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LIST OF ABBREVIATIONS AND ACRONYMS

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

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

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

INTRODUCTION

Contemporary armed conflicts in different parts of the world, most notably in Syria, have shown that one of the greatest challenges of International Humanitarian Law (hereafter, 'IHL') is the lack of a centralized monitoring mechanism in charge of ensuring that it is correctly applied and enforced. While it is difficult to have access to reliable figures on the number of civilian casualties in armed conflicts, there is no doubt that too many men, women, and children are killed unlawfully every day in blatant violation of IHL. Against this background, the involvement of the European Union (hereafter, 'EU') in this field, formalized with the adoption of the Guidelines on Promoting Compliance with IHL in 2005¹, constitutes a promising development for the respect and promotion of IHL. The objective of this thesis is therefore to analyze to what extent the EU and two of its Member States – France and Spain – ensure respect for IHL pursuant to Common Article 1 to the 1949 Geneva Conventions.

1. BACKGROUND AND CONTEXT OF RESEARCH

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

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

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

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

IHL is subtended by the principle of 'Human Law', a principle formulated by Jean Pictet in the following terms: «[m]ilitary necessity and the maintenance of public order must always be compatible with respect for the human person»⁵. Three other principles spring from this principle, all of them being foundational to IHL treaties and conventions. First, there is the principle of 'Humanitarian Law' according to which «[b]elligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy»⁶. Second, the principle of the 'Law of Geneva' is defined as follows: «[p]ersons placed *hors de combat* and those not directly participating in hostilities shall be respected, protected and treated humanely»⁷. Finally, the principle of the 'Law of War' provides that «the right of the parties to the conflict to choose methods or means of warfare is not unlimited» and is the cornerstone of The Hague Law⁸.

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

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

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

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

⁶ *Ibid.*, p. 62.

⁷ *Ibid.*, p. 63.

⁸ *Ibid.*

⁹ *Ibid.*, p. 57.

¹⁰ *Ibid.*

Since the adoption of the first Geneva Conventions, about 150 years ago, IHL has become one of the pillars of public international law. It finds its origins both in treaty and customary international law. The former traditionally comprises two streams, already identified by Jean Pictet: the so-called ‘Hague Law’ and ‘Geneva Law’. In addition to these bodies of law, several specialized treaties and conventions have been adopted, especially on the regulation of weapons and arms¹¹.

The Hague Law is the most ancient *juris corpus* of IHL and mainly regulates the conduct of hostilities. Based on the observation that war cannot be eradicated, The Hague Conventions, adopted in 1899¹² and 1907¹³, aim at organizing warfare in accordance with some established principles and rules. These principles do not seek the eradication of violence but intend to limit abuses by establishing thresholds of tolerance, determining what is necessary to conduct hostilities, and providing for the limits of the use of lethal force¹⁴.

As for Geneva Law, it emerged in response to various convergent factors. Its origins date back to the nineteenth century, when Henri Dunant witnessed the atrocities committed during the Battle of Solferino¹⁵. After that terrible event, he wrote ‘*Un souvenir de Solferino*’ where he exposed the ideas that would lead to the creation of the ICRC and the adoption of the first Geneva Convention, in 1864¹⁶. Nonetheless, this instrument and the following ones – such as The Hague Conventions – proved to be unsuccessful in impeding the commission of other mass exactions.

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

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

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

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

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

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

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

Conditions of the Wounded and Sick in Armies in the Field¹⁷, Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention¹⁸ and the Convention relative to the Treatment of Prisoners of War¹⁹. Japan and the USSR had not ratified the latter and no convention encompassed the protection of civilians as such. The atrocities committed during World War II therefore underlined the important gaps of the existing legal framework, hence the adoption of the four Geneva Conventions of 1949: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereafter, ‘GC I’), the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereafter, ‘GC II’), the Geneva Convention relative to the Treatment of Prisoners of War (hereafter, ‘GC III’), and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereafter, ‘GC IV’)²⁰. The Geneva Conventions have reached universal ratification. They mainly intend to protect and safeguard the persons that do not take part in hostilities, those who are *hors de combat*. In 1949, the objective was to instill humanity in international law as a whole and in IHL specifically, in order to prevent barbarities from occurring again.

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

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

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

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

²⁰ Although three of them were already under discussion before World War II.

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

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

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

At operational level, the ICRC is entrusted with many tasks; one of them is to serve as an intermediary between the parties to the conflict and to assist war victims, in particular, to visit and conduct individual interviews with prisoners of wars and interned civilians²². At the beginning of an armed conflict, the ICRC sends a note to the belligerent parties to remind them of their duties stemming from IHL. Then, during the armed conflict, the ICRC intends to enhance respect of IHL through procedures that often are confidential. It formulates constructive propositions while pressuring the parties to respect IHL. Finally, it proposes countless spontaneous humanitarian initiatives that go far beyond its specific rights conferred upon by the Geneva Conventions²³. It discreetly performs considerable work and is the actor *par excellence* of IHL.

At legal level, the original Geneva Convention of 1864 was adopted on the ICRC's initiative and the ICRC has developed IHL ever since, adapting the legal framework to modern developments. Furthermore, the universal ratification of the Geneva Conventions may be credited to this organization and the ICRC continues to advocate for the ratification of other IHL treaties. In this context, one of the ICRC's principal missions is to ensure respect for the Geneva Conventions and their additional Protocols in international and non-international armed conflicts, as stated in article 4 of its statute²⁴.

