 September 2011.

\textsuperscript{182} See Judith Evans, ‘Gaza flotilla deaths: the world reacts’, \textit{Times Online} (31 May 2010) <http://www.timesonline.co.uk/tol/news/world/middle_east/article7141083.ece>.


\textsuperscript{184} Progress Report Israel (n 19) 3.

\textsuperscript{185} Speech by Catherine Ashton, EU High Representative for Foreign Affairs and Security Policy, at the European Parliament (Strasbourg, 15 December 2010).


\textsuperscript{187} Hollis (n 173) 34.


\textsuperscript{189} UN Human Rights Council, 16\textsuperscript{th} Session, Agenda item 7, Follow-up to the Report of the United Nations Fact Finding Mission on the Gaza Conflict, UN Doc A/HRC/16/L.31, para 10.
had it been available at the time.\textsuperscript{190} The article sparked renewed controversy over the report, prompting Israeli supporters to rejoice, almost to the point of heralding the comments as exculpatory evidence against every allegation made in connection with Operation Cast Lead, and prompting Israel to demand a retraction of the entire report.\textsuperscript{191} The other three members of the fact finding mission, in any case, insisted that the report and its conclusions stood.\textsuperscript{192} Richard Falk has commented that the debacle gave the report a ‘second life’ and presented an opportunity for renewed action in relation to ensuring an even-handed approach to the application of the rule of law, considering the robust reaction to events in Libya in comparison to support for such action in response to the blockade of Gaza.\textsuperscript{193} Rather than the EU seizing such an opportunity for renewed action, a spokesperson for the EU’s high representative for foreign affairs and security policy merely maintained that Goldstone’s remarks in no way changed their ‘consistent line’ calling on all parties to respect international law and that their demands for thorough investigations by the parties into possible violations of international humanitarian law stood,\textsuperscript{194} despite negligible movements towards such action by either side.

Both the initial reaction to the report, and the debacle attending the erroneously labelled ‘retraction’, point to the significance of both reputation and legitimacy as relevant in relation to this conflict. Firstly, the consideration of reputational affect may have been insufficient to change the behaviour of the parties during the conflict, but it may affect the response to allegations of violations, and may prompt investigations into such allegations, leaving aside the independence and veracity of such investigations. Reputational effect can impact a state or non-state actor’s incentives, but as Andrew Guzman has acknowledged ‘in some instances that impact will be insufficient to alter country behavior’.\textsuperscript{195} Reputational theory thus ‘reconciles the claim that international law affects behaviour with the fact that the law is not always followed’.\textsuperscript{196} Israel may not be concerned with having a flawless reputation

\textsuperscript{191} See Barak Ravid, ‘Netanyahu to UN: Retract Gaza war report in wake of Goldstone’s Comments’ \textit{Haaretz} (2 April 2011); and Barak Ravid, ‘Israel to Launch campaign urging UN to retract Goldstone report’ \textit{Haaretz} (3 April 2011).
\textsuperscript{192} Hina Jilani, Christine Chinkin, and Desmond Travers, ‘Goldstone Report: Statement issued by Members of UN mission on Gaza War’, \textit{The Guardian} (14 April 2011).
\textsuperscript{194} See Yossi Lempkowicz, ‘Richard Goldstone’s article “doesn’t change the EU’s consistent line that all parties must respect international law”’ \textit{European Jewish Press} (6 April 2011) <http://ejpress.org/article/50189#>.
\textsuperscript{196} Ibid.
in relation to international humanitarian law, but it may be concerned with maintaining good standing with its supporters, most notably the United States, and may also be concerned with what costs would be involved with losing its reputation or standing entirely, in other words if its supporters come to perceive that it has crossed a certain line. Falk has recognised that part of this concern for reputation and for vindication is Israel’s ‘implicit acknowledgement that the UN is after all a major site of struggle in the ongoing legitimacy war being fought against Palestinian claims of self-determination’ 197 Israel may recognise that its reputation is already damaged, and may wish to avoid destroying it completely in the context of this struggle. The EU could pay attention to such a desire in its attempts to influence increased compliance, but its deeds ultimately undermine the authority and impact of its criticisms of Israel. Hamas, on the other hand, may have been even less susceptible to any potential deterrence through reputational concerns, given that it was already under a severe and prolonged international boycott and listed as a terrorist group. The isolation of Hamas may indeed have negatively affected compliance, although such an outcome would be difficult to definitively discern.

Secondly, the response to the report, to Goldstone’s remarks, and the ineffective response to the ongoing blockade also highlight the role that legitimacy plays in this conflict. If the legitimacy of the relevant law suffers, then compliance may consequently suffer. The legitimacy of the law can be damaged, not only by perceived inequalities by both sides, but also because of issues related to transparency and ‘lawfare’, 198 that may threaten the perceived legitimacy of international humanitarian law in this context. It has been argued that threats to the legitimacy of the law can arise through neglect of transparency, or more simply neglect of honesty, in terms of international legal scholars ‘denying the political project inherent in legal forms’. 199 The central question in this respect is whether many international legal scholars are in fact ‘hurling stones under the guise of legal forms’. 200 It has also been recognised however, that against the backdrop of this particular conflict, ‘it is hard to deny that rules of international law have barely been observed while being simultaneously the object of abusive interpretations justifying the state of exception’. 201 The law is then open to abuse from many sides, and transparency is one of the solutions proffered:

200 Ibid.
201 Ibid 9.
Such transparency is not only conducive to the ability of legal forms to be a transparent platform for debates. It is necessary if we want that the actual absence of legal rules or their insufficient development be not obfuscated and that we remain in a position to lay bare the – sometimes acute – necessity of lobbying for the adoption of new rules or the change of the existing ones. In the more particular context of the Palestinian-Israeli conflict, it is also indispensable if we want that the legal discourse about the Palestinian-Israeli conflict [ceases] to be hijacked and abused by some parties.  

Accusations of ‘lawfare’ against those attempting to promote and enforce international law are also common with respect to this particular conflict, and conveniently distract from any form of accountability for violations that have occurred. A definition of ‘lawfare’ that may be appropriate in this context is as follows: ‘A word coined within the United States military and subsequently adopted by right-wing ideologues as a way of stigmatizing legitimate recourse to legal remedies, particularly within an international law context’. The law finds itself at the centre of each controversy that emerges, and is interpreted by different parties in radically different ways. It may also be the case that the real or perceived indeterminacy of the law applicable to both the prolonged blockade and the flotilla incident affects legitimacy and thus compliance. This may indeed prove difficult terrain for the EU to navigate, but it must take a position on which interpretation of the law it seeks to promote, as it cannot promote the law effectively in abstract.

