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Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?

Aurel Sari and Ramses A. Wessel
(eds.)

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**HUMAN RIGHTS
IN EU CRISIS MANAGEMENT OPERATIONS:
A DUTY TO RESPECT AND TO PROTECT?**

**AUREL SARI
RAMSES A. WESSEL
(eds.)**

CLEER WORKING PAPERS 2012/6

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ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

© Contributors
Printed in The Netherlands
T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

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INTRODUCTION

HUMAN RIGHTS IN EU CRISIS MANAGEMENT OPERATIONS: A DUTY TO RESPECT AND TO PROTECT?

Aurel Sari and Ramses A. Wessel

Over the course of the last decade, the European Union has acquired an operational capability enabling it to deploy military and civilian crisis management missions in third countries in pursuit of its foreign and security policy. As a result of this development, the EU has launched more than twenty crisis management missions since 2003, ranging from large-scale military and civilian deployments in the Balkans to more modest security sector and monitoring missions in Georgia, Guinea Bissau and elsewhere.

The purpose of the present working paper is to assess the role of human rights and fundamental freedoms in EU crisis management operations. To this end, the paper brings together contributions from recognised experts on two cross-cutting themes: the duty to ensure respect for human rights and fundamental freedoms in the conduct of EU crisis management missions and the contribution that such missions make to the Union's long-standing policy of promoting human rights at the international level.

The choice of these two themes reflects the dual role that human rights play in the external activities of the EU. On the one hand, its founding Treaties direct the Union to respect human rights whenever it acts on the international scene, including in the field of crisis management.¹ The founding Treaties thus suggest that the EU is subject to its own legal obligations to respect human rights and fundamental freedoms in addition to the obligations binding its Member States. The Treaties also signal a broader political or moral commitment on part of the Union to conduct its external activities in a manner that upholds the highest human rights standards. On the other hand, the promotion of human rights at the international level is one of the principal foreign policy objectives of the EU's external action as a whole.² European crisis management missions can

¹ Art. 2 TEU declares that the 'The 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 in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' Art. 21(1) TEU applies this general principle to the area of foreign and security policy by providing that 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, 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.'

² This is evident from Art. 3(5) TEU, which provides that 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity

make a significant contribution to this objective. For example, the EU may deploy military forces in order to contribute to the establishment of a secure environment in which the humanitarian needs of local populations can be addressed.³

However, in practice the implementation of this dual commitment to ensure respect for and to promote human rights encounters certain difficulties. First, the protection of human rights in EU crisis management missions is not governed by a single legal regime. Rather, EU-led operations involve action by a multitude of entities—including the EU, its Member States and any contributing third States and international organisations—subject to diverse instruments and obligations (international, regional and domestic). This not only raises questions about the consistency of human rights protection in EU missions, but it also means that it may be unclear where responsibility for violations of individual rights lies in specific cases. Second, the legal effect and applicability of the relevant human rights instruments is uncertain in important respects. For example, while the extra-territorial applicability of the European Convention on Human Rights (ECHR) is well-established in principle, significant doubts remain about the Convention's reach in crisis management missions, especially in the light of the decision of the European Court of Human Rights in the *Behrami* and *Saramati* cases. Third, the entry into force of the Lisbon Treaty on 1 December, 2009 has significantly altered the regulatory framework of EU external action. In particular, the Treaty calls for the accession of the EU to the ECHR and provides that the EU Charter of Fundamental Rights has the same legal value as the founding Treaties. These are major developments with potentially far-reaching implications that need to be investigated as a matter of urgency. Fourth, the fact that EU missions are deployed in operationally challenging environments may lead to certain tensions between human rights and operational effectiveness. For instance, EU personnel normally benefit from certain immunities from local jurisdiction. Such derogations raise questions about their compatibility with the Union's obligations and commitments to uphold human rights, in particular as regards their necessity and proportionality. Fifth, the EU's long-standing commitment to human rights, its relatively high level of political homogeneity and the robustness of its decision-making processes suggests that it should be an ideal framework for the development of best practices and standards in crisis management. It is unclear, however, to what extent the EU has succeeded in setting an example for other organisations or indeed what lessons it should learn in areas where it has not fully lived up to its commitments and potential.

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.' This basic principle is once again applied to the area of foreign and security policy by Art. 21(2), which states that 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: ... (b) consolidate and support democracy, the rule of law, human rights and the principles of international law'.

³ E.g. Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic, OJ [2007] L 279/21.

The contributions to this working paper engage with a number of these questions. Offering an insider's perspective, **Hadewych Hazelzet** starts off by arguing convincingly that over the past decade the EU has made a very important *indirect* contribution to human rights protection by helping to build the rule of law and stability in many post-crisis situations around the world. Yet, it remains difficult to explicitly integrate human rights concerns into the missions' mandates. At the same time, host-governments will also have to be convinced more stringently to adhere to human rights standards in the context of deploying an EU mission or operation. Her main message is that the nexus between human rights and security is as fundamental as the one between security and development.