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

²³ *Ibid.*

²⁴ Statutes of the International Committee of the Red Cross adopted on 19 November 2015 and came into force on 1 January 2016, article 4:

«1. The role of the ICRC shall be in particular:

- (a) to maintain and disseminate the Fundamental Principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality;
- (b) to recognize any newly established or reconstituted National Society which fulfils the conditions for recognition set out in the Statutes of the Movement, and to notify other National Societies of such recognition;
- (c) to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;
- (d) to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;

As a result, IHL would not be as important as it is today without the ICRC's work²⁵.

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

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

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

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

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

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

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

internal²⁷, and therefore involve non-State armed groups, which do not necessarily have access to IHL knowledge. In addition, while the principle of distinction between combatants and civilians is the cornerstone of IHL, civilians have become the main target in numerous conflicts²⁸. These elements, together with other factors, lead to widespread violations of IHL. It is commonly accepted that IHL itself remains fit for purpose and still represents the appropriate framework to regulate armed conflicts. Consequently, finding ways to ensure greater compliance with IHL represents one of IHL's greatest important challenges. In this respect, an important weakness of such a well-established corpus of law is – paradoxically – that IHL treaties and conventions do not establish a centralized oversight mechanism²⁹. As observed by the ICRC:

[T]he Geneva Conventions of 1949 are an exception among multilateral treaties in that they do not establish a Conference of State Parties or another similar type of institutional forum, in which States can discuss the application of IHL or current and emerging challenges to compliance with it³⁰.

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

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

²⁸ *Ibid.*

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

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

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

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

on the creation or development of an efficient compliance mechanism. Instead, it was agreed to pursue the «inclusive, State-driven intergovernmental process» and to submit its outcome to the 33rd International Conference³³.

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

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

2. RESEARCH PROBLEM

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

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

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

adoption of the Geneva Conventions³⁵, as it marks the first time the EU refers exclusively to IHL³⁶. After this fundamental declaration, references to IHL in EU acts have become more frequent and explicit and have been included in legally binding acts³⁷. This interest in IHL gained momentum with the adoption of the EU Guidelines on promoting compliance with IHL (hereafter, ‘IHL Guidelines’) in 2005, revised in 2009³⁸.

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

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

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

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

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

³⁸ IHL Guidelines.

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

insofar as it already possessed a ‘multilevel constitution’, entailing the EU founding treaties together with the EU Member States’ constitutions⁴⁰. As noted by Francisco Balaguer Callejón, the process of European integration has created new constitutional spaces and a constitutional dialogue among the different agents at stake, which inevitably have an impact both at EU and domestic levels⁴¹. In this context, the underpinning of multilevel is that powers and competences are distributed among various levels of governance – international, regional, national, and local – «in a flexible manner, depending on considerations of effectiveness, subsidiarity, culture and so on»⁴².

Paraphrasing Teresa Freixes, the multilevel approach constitutes an autonomous paradigm in the process of European integration, as it allows explaining the legal complexities applicable to the systems integrated into sub-systems⁴³. As observed by Yolanda Gómez⁴⁴, the multilevel interpretation of the legal order is not centered exclusively on the European and national levels of legal production. Conversely, it also integrates the other levels found internally (such as the legislation produced by sub-national entities⁴⁵) and, for present purposes, externally. As Teresa Freixes has shown, «multilevel is all-pervasive, as it is present in both vertical (hierarchy), horizontal (competences) and network relations (cooperation and subsidiarity)»⁴⁶.

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

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

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

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

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

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

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

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

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

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

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

3. INNOVATIVE ASPECTS

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

Some authors have touched upon questions regarding the EU and IHL. In this respect, the interest on this matter probably dates back to 2001, as Tristan Ferraro submitted a PhD thesis on IHL and the EU («Droit international humanitaire et l'Union européenne»⁴⁷). A year after, he published a groundbreaking article on IHL in the EU's Common Foreign and Security Policy⁴⁸. As the EU's practice on the matter and involvement in security questions have developed, so has the interest in the scholarship.

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

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

In particular, the applicability of IHL to the EU, with a special focus on CSDP operations⁴⁹, is a growing concern among scholars. In the same way, some book chapters⁵⁰, one book⁵¹, and at least one research project⁵² have focused on the relationship between the EU and IHL⁵³. Nonetheless, such literature fails to directly address the question of the obligation to ensure respect for IHL at EU level. It should likewise be noted that while some articles and book chapters have been published on the EU Guidelines on promoting compliance with IHL⁵⁴, they are either outdated or incomplete. In particular, they fail to situate the issue in a broader context and to articulate it with EU legal issues.

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

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

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

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

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

⁵³ At the time of writing.

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

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

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

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

4. STRUCTURE OF THE STUDY

In this thesis, it is sustained that the EU has established itself as an important actor of IHL on the international scene. The EU – a self-proclaimed leader in human rights matters – and its Member States are not only bound by Common Article 1 but have also accepted their mandate to effectively enforce it on the international scene. This thesis takes the view that the enforcement of IHL must rely not only on national law, its transposition, and enforcement at national level to be truly effective⁵⁶, but that it must further be analyzed from a multilevel perspective. In accordance with this view, Member States remain primary enforcers of Common Article 1, but the EU is considered an additional level, both of guarantee and action.

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

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

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

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

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

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