## 5.7 Conclusion

Over a decade ago, it was determined that the duty of the European Union to ensure respect for international humanitarian law in Israel/Palestine had been subordinated to other political demands, including that of the peace process, and that equal ‘degrees of action (as compared to declared commitment) in support of the peace process and in support of international law have not been forthcoming’. Notwithstanding the adoption of specific policy on the promotion of international humanitarian law along with the supposed enhancement and streamlining of the rule of law, human rights and international humanitarian law in EU external policy in the intervening years, the unavoidable conclusions that must be drawn remain the same.

Various windows of opportunity for the EU to assert itself as a player rather than predominantly a ‘payer’ in relation to the Middle East conflict since 2006 have been
identified by different observers.\textsuperscript{205} Most of these opportunities, however, have essentially been squandered. Implementation of common EU policy on international humanitarian law and a commitment to the shared values of the rule of law and accountability would appear to have been sacrificed in the interests of individual EU Member States and of the different EU institutions. The EU response to Operation Cast Lead and its aftermath most clearly exposes the difficulties inherent in having a coherent EU external policy, especially one based on principles of international law. Both EU institutions and EU Member States were divided on how to respond, on what approach to take, on what the priorities were in responding, and essentially on who was to blame, Israel or Hamas (i.e. whether it was an offensive use of force or an example of legitimate self-defence). The Council and the Commission took a reserved approach, and the EU Parliament was characteristically more outspoken, perhaps closer to representing the views of civil society in EU Member States.\textsuperscript{206} The EU Member States reacted according to their traditional allegiances, in line with which party to the conflict their sympathies lay. This conflict makes it clear that Europe ‘still speaks in many voices’.

The potential for greater dialogue with Israel is one potential benefit that results from closer relations. If that dialogue does not result in any concrete policy changes, then it must be acknowledged that Israel is benefitting from the relationship more than the EU, and the EU is failing to uphold its values and implement its policy on international law.\textsuperscript{208} A managerial or ‘no fault’\textsuperscript{209} approach to improving compliance has not offered any advantages, and indeed while certain international obligations may be violated due to a lack of state capacity or resource constraints, it is difficult to see how actions such as deliberate targeting of civilians and civilian objects as outlined in the Goldstone report could fit into this mould. In relation to the potential for a stronger relationship to enhance the EU’s capacity and ability

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\textsuperscript{205} See, eg, Ruth Hanau-Santini, ‘A Propitious Moment for the EU to Assert Itself in the Palestinian Occupied Territories?’ (Centre for European Policy Studies, Commentary 17 July 2007).


\textsuperscript{208} See Cronin (n 125) 12.

\textsuperscript{209} Kal Raustiala and Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’ in Walter Carlsnaes, Thomas Risse, and Beth A Simmons (eds), \textit{Handbook of International Relations} (Sage 2002) 543.
\end{footnotesize}
to influence Israel, it has been remarked that the EU should rethink this strategy, considering that its success thus far is severely limited.\textsuperscript{210}

Leverage and influence are also reduced due to critical perceptions of the EU from both Israeli and Palestinian perspectives. While Israel predominantly views the EU as a source of potential economic advantage, there are concerns about a pro-Palestinian bias, and a hostile and critical attitude towards Israel’s position and behaviour.\textsuperscript{211} Israeli policy makers and the Israeli public also prioritise the relationship with the United States over that of the EU, considering the special relationship and support from the former as crucial.\textsuperscript{212} The Palestinians, on the other hand, are greatly dependant on the EU for financial assistance, and would welcome a more active and strengthened diplomatic role for the EU, ‘which is broadly considered more favourable to the Palestinian negotiating position’ than the United States.\textsuperscript{213} The EU remains in the eyes of many Palestinians, however, as a donor first and foremost (‘almost neck-and-neck with the UN’)\textsuperscript{214} and a political player and mediator in the Middle East Peace Process to a considerably inferior extent.\textsuperscript{215}

International perceptions of both Israel and the EU have suffered dramatically as a result of Operation Cast Lead and the surrounding issues and incidents. The EU recognised that the operations ‘have tarnished Israel’s international standing, and have given rise to concerns as to international humanitarian law violations by all parties to the conflict’.\textsuperscript{216} Chris Patten has noted that Israel cannot ‘trample over the rule of law, over the Geneva conventions, over what are generally regarded as acceptable norms of behaviour without it doing colossal damage to their reputation’.\textsuperscript{217} Similarly, the EU cannot continue to allow a dramatic disparity between its rule of law rhetoric and its action in relation to violations of international humanitarian law, without undermining its legitimacy as an international actor driven by the values of human rights and the principles of international law. The ‘business as usual’ approach of the EU to relations after Operation Cast Lead has meant that the temporary suspension of the upgrade has had little effect on the EU’s credibility, ‘particularly tarnished in

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\textsuperscript{210} Victor Kattan, ‘The EU’s Pivotal Role in Middle East Peace’ (8 January 2005) \textit{Rev Intl Social Questions} [http://www.risq.org/article394.html].
\textsuperscript{212} Ibid 74.
\textsuperscript{213} Simona Santoro and Rami Nasrallah, ‘Conflict and Hope: the EU in the Eyes of Palestine’, in Lucarelli and Fioramonti (eds) (n 211) 87.
\textsuperscript{214} Ibid, 95.
\textsuperscript{215} Ibid, 89.
\textsuperscript{216} Progress Report Israel (n 19) 3.
\textsuperscript{217} Chris Patten, former European Union External Affairs Commissioner, ‘Israel faces rage over “massacre”: London and Brussels politicians demand UN investigation of Jenin allegations’ \textit{The Guardian} (17 April 2002).
\end{flushright}
the eyes of the Palestinian and the international human rights community.\textsuperscript{218} The relations between the two suffered a significant amount of ‘wear and tear’, however, which could have been mitigated to some extent by independent and expedient Israeli investigations into the allegations on the use of certain weapons, violations of international humanitarian law, and the use of disproportionate force.\textsuperscript{219}

The approach of the EU to Israel and Palestine runs on a two track approach, where politics has been separated from economics, and politico-legal responses to the conflict have been compartmentalised from EU-Israel economic relations.\textsuperscript{220} The difficulty faced by the EU is that the points where it can influence Israel the most are not directly related to the conflict or its resolution, and so may not be seen as appropriate by either party to be connected to specific policies or alleged violations\textsuperscript{221} – yet the foremost sites of influence should be taken advantage of. The EU can continue to compartmentalise, but publicly condemning ongoing violations of international humanitarian law while maintaining and even upgrading relations weakens its credibility and legitimacy as an actor driven by the principles of international law. The EU continues to use political dialogue and public statements as its main tool for influencing compliance with international humanitarian law in relation to this conflict, despite the fact that this approach has proven to be almost futile for influencing behaviour in any substantial way in this particular conflict.\textsuperscript{222} The European Commission has affirmed that the EU should pursue dialogue wherever possible, but should also recognise that in certain cases the third country involved ‘may have no genuine commitment to pursue change through dialogue and consultation’, and thus under certain circumstances, ‘negative measures may therefore be more appropriate’.\textsuperscript{223} It is supposedly on this basis which the suspension clauses included in agreements with third countries should operate. It has been observed that there has been no move to suspend any part of the Association Agreement despite continuing violations of human rights and international law committed by Israel and despite repeated and public condemnation by the EU.\textsuperscript{224}