Before going into detail as to how human rights and humanitarian law could be applied in specific cases, the question is which general principles of international law may have to be taken into account by the EU when employing civilian and military missions. In a general introduction to the topic, **Gentian Zyberi** addresses the question of to what extent the EU would be bound by those general principles, including a large number of international human rights standards. Given the fact that the EU as such is not a party to the most relevant treaties, it is necessary to take the customary nature of the norms into account, as well as the fact that EU Member States remain bound. Zyberi concludes that a considerable number of general principles and instruments of international law are applicable and guide the EU's activities in the CSDP area.

The legal framework governing the protection and promotion of human rights at EU level is analysed by **Frederik Naert**, who is also able to take an insider's view. Naert analyses the relevant provisions in the EU Treaties and argues that there is a solid basis for both respect for and promotion of human rights in CSDP missions. The bottom-line is that the Treaties and several other documents can and should serve as a basis for application of human rights to CSDP missions. At the same time several provisions call for human rights as an objective of missions abroad.

Obviously, the EU Treaties do not form the only legal context for the application of human rights. The ECHR is equally relevant. Since all EU Member States are Member States of the ECHR and Art. 6 (2) TEU still promises that the EU itself will accede to the Convention, the European Court of Human Rights will *prima facie* have jurisdiction over human rights violations which occur during EU crisis management missions. However, as **Heike Krieger** argues, the judicial enforcement of civilians' human rights during military operations abroad is a highly contentious issue. There are numerous unresolved legal issues implicated which might speak against the jurisdiction of the Court or even against the responsibility or accountability of the EU or its Member States. Two cases, *Al Skeini* and *Al Jedda*, are used to further analyse in particular the problem of extraterritoriality when applying the ECHR provisions.

The clear military nature of some of the EU missions calls for the more specific question of whether there is a duty to respect international humanitarian law (IHL) during EU-led operations, and if so, who is the addressee of this obligation. **Marten Zwanenburg** argues that the EU may indeed itself become

a party to an armed conflict when an EU-led operation becomes involved in hostilities. At the same time, this does not preclude troop-contributing states from also becoming such parties. The question then is how to determine whether the EU or rather troop-contributing states are accountable under the rules of IHL.

Finally, the democratic oversight of the application of human rights principles by the EU is analysed by **Wanda Troszczyńska-Van Genderen**. Providing again an insider's perspective she discusses the human rights-related priorities of the European Parliament, including adherence to international human rights and humanitarian law in the context of CSDP missions and operations, as well as ensuring adequate staffing, training and expertise related to broadly defined human rights work praxis. Although the European Parliament is actively involved in advancing the fundamental rights agenda, its capacities are limited.

The present Working Paper thus aims to bring together a number of issues related to the application of human rights to EU civilian and military missions. With the coming of age of the EU's CSDP the questions raised become more prominent and a new research agenda clearly emerges. The Editors are grateful to the Royal Netherlands Academy of Arts and Sciences (KNAW) for supporting the workshop and to Dr. Tamara Takacs at the Centre for the Law of EU External Relations (CLEER) and the T.M.C. Asser Instituut who continued to stimulate this project.

COMMON SECURITY AND DEFENCE POLICY: WHAT NEXUS BETWEEN HUMAN RIGHTS AND SECURITY?

Hadewych Hazelzet¹

1. INTRODUCTION

On 15 May 2012, after much preparation and political debate, the EU started disabling boats left on the beach by pirates from helicopters above the shore of Somalia.² A few days later, at the NATO Summit in Chicago, the EU could demonstrate that it is no longer a 'soft' power only. It is almost ten years ago that the EU launched its first civilian and military crisis management missions and operations. Today, the EU is deploying a little over 5,000 civilian and military staff in 12 civilian missions and three military operations.

What contribution has the EU's Common Security and Defence Policy (CSDP) made to the protection and promotion of human rights? I would argue that based on an analysis of ten years of CSDP, the EU has made a very important *indirect* contribution to human rights protection by helping to build the rule of law and stability in many post-crisis situations around the world. An analysis of a decade of mainstreaming human rights policy into CSDP, however, shows that efforts to *explicitly* integrate human rights concerns into the missions' mandates and conduct have some way to go. In order to assure lasting results on the ground, more political pressure could be brought to bear on host-governments to adhere to human rights standards in the context of deploying an EU mission or operation. Using hard power responsibly and pursuing a truly comprehensive approach means acknowledging the triangular nexus between human rights, security and development.

I was asked to address the challenges of human rights protection in CSDP missions and operations. I will be preaching today to the converted and I am grateful for the opportunity. Because from a practitioner's perspective—as well as from that of an academic with a passion for human rights—after ten years of trying to link EU's human rights policy to CSDP, despite progress, there are still some challenges and opportunities ahead.

¹ This article is written in a personal capacity and reflects the views of the author only. The author works as an official for the European External Action Service, Crisis Management and Planning Directorate. She has worked in various capacities on CSDP since 2006. From 2003-2006 she was the human rights desk officer in the Directorate General for External and Politico-Military Affairs in the Council Secretariat. From 2001-2003 she worked there in the development co-operation division. The author wishes to thank several colleagues for their comments on the draft.

