

IV

(Notices)

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⁾.

⁽¹⁾ See EU Guidelines on Human Rights Dialogues (approved by the Council on 13 December 2001, updated on 19 January 2009); Guidelines for EU Policy towards Third Countries on Torture and other Cruel, Inhuman or Degrading Punishment or Treatment (approved by the Council on 9 April 2001, updated on 29 April 2008); EU Guidelines on Children and Armed Conflict (approved by the Council on 8 December 2003, updated on 17 June 2008); EU Guidelines on the Promotion and Protection of the Rights of the Child (approved by the Council on 10 December 2007); Guidelines on Violence against women and girls combating all forms of discrimination against them (approved by the Council on 8 December 2008) and Council Common Position 2003/444/CFSP of 16 June 2003 on the ICC (OJ L 150, 18.6.2003, p. 67).

⁽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.

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

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.

⁽³⁾ See the Union's Common Position on the ICC (2003/444/CFSP) and the EU's Action Plan on the ICC. See further Decision of 13 June 2002 (2002/494/JHA) by which the Council set up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes; the Framework Decision (2002/584/JHA) on the European arrest warrant and the procedures between Member States; the Decision of 8 May 2003 (2003/335/JHA) concerning the investigation and prosecution of genocide, crimes against humanity and war crimes; Council Decision 2006/313/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ L 115, 28.4.2006, p. 49.

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 ⁽⁴⁾ 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 where 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.

⁽⁴⁾ 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.

⁽⁵⁾ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335, 13.12.2008, p. 99. This Common Position replaces the European Code of Conduct on Arms Exports adopted by the Council on 8 June 1998.

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 I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
- 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
- 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict
- Regulations for the Execution of Convention for the Protection of Cultural Property in the Event of Armed Conflict
- 1954 First Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict
- 1999 Second Hague Protocol 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
- 2003 Protocol V on Explosive Remnants of War
- 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

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- 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
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