\textsuperscript{218} Nathalie Tocci ‘The Conflict and EU-Israeli Relations’, in \textit{European Involvement in the Arab-Israeli Conflict} (n 69) 59.
\textsuperscript{219} See Eran (n 20) 67.
\textsuperscript{221} Tocci (n 218) 57.
\textsuperscript{222} Ibid 58.
\textsuperscript{224} Tocci (n 218) 59. Nor has there been any intention to suspend the agreement with the Palestinian Authority, although because of political and factional divisions it may be more complicated to hold the PA responsible for the actions of certain Hamas members operating in Gaza.
The EU preference is declarative diplomacy over operative diplomacy. The former can be defined as setting out commitments without attaching them to any actual or potential consequence, and the latter as consisting of actions taken in the bilateral or multilateral spheres that influence the decisions of a third state.\textsuperscript{225} This preference is in stark contrast to more robust responses that have been forthcoming in response to widespread violations of both human rights and international humanitarian law witnessed elsewhere, for example in Sri Lanka, Côte d’Ivoire, Georgia, and Libya.\textsuperscript{226} In Sri Lanka, the EU demanded an independent inquiry to investigate allegations into war crimes, welcomed the appointment of a United Nations Panel of Experts, and withdrew preferential trade arrangements. The EU renewed and extended restrictive measures which were imposed against individuals in Côte d’Ivoire who were responsible for serious violations of international humanitarian law. The EU commissioned an independent international fact finding mission on the conflict in Georgia, one of the aims of which was to investigate the origins and the course of the conflict, with regard to international law, international humanitarian law and human rights, and accusations made, including allegations of war crimes. In relation to Libya, the EU broadened its restrictive measures more than once to extend the application of the Security Council asset freeze and travel ban and expressed eagerness to deploy ground troops to the country, to secure the delivery of humanitarian aid.\textsuperscript{227}

Members of the European Community also acted unilaterally in the past without express authorisation from the Security Council, for example in relation to the hostage crisis in the American Embassy in Iran, imposing sanctions after the Soviet Union had vetoed a resolution before the Security Council, stating that ‘the situation created a concern for the whole international community’.\textsuperscript{228} The EU should not only endeavour to act consistently in relation to the conflict in the Middle East in line with its response to alleged violations committed during the course of the other conflicts mentioned above, but it should also seek to act independently of the United States in relation to this conflict. Victor Kattan has highlighted that while the US has a seat in the Security Council, ‘it does not have a seat in the

\textsuperscript{226} As outlined in detail in Chapter 3 on current practice of the EU.
\textsuperscript{227} See Council of the EU, Council Conclusions on Libya, 3082\textsuperscript{nd} Foreign Affairs Council Meeting (Luxembourg, 12 April 2011); Ian Traynor, ‘Libya Conflict: EU Awaits UN Approval for Deployment of Ground Troops’, The Guardian (18 April 2011).
European Council. The EU continues to allow itself to be divided internally in response to Israeli policy and actions and continues to capitulate in the face of the United States’ prerogative within the Quartet. The legal obligation of EU Member States and the duty of the EU to ensure respect for the Geneva Conventions have been overshadowed by the imperative to resume the peace process and the desire to maintain close relations with Israel. Just as the response to the conflict in the former Yugoslavia was perceived as a great failure of Europe and spurred the EU to develop its capacity to react to such crises, the situation in Gaza and the wider conflict may come to be seen as the ultimate challenge to the EU’s credibility as a promoter and enforcer of international humanitarian law.

229 Kattan (n 210).
Conclusion

This study set out to analyse the role of the EU and its Member States in ensuring respect for international humanitarian law. The EU, as one of the most economically prosperous, stable and influential world powers, has a duty to uphold international law, and a responsibility to ensure respect for international humanitarian law, which it recognises as ‘one of the strongest tools the international community has to ensure the protection and dignity of all persons’.¹ Regional organisations have an increasingly important role to play in defending international law, and the EU is exemplary in this respect. The EU has considerable leverage in terms of advocacy and lobbying at the international level in relation to concerns of international law, not least due to its unique super-observer status at the UN. The efforts of the EU to promote international human rights law externally are distinct from, and indeed hitherto superior to, the more recent attempts to engage with international humanitarian law promotion, which are evolving in response to external demand and necessity. International humanitarian law essentially entered the ‘orbit’ of the EU² around the time of the conflict in the former Yugoslavia and has steadily increased in relevance throughout the external relations of the EU ever since.

The EU’s role in promoting compliance with this body of law cannot be appreciated without first understanding how compliance operates in international law overall. There is no one theory that can explain every aspect of compliance and non-compliance; however some theories, such as reputation, legitimacy, management and internalisation have proven more useful than others in relation to both international humanitarian law and the options available to the EU for influencing compliance in particular. As has been demonstrated, factors which influence levels of respect for international law are broadly addressed by compliance theory, but particular challenges related to improving compliance and enforcement emerge in relation to international humanitarian law, such as asymmetry in warfare, and difficulties related to effective dissemination and training. A regional approach to the various challenges involved is proposed in this study, through the framework of EU policy, specifically through the European Union Guidelines on Promoting Compliance with International Humanitarian Law. The guidelines provide a practical toolbox for the EU, and certain tools provided are of

¹ Council of the EU, Council Conclusions on Promoting Compliance with International Humanitarian Law, 2958th Foreign Affairs Council Meeting (Brussels, 8 December 2009) para 11.
particular use, such as political dialogue (including accession negotiations) and restrictive measures, while a combination of measures is the most effective approach overall.

EU Member States have a duty to ensure respect for international humanitarian law in third countries, as demonstrated in chapter two, which can be fulfilled through the external activities of the EU. This study established that the duty entails an obligation for states not involved in conflict to ensure that parties to an armed conflict respect the relevant law. It was further observed that this obligation was not one of result, but rather comprised a duty to act in whatever ways possible and permissible under international law. The links between protecting human rights and protecting civilians in armed conflicts were outlined, and it was resolved that human rights mechanisms have the potential to be a useful tool for influencing compliance and enforcing accountability. Some of the dangers inherent in fully merging the two fields of law, however, include the potential for unfulfilled expectations to undermine the legitimacy or credibility of these regimes. Once the legal parameters of the research were determined, the study proceeded to examine the related practice.

The practical fulfilment of the Member States’ duty to ensure respect for the law through the vehicle of the EU was considered in the latter three chapters of the study. The practice was discussed with reference to the compliance theory explored at the beginning of the study, which was used as an aid in analysing EU practice. One of the key issues that arose throughout the examination of practice is that what the EU does in one area can affect its legitimacy in another area. Externally the EU is often perceived as one entity and one actor, and it continually strives to foster this unified image. What the EU does in one arena, however, for example, trade or humanitarian policy, may affect its credibility in another arena, for example, promotion of the rule of law, including international humanitarian law. The EU should be careful to protect its legitimacy when it comes to being a humanitarian donor, a trading partner, and a normative actor: external actors may not perceive differences between the EU as a donor or economic power and the EU in its other, more ethical, guises.

The EU exists and operates on several planes, among them, ‘the one on which it presents itself; the way in which politicians try to mould it; the actual; and the potential’; all of which can overlap and interact with each other. While the EU is a unified actor in certain respects, it also represents, as emphasised in the introduction, and illustrated through the practice explored, ‘27 ministries of foreign affairs, 27 ministries of defence and 27 prime

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ministers/heads of state’, all of whom may have different approaches to international law in different situations, and might not want to diminish their own influence, power and leverage within the EU. Achieving a common position on matters of international law, and more importantly on addressing violations of international law, depends on harmonising the positions produced by the calculations of those states, which in turn may be influenced by domestic economic, cultural and social interests and values, and historical inheritance, and foreign policies in particular are at risk of falling ‘victim to the parochial and sectoral interests of individual Member States’. Some Member States, as has been discerned from the practice discussed throughout the study, are ‘particularly insistent on their independence’, some of the ‘usual suspects’ being Britain and France. Some divisive situations, for example the conflict in Iraq and the 2008/2009 military operation in Gaza as alluded to in this study, are ‘particularly liable to produce a splintering of European reactions’.

Aside from the divisions between EU Member States, the internal divergence between EU institutions has also been notable in several examples of practice, which can similarly increase with respect to particular issues, such as the conflict in Iraq or in the Middle East. Each Presidency of the Council of the EU also has its own priorities which can affect practice, including on external relations and external action, for its six-month period in office. The continuing economic crisis in Europe in 2010-2011 resulted in the focus turning overwhelmingly inwards for the EU Presidencies of that period. Only one of the main objectives of the common work programme during the period related explicitly to external affairs, albeit with a self-interested rather than a normative objective: the aim was to ‘set up a more consistent, effective external EU representation’. The danger inherent in this reality is that economics may prove to continually remain the core force determining the priorities of the EU, over and above concerns of international law.

One final division which must be borne in mind, although not directly addressed in this study, is the perceived distance between the priorities and preferences of EU civil society and of the EU itself; this is part of the democratic deficit problem which has yet to be solved. This deficit has manifested itself, for example, with widespread protests over the recourse to

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6 Jan Zielonka, ‘Constraints, Opportunities, and Choices in European Foreign Policy’ in Zielonka (n 3) 12.
7 Christopher Hill, ‘Convergence, Divergence and Dialectics: National Foreign Policies and the CFSP’ in Zielonka (n 3) 36-37
8 Ibid.
9 For details see <http://www.eutrio.be/trio-presidencies>. 

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war in relation to Iraq, or widespread misapprehension in many EU countries surrounding the adoption of the Lisbon Treaty. The democratic deficit can negatively affect the reputation of the EU as an ‘exporter’ of the goods of democracy, human rights, and the rule of law, and as champion of international law including international humanitarian law. The internal diversity of the EU leads to a situation whereby its power on the international scene can be questioned, in that the ‘plurality of identities and interests as well as the multifaceted approach are seen as the main factors causing its lack of global actorness’.  

Intriguingly, the EU’s greatest weakness in terms of its diversity and internal division, however, can also be its greatest strength, and can endow the EU with a unique ‘presence’ and ‘moral authority’ on the international scene. The International Criminal Court, for example, has benefitted from 27 timely ratifications of its statute, and continues to benefit from the strong support of 27 diverse European states. This contributes to the legitimacy of the institution, and simultaneously endows it with an effective and powerful advocate, whose credibility derives from its diversity. This power in numbers is a crucial element in deepening the EU’s external relations, as the ‘various member states have different capacities to reach out to other countries, particularly due to historical links and versatile expertise’. It is the complexity, fragmentation, and multi-level intergovernmental collaboration which invest the EU with its ‘soft power’. The idea of a strong union of states is the most recurrent image associated with the EU, and many observers would agree that the EU ‘stands out as an agent of peace, both in relation to its internal role of supranational power within the European continent as well as its international strategy to resolve controversies through diplomatic means’.

Another issue related to external perceptions of the EU, which arose in chapter three, concerned the manner in which the EU exerts its power, and how it engages in partnerships. EU High Representative Catherine Ashton has asserted that the EU can offer post-imperial partnerships in a post-imperial age. The image of the EU as an ‘honest broker’ promoting democracy and the rule of law may be one that the EU is keen to project, but it is not

11 Ibid 215.
12 Ibid 208-209.
13 Ibid 208.
14 Ibid 209.
15 Speech by Catherine Ashton, EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, ‘A world built on co-operation, sovereignty, democracy and stability’ at Corvinus University (25 February 2011).
16 Ibid.
necessarily reflected in the reality of EU action, nor is it the crux of external perceptions of the EU. In relation to EU action as explored in chapter three, international law, including international humanitarian law, is not always an essential element of agreements, nor does it constitute an absolute principle by which the EU acts. The law is instead often used as a political tool in the EU’s foreign policy, and is caught up in considerations relating to trade, economics, development and other aspects of foreign policy. In relation to external perceptions of the EU, suspicions or accusations of inconsistency, incoherency or even of double standards, can affect the credibility and legitimacy of the EU, and thus its leverage over other actors. The EU would be wise to ensure that it does not replace a legal and political dominance with an economic and normative dominance over countries, a number of which were former colonies of certain EU Member States. The organisation must be careful to avoid an imperialistic image, and it has been remarked as somewhat paradoxical that the ‘continent which once ruled the world through the physical impositions of imperialism is now coming to set world standards in normative terms. There is perhaps a new form of European symbolic and institutional dominance even though the political form has entirely vanished’. 

Accusations of imperialism and double standards have similarly arisen from EU Member State engagement in controversial conflicts in Iraq and Afghanistan, EU involvement in extraordinary rendition, and the EU’s status as principal arms dealer to some of the poorest and most volatile countries in the world. It has been widely observed that while human rights and international humanitarian law have been used to justify forceful interventions in Kosovo, Afghanistan, and Iraq, ‘such interventions appear to have themselves to some extent undermined human rights and humanitarian values and objectives, especially given the impact on civilian populations’. EU Member States are implicated in all of these, which can threaten the legitimacy of the EU itself as discussed in chapter three.

In terms of EU partnerships with third countries and other regions, it has been lamented that the EU has a tendency to promote unequal partnerships, ‘deeply rooted in a “superiority complex”, and a “top down” approach’, giving rise to suspicions of a neo-colonial attitude to working with certain partners. This approach obviously affects the

18 Ian Cobain and Martin Choluv, ‘Libyan papers show UK worked with Gaddafi in rendition operation’ The Guardian (4 September 2011).
20 Carta (n 10) 212.
21 Lorenzo Fioramonti and Sonia Lucarelli, ‘Self-representation and External Perceptions: can the EU Bridge the Gap?’ in Lucarelli and Fioramonti (n 10) 222.
credibility and indeed feasibility of the EU as an international actor based on the principle of international law. This is relevant for example with respect to its ACP agreements, where many of the countries are in an inferior position and must accept the EU’s demands. If rule of law and international humanitarian law promotion are only a tool of political bargaining for the EU and for third countries, it is unlikely that this approach will result in the internalisation necessary for an overall and long-term increased obedience (as Koh would have it) to the laws themselves. With the increasing power and influence of the EU on the international scene comes increasing responsibility. To be effective in ensuring respect for international humanitarian law, the external perceptions of the EU matter, because it is third states and non-state actors that are the focus of its efforts, and it is they who may decide to heed or discount the public statements, and accept or disregard the overtures of the EU. The ubiquitous ‘presence’ of the EU on the international scene is undisputed, but persistent monitoring of how the EU acts, and what kind of power and influence the EU exerts, is crucial.

The exploration of practice in this study revealed a strong preference for a managerial approach to improving compliance with international humanitarian law; a preference for dialogue and engagement over sanctioning and isolation. The EU High Representative has labelled this approach ‘soft power with a hard edge’; meaning that the EU has more than the power required to simply promote its values and interests, but less than the power required to impose its will. This preference for management, dialogue and the provision of incentives exists for a number of reasons, which range from the ‘exigencies of compromise among the Member States (which can hinder the taking of strong negative measures) to a more profound aversion to using coercion’. Accession to the EU has obviously been one of the strongest incentives for some third states to cooperate in terms of political conditionality, but this approach is limited to states within the continent of Europe, and so is not an option in most cases. Conditionality played a significant role in the success of the ICTY in apprehending its high-profile suspects, but this overwhelming focus on the ICTY may also have overshadowed other concerns, just as the preoccupation with counterterrorism as noted in chapter three may have detracted from efforts to improve means and methods of improving compliance with international humanitarian law.

23 Speech by EU High Representative 25 February 2011 (n 15).
24 Karen E Smith, ‘The Instruments of European Union Foreign Policy’ in Zielonka (n 3) 67.
25 See Howse and Teitel (n 19) 14.
The considerable EU energy expended on both general and targeted public statements relating to the law is another example of soft power, or what has been termed the adoption of ‘megaphone’ diplomacy.\textsuperscript{26} This tendency to ‘issue grand declarations based on principles regardless of their feasibility’\textsuperscript{27} is relevant both in relation to its promotion of compliance with international humanitarian law and to its declarative support for accountability with regard to international criminal justice. The risk remains that if there is no perceived threat of the hard edge of EU power ever emerging, the soft ‘megaphone’ approach, or repeated public statements targeted at actors violating international humanitarian law, may not be effective, depending on the levels of reputational concerns of the parties involved. The approach to targeted statements would benefit from hardening over time. More detail could be included on targeted public statements if it appears that there is no response to them, i.e. statements could become more specific over time, refer explicitly to the parties and to the violations involved, and outline what measures will be taken if the parties do not return to an attitude of compliance.

The EU’s soft approach, in terms of its use of public statements, incentives and political dialogue, distinguishes it from other international actors, who may favour a more aggressive and unilateral approach to exporting norms and ensuring compliance with international law.\textsuperscript{28} Crisis management operations are increasingly part of the foreign policy instruments used by the EU to create security and stability, but many of these operations could potentially benefit from the inclusion of a more explicit role in the promotion of humanitarian norms embedded in their mandate. Efforts aimed at third party dissemination and training could also be increased, as a means of \textit{ex ante} or preventative means to ensure respect for international humanitarian law. Effective operational training can also assist the process of internalisation of the norms involved, which may produce a more long-term rather than reactive result. Arms control is another avenue of preventative means to ensure respect, and the EU’s credibility as a normative actor is especially called into question if it simultaneously issues public entreaties for parties to return to compliance with the law while Member States continue to supply the parties with arms, notwithstanding the levels of violations occurring. The preference for \textit{ex post} means of improving compliance needs to be addressed if promotion of compliance with the law is a genuine long-term priority for the EU.

\textsuperscript{26} Carta (n 10) 212.
\textsuperscript{27} Ibid.
\textsuperscript{28} Fioramonti and Lucarelli (n 21) 221.
A reconstruction of Jonas Tallberg’s management-enforcement ladder of compliance, or a combination of cooperative and coercive measures that gradually improves the capacity and incentives for compliance, as discussed in chapter one, might help to envisage a spectrum of measures ranging from *ex ante* to *ex post* that can be implemented as violence escalates and a conflict develops. Tallberg argues that compliance systems that develop a complementarity between management and enforcement demonstrate an enhanced capacity to deal with non-compliance, and notes that new regimes such as environmental regimes can illustrate how refined enforcement mechanisms can enhance the effectiveness of existing managerial mechanisms, leading to increased overall compliance. Tallberg’s ladder moves in stages from preventative measures such as capacity building, to enhanced monitoring of compliance, to an enhanced legal system equipped to deal with violations, to sanctions as a final measure. Veuthey has argued that a more creative application of remedies is necessary to promote respect for fundamental rules in all situations, and some of his suggestions could be borrowed to flesh out the management-enforcement ladder, and provide further options for the EU in its efforts to secure compliance.

An invocation of the concept of due diligence, as discussed in relation to the ICJ’s case on prevention of genocide, might allow the EU to concentrate initially on managerial strategies but to advance up the ladder towards progressively more coercive means if compliance deteriorates. Smith has remarked that it is not utopian to expect the EU’s fostering of independence and dialogue to have a positive influence, but the EU must be prepared to go further. This is because its preference for persuasion and incentives over coercion and deterrents ‘opens it up to charges of complicity and appeasement ... Inconsistent use of sticks and carrots may eventually lessen the EU’s influence’. Increased coherence and improved coordination of the individuals and agencies managing the EU’s external relations is ‘critical for the credibility of the EU in the world’, and credibility is in turn critical for its effectiveness as a normative actor.

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30 Some of which are already being implemented to a limited degree by the EU, such as training and arms control, see: Michel Veuthey, ‘Public Conscience in International Humanitarian Law Today’, in Horst Fischer et al (eds), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection* (BWV 2004) 634-636. Recommendations specifically addressed to the EU concerning international humanitarian and human rights law, most of which elaborate on existing EU policy, law have also been developed by Atlas, a research project funded by the EU. See <https://sites.google.com/site/atlasihlrecommendations/home>.
31 Smith (n 24) 79.
32 Ibid.
33 Carta (n 10) 216 [emphasis added].
The example of Operation Cast Lead in particular would seem to have been an obvious and unique opportunity for the EU to move from persuasive to more coercive tactics, and to speak with a strong and coherent voice, in response to the escalation of breaches of international humanitarian law. As discerned in chapter five, the EU essentially allowed the blockade to continue and for the violence to escalate, waiting for violations to be committed so that it could implement its favoured ‘megaphone’ diplomacy strategy. Widespread violations committed by the Israeli forces against civilians as outlined in the Goldstone report, and a failure to effectively investigate such violations, ultimately entailed very little impact on Israel’s relations with the EU, considerably undermining the credibility and legitimacy of the EU as a normative international actor. This reluctance to move towards coercion when necessary can ‘make manifest serious inconsistencies in the EU’s approach. While [Common Foreign and Security Policy] statements condemn the behaviour of a state, trade concessions and aid flows remain unaffected’.

The rule of law was certainly not a key priority for the EU in this particular situation. If the EU’s priorities oscillate from situation to situation essentially hostage to the interests of Member States, positioning self-interest and security before law, it is extremely problematic to envisage an image of the EU as an impartial promoter and enforcer of international law. External perceptions of the EU from both the Israeli and Palestinian perspectives as established in chapter five do nothing to dispel this conviction. As discussed in the introduction to this study, the EU already had a legitimacy deficit in relation to the Middle East, and the EU’s ineffective response to both the ongoing blockade and to Operation Cast Lead did little to improve this situation.

While regional and international peace and security are legitimate interests, if the EU ultimately manifests itself as an ‘an entity striving to defend itself from global threats by promoting its own interests and refraining from assuming leadership in global affairs’, its credibility and effectiveness will suffer. This convergence of interests may certainly come into play, but if it is perceived to drive the EU over and above normative interests the achievement of the goals concerned may be threatened. If emphasis is placed on trade and regulation over politics, and indeed on presence over actorness, this is a ‘way of maintaining a privileged economic position on the international scene’, and the developing world will continue to see the EU as a ‘protectionist bloc’. The EU would also benefit from cultivating

34 Smith (n 24) 76.
35 Fioramonti and Lucarelli (n 21) 224.
36 Carta (n 10) 210.
an image as a ‘counterforce to the hegemonic position’\textsuperscript{37} of the United States, but only if it can consistently stand up to immense pressure exerted as it successfully did in relation to support for the ICC.

The project of international criminal justice, with which the EU is closely associated through its significant support and engagement, can also undermine perceptions of credibility, with accusations of ‘victor’s justice’ accompanying the \textit{ad hoc} tribunals, doubts surrounding a selective and biased prosecutorial strategy accompanying the ICC, and especially challenges related to the motivations behind the exercise of universal jurisdiction within the EU. Despite the significant attention and support lent to international criminal justice by the EU, even a perfected system could not alone create a world ‘free of dehumanizing conflicts.

The messy and contingent business of brokering political deals between groups and factions, and of economic reconstruction has become less glamorous than that of trying and punishing the “villains” (however worthy and justified in itself)\textsuperscript{38}. Declarative and financial support for this form of enforcement should not therefore entirely detract from other engagements with the parties to armed conflicts, and from other efforts at improving compliance with the law.

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Many of the situations explored in this study illustrated the continuing issue of the capability-expectations gap. The distinction mentioned above between EU ‘presence’ and its ‘actorness’, also ‘reveals the direct correlation between growing expectation and institutional constraints’\textsuperscript{39}. The EU has a propensity to make promises that outstretch its capacity to fulfil those promises, particularly when it enters new spheres of activity, such as the promise to promote international humanitarian law, or the promise not to tolerate impunity. Expectations the EU raises about what it will achieve, such as respond effectively to serious and widespread violations of international law, can often run ahead of its capabilities, thus a ‘re-evaluation of the EU’s aims could lead to a better appreciation of its strengths and weakness’ and of the particular merits it possesses as a result of its \textit{sui generis} character\textsuperscript{40}. An EU that can be criticised for being too weak is ultimately better as an advocate for international law than an international organisation with a preference for unilateral action and increased military action. Increased and more creative use of soft measures of influence could be encouraged, rather than a turn towards harder methods of coercion being sought.

\textsuperscript{37} Carta (n 10) 212.
\textsuperscript{38} Howse and Teitel (n 19) 25.
\textsuperscript{39} Carta (n 10) 215.
\textsuperscript{40} Smith (n 24) 67.
Levels of influence publicly exerted by the EU, the means and methods used to exert that influence, and the responses of third states and other actors are appropriate gauges of the effectiveness of EU external action. In each conflict situation the EU might be successful in some respects, and less so in others. Just as the ICRC study on customary international humanitarian law is a photograph of a moving target, as noted in chapter two on the duty to ensure respect, so any appraisal of the external action of the EU is also an attempt at capturing an image of a moving target. Notwithstanding that reality, however, certain patterns have certainly emerged, such as the preference for managerialism over enforcement, and *ex post* over *ex ante* means of influencing compliance levels.

The EU appears to be effective in its long-term ambitions, such as conditionality negotiations eventually leading to accession, and developing its external human rights policy over a number of years. The EU’s strategies of cooperation and dialogue and an overall managerial approach may be effective for raising the standards of democracy and human rights in the long-term, but not very constructive for stopping breaches of international humanitarian law occurring in the throes of an armed conflict. It may take time for the EU to influence an increased internalisation of humanitarian norms, and this will only occur where it chooses to exert its influence in a concentrated and sustainable way. Being uniquely placed to address the causes of instability, the EU has considerable potential to positively influence peace and stability in the long run, and therefore prevent violations of international law, or ‘inoculate’ against crises.\(^{41}\) ‘as many conflicts and tensions are rooted in political, social and economic instabilities, the Union is much better equipped than any other international organisation to address related problems’.\(^{42}\)

Two developments have significantly affected the EU’s ambition and influence in this arena in recent years – the global recession and the wave of uprisings that spread throughout the Middle East and North Africa. As noted above, the global recession has prompted a move towards internal economic concerns within the EU, and away from external normative concerns, but there is also a positive outcome to this development. The crisis demonstrated that multilateral responses to global problems, such as those implemented by the EU during the crisis, by ‘sharing the burden and pooling efforts’, are most effective, and indeed that individual states increasingly do not have the capacity to respond to either economic

\(^{41}\) Ibid 79, citing Christopher Hill.
\(^{42}\) Ibid citing Mathias Jopp.
instability, or any other geopolitical or environmental challenges, all of which can both affect existing conflicts and have the potential to trigger new conflicts.\textsuperscript{43}

The Arab Spring, a ‘political tsunami’\textsuperscript{44} that swept across the Middle East and North Africa in 2011, also altered the EU’s approach to external relations. The EU was offered a chance to rise to the historical challenges developing in its neighbourhood,\textsuperscript{45} and demonstrate its capacity for effective external action. Following initial hesitation, the EU responded in a reasonably coherent and effective way to the widespread turbulence, and eventually the EU ‘solidified and devised a balanced policy of principled pragmatism’.\textsuperscript{46} The EU was forced to calibrate its external policies in response to the changing environment. The EU political strategies in its neighbourhood were reviewed and a number of changes were made, three of which in particular have the potential to improve the EU’s action with regard to ensuring respect for international humanitarian law.\textsuperscript{47} The first of these is the introduction of the principle of mutual accountability in partnerships as an alternative to conditionality, which may allow for more equal partnerships to emerge. The second is increased engagement with civil society, for example when the EU curtails relations with a particular government, it has declared that it will ‘not only uphold but strengthen further its support to civil society’.\textsuperscript{48} The third development arising out of the EU’s experience with the Arab Spring is its determination to create simplified and coherent policy and programme frameworks, with clearer priorities. This focus on a smaller number of specified priorities, which will supposedly be backed by more precise benchmarks for the parties involved, could in part solve the issue of overstretching that has been identified in this study.

The response to events in Libya in 2011 was an example of particularly enthusiastic and engaged EU external action. The EU responded to Libya on the basis that ‘regimes that shoot at their own people have no place in the community of nations’.\textsuperscript{49} Realists would argue that it was a convergence of interests which incited such a forthright response, with incentives, including economic benefits, to be derived from the country. Indeed, a similar

\begin{footnotes}
\item[43] See Fioramonti and Lucarelli (n 21) 225.
\item[47] A New Response to a Changing Neighbourhood (n 45).
\item[48] Ibid.
\item[49] From speech by José Manuel Durão Barroso, President of the European Commission, ‘Partners in Freedom: the EU response to the Arab Spring’ (Cairo, 14 July 2011).
\end{footnotes}
approach was not observed elsewhere, and many other regimes which target civilians, such as Sri Lanka, or target their own citizens, such as Syria, have not witnessed any significant consequences for their actions.

Despite the complexity and diversity of the EU’s external relations, however, most third countries and non-state actors remain attracted to the power and economic strength of Europe, and the EU has drawn many ‘nations into its web of economic and political associations. Countries want to join or to be linked with Europe, not to oppose it. Peripheral countries have been centripetally attracted to the European centre, not driven away from it’. High Representative Catherine Ashton has acknowledged that the EU continues to have a significant influence, which is a direct result of this centripetal force:

One of the things I find wherever I go - perhaps the only thing that is common to each country I visit - is that every political leader, and everyone in business, the professions and civil society too, wants to be our partner. Sometimes the partnership they seek concerns trade, sometimes it concerns security, sometimes development, sometimes human rights. Whatever the subject, the ambition of countries round the world, from the biggest and richest to the smallest and poorest, is the same: to make the EU their ally.

The EU should harness this leverage, and civil society in the EU should be aware of its potential and of the implications of this degree of influence. Irrespective of what way the EU chooses to exert its power and influence, it is a player to be reckoned with, heavily involved in many issues and activities surrounding armed conflicts. The EU has repeatedly pledged that it will do its utmost to promote an international order where no state or individual is above the law, and no one is outside the protection of the law. The extensive influence of the EU on the dynamics of contemporary armed conflicts cannot be ignored, and its efforts to promote compliance with the law must be continuously scrutinised, to ensure implementation of EU policy and fulfilment of the duty of EU Member States to ensure respect for international humanitarian law.

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50 Rosecrance (n 17) 16.
51 Speech by EU High Representative 25 February 2011 (n 15).
52 Fioramonti and Lucarelli (n 21) 218.
53 Council of the EU, Council Conclusions on Promoting Compliance with International Humanitarian Law, 2958th Foreign Affairs Council Meeting (Brussels, 8 December 2009) para 11.
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Annex 1:

Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL)
NOTICES FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COUNCIL

Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL)

(2009/C 303/06)

I. PURPOSE

1. The purpose of these Guidelines is to set out operational tools for the European Union and its institutions and bodies to promote compliance with international humanitarian law (IHL). They underline the European Union’s commitment to promote such compliance in a visible and consistent manner. The Guidelines are addressed to all those taking action within the framework of the European Union to the extent that the matters raised fall within their areas of responsibility and competence. They are complementary to Guidelines and other Common Positions already adopted within the EU in relation to matters such as human rights, torture and the protection of civilians (1).

2. These Guidelines are in line with the commitment of the EU and its Member States to IHL, and aim to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States. Whilst the same commitment extends to measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct, including by their own forces, such measures are not covered by these Guidelines (2).

II. INTERNATIONAL HUMANITARIAN LAW (IHL)

Introduction

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

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

5. States are obliged to comply with the rules of IHL to which they are bound by treaty or which form part of customary international law. They may also apply to non-State actors. Such compliance is a matter of international concern. In addition, the suffering and destruction caused by violations of IHL render post-conflict settlements more difficult. There is therefore a political, as well as a humanitarian interest, in improving compliance with IHL throughout the world.

Evolution and Sources of IHL

6. The rules of IHL have evolved as a result of balancing military necessity and humanitarian concerns. IHL comprises rules that seek to protect persons who are not, or are no longer, taking direct part in hostilities — such as civilians, prisoners of war and other detainees, and the injured and sick — as well as to restrict the means


(2) All EU Member States are Parties to the Geneva Conventions and their Additional Protocols and thus under the obligation to abide by their rules.
and methods of warfare — including tactics and weaponry — in order to avoid unnecessary suffering and destruction.

7. As with other parts of international law, IHL has two main sources: international conventions (treaties) and customary international law. Customary international law is formed by the practice of States, which they accept as binding upon them. Judicial decisions and writings of leading authors are subsidiary means for determining the law.

8. The principal IHL Conventions are listed in the Annex to these Guidelines. The most important are the 1907 Hague Regulations, the four Geneva Conventions from 1949 and their 1977 Additional Protocols. The Hague Regulation and most of the provisions of the Geneva Conventions and the 1977 Additional Protocols are generally recognised as customary law.

Scope of application

9. IHL is applicable to any armed conflicts, both international and non-international and irrespective of the origin of the conflict. It also applies to situations of occupation arising from an armed conflict. Different legal regimes apply to international armed conflicts, which are between States, and non-international (or internal) armed conflicts, which take place within a State.

10. Whether situation amounts to an armed conflict and whether it is an international or non-international armed conflict are mixed questions of fact and law, the answers to which depend on a range of factors. Appropriate legal advice, together with sufficient information about the particular context, should always be sought in determining whether a situation amounts to an armed conflict, and thus whether international humanitarian law is applicable.

11. The treaty provisions on international armed conflicts are more detailed and extensive. Non-international armed conflicts are subject to the provisions in Article 3 common to the Geneva Conventions and, where the State concerned is a Party, in the 1977 Additional Protocol II. Rules of customary international law apply to both international and internal armed conflicts but again there are differences between the two regimes.

International Human Rights Law and IHL

12. It is important to distinguish between international human rights law and IHL. They are distinct bodies of law and, while both are principally aimed at protecting individuals, there are important differences between them. In particular, IHL is applicable in time of armed conflict and occupation. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them. However, these Guidelines do not deal with human rights law.

Individual responsibility

13. Certain serious violations of IHL are defined as war crimes. War crimes may occur in the same circumstances as genocide and crimes against humanity but the latter, unlike war crimes, are not linked to the existence of an armed conflict.

14. Individuals bear personal responsibility for war crimes. States must, in accordance with their national law, ensure that alleged perpetrators are brought before their own domestic courts or handed over for trial by the courts of another State or by an international criminal tribunal, such as the international Criminal Court (3).

III. OPERATIONAL GUIDELINES

A. REPORTING, ASSESSMENT AND RECOMMENDATIONS FOR ACTION

15. Action under this heading includes:

(a) In order to enable effective action, situations where IHL may apply must be identified without delay. The responsible EU bodies, including appropriate Council Working Groups, should monitor situations within their areas of responsibility where IHL may be applicable, drawing on advice, as necessary, regarding IHL and its applicability. Where appropriate they should identify and recommend action to promote compliance with IHL in accordance with these Guidelines. Consultations and exchange of information with knowledgeable actors, including the ICRC and other relevant organisations such as the UN and regional organisations, should be considered when appropriate.


Consideration should also be given, where appropriate, to drawing on the services of the International Humanitarian Fact-Finding Commission (IHFFC) established under Article 90 of the Additional Protocol I to the Geneva Conventions of 1949, which can assist in promoting respect for IHL through its fact-finding capacity and its good offices function.

(b) Whenever relevant, EU Heads of Mission, and appropriate EU representatives, including Heads of EU Civilian Operations, Commanders of EU Military Operations and EU Special Representatives, should include an assessment of the IHL situation in their reports about a given State or conflict. Special attention should be given to information that indicates that serious violations of IHL may have been committed. Where feasible, such reports should also include an analysis and suggestions of possible measures to be taken by the EU.

(c) Background papers for EU meetings should include, where appropriate, an analysis on the applicability of IHL and Member States participating in such meetings should also ensure that they are able to draw on advice as necessary on IHL issues arising. In a situation where an armed conflict may be at hand, the Council Working Group on International Law (COJUR) should be informed along with other relevant Working Groups. If appropriate and feasible, COJUR could be tasked to make suggestions of future EU action to relevant EU bodies.

B. MEANS OF ACTION AT THE DISPOSAL OF THE EU IN ITS RELATIONS WITH THIRD COUNTRIES

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. This is particularly important in the context of on-going armed conflicts where there have been reports of widespread IHL violations. However, the EU should also, in peacetime, 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 Statute. Full implementation includes enactment of any necessary implementing legislation and training of relevant personnel in IHL.

(b) General public statements: In public statements on issues related to IHL, the EU should, whenever appropriate, emphasise the need to ensure compliance with IHL.

(c) Demarches and/or public statements about specific conflicts: When violations of IHL are reported the EU should consider making demarches and issuing public statements, as appropriate, condemning such acts and demanding that the parties fulfil their obligations under IHL and undertake effective measures to prevent further violations.

(d) Restrictive measures/sanctions: The use of restrictive measures (sanctions) may be an effective means of promoting compliance with IHL. Such measures should therefore be considered against State and non-State parties to a conflict, as well as individuals, when they are appropriate and in accordance with international law.

(e) Cooperation with other international bodies: Where appropriate, the EU should cooperate with the UN and relevant regional organisations for the promotion of compliance with IHL. EU Member States should also, whenever appropriate, act towards that goal as members in other organisations, including the United Nations. The International Committee of the Red Cross (ICRC) has a treaty-based, recognised and long-established role as a neutral, independent humanitarian organisation, in promoting compliance with IHL.

(f) Crisis-management operations: The importance of preventing and suppressing violations of IHL by third parties should be considered, where appropriate, in the drafting of mandates of EU crisis-management operations. In appropriate cases, this may include collecting information which may be of use for the ICC (*) or in other investigations of war crimes.

(g) Individual responsibility: While, in post-conflict situations it is sometimes difficult to balance the overall aim of establishing peace and the need to combat impunity, the European Union should ensure that there is no impunity for war crimes. To have a deterrent effect during an armed conflict the prosecution of war crimes must be visible, and should, if possible, take place in the State were the violations have occurred. The EU should therefore encourage third States to enact national penal legislation to punish violations of IHL. The EU’s support of the ICC and measures to prosecute war criminals should also be seen in this context.

(*) See the Agreement on Cooperation and Assistance between the European Union and the International Criminal Court referred to in footnote 3 above.
(h) Training: Training in IHL is necessary to ensure compliance with IHL in time of armed conflict. Training and education must also be undertaken in peacetime. This applies to the whole population, although special attention should be given to relevant groups such as law enforcement officials. Additional obligations apply to the training of military personnel. The EU should consider providing or funding training and education in IHL in third countries including within the framework of wider programmes to promote the rule of law.

(i) Export of arms: The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (5) provides that an importing country’s compliance with IHL should be considered before licences to export to that country are granted.

ANNEX

PRINCIPAL LEGAL INSTRUMENTS ON INTERNATIONAL HUMANITARIAN LAW AND OTHER RELEVANT LEGAL INSTRUMENTS

— 1907 Hague Convention IV Respecting the Laws and Customs of War

— Annex to the Convention: Regulations Respecting the Laws and Customs of War

— 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare

— 1949 Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field

— 1949 Geneva Convention II for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

— 1949 Geneva Convention III Relative to the Treatment of Prisoners of War

— 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War


— 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts


— Regulations for the Execution of Convention for the Protection of Cultural Property in the Event of Armed Conflict


— 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction

— 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects

— 1980 Protocol I on Non-Detectable Fragments

— 1980 Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices

— 1996 Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices

— 1980 Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons

— 1995 Protocol IV on Blinding Laser Weapons


— 1993 Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction

— 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
— 1993 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

— 1994 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

— 1998 Rome Statute of the International Criminal Court

— 2005 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)

— 2008 Convention on Cluster Munitions