² 15 May 2012—See *Frankfurter Allgemeine Zeitung* 16 May 2012.

2. A DECADE OF CSDP: WHAT CONTRIBUTION TO HUMAN RIGHTS PROTECTION?

Let us first look at a decade of crisis management. The first EU interventions—in Bosnia and Herzegovina, the former Republic of Macedonia and in Bunia, Eastern Congo in 2003—certainly aimed, albeit not explicitly, to contribute to the promotion and protection of human rights in a crisis situation. That is still the case for I would say all missions and operations today. During and following crisis situations, human rights are typically violated in the absence of any rule of law. Indeed, had these places been shiny examples of human rights protection, the EU would most likely not have intervened. In that crude sense, human rights are at the heart of CSDP. That said, the EU is usually not at the forefront *during* violent conflict when human rights violations are at their worst—here we sometimes rather see a multilateral response by the UN. With a number of exceptions, the EU has mainly intervened in *post-crisis* situations.³

EU military operations as well as some civilian missions typically operate under a strictly defined UN mandate, which is subsequently elaborated at the operational level by the EU. Human rights related activities outside of the scope of a UN Security Council mandate may not be welcomed by the host-country. Comparing the EU Council **mandates** of almost two dozen CSDP interventions—both civilian and military—shows that only very **few explicitly mention human rights** (or ‘international standards’), including the EU Monitoring Mission in Aceh, Indonesia in 2005, EULEX Kosovo in 2006, the police mission in Afghanistan in 2007, EUFOR Tchad and the EU Monitoring Mission in Georgia in 2008. If not directly in the mandate, CSDP planning documents for virtually all missions and operations refer to human rights and gender issues.⁴

The mandate for the naval operation off the coast of Somalia refers *inter alia* to UN Security Resolution 1851 (2008), which stipulates that any measures against piracy [on land] ‘shall be undertaken consistent with applicable international humanitarian and human rights law’. The law of the sea applies to the ships that capture pirates at sea. The provisions on the transfer of pirates as well as the transfer agreements include extensive references to human rights.

Although **the other mandates**, the great majority, thus do not contain such specific references, they **indirectly aim at contributing to human rights protection**, typically in **four ways**: (1) by contributing to a stable and secure environment—most military operations, or (2) as is the case in almost all civilian missions, by mentoring, training and advising on reforming state institutions in accordance with the rule of law and international standards; (3) by monitoring a peace plan; and (4) by contributing (typically through non-CSDP instruments) to non-EU-led operations such as support to the UN or regional

³ For instance Operation Artemis, EUFOR Tchad/RCA, arguably also DRC and EUPOL Afghanistan.

⁴ See Report on the EU-indicators for the Comprehensive Approach to the EU implementation of the UN Security Council UNSCRs 1325 & 1820 on Women, Peace and Security, doc. 9990/11, indicator 14.

organisations. The latter tend to be the most violent situations where protection of civilians is most urgently needed, such as in Syria.

The examples may be familiar:

1. **Stabilisation:** the EU was mandated to protect humanitarian convoys and the civilian population in Tchad in parallel to and as a bridging operation for the UN; EUFOR Althea deploys soldiers in Bosnia and Herzegovina to provide security guarantees in a still fragile situation; or fighting piracy off the coast of Somalia. Rules of engagement in line with international law apply in this first category where staff is armed. Although it cannot be guaranteed that innocent civilian will never be hurt, utmost care is taken including through detailed operational planning to avoid casualties.
2. **Mentoring/training and advising on the rule of law and security sector reform:** the EU is for instance training and mentoring police officers and judges in Kosovo, Afghanistan, the Palestinian Territories and Iraq; training and reforming police and military in the Democratic Republic of Congo and training Somali soldiers in Uganda. Training usually includes modules on international human rights and humanitarian law. These missions report how human rights standards are upheld in their work as part of their regular reporting. EULEX Kosovo is an exceptional case in that it has an executive mandate.
3. **Monitoring:** the EU monitored the demobilisation of armed rebels in Aceh and is monitoring a peace plan in Georgia; it is contributing to border management in Libya. Monitoring a peace plan would also take place within a human rights framework. Again, regular reporting includes human rights elements in function of the missions' mandate.
4. **Support to other organisations:** the EU operated as a clearing house for contributions to the crisis between Israel and Lebanon in 2006 and the natural disaster in Haiti in 2009. It is providing capacity building measures to the African Union and the Arab League and is supporting the United Nations in a variety of ways.

Figure 1 shows that although the EU is deploying **more civilian missions than military operations**, in terms of size, the **military operations are much larger**. Staff engagements have fluctuated over time depending on crises. To put the EU's staff engagements in perspective: in 2011, the **UN** deployed almost 115,000 uniformed and civilian personnel⁵ and **NATO** deployed almost 150,000 troops—**more than 23 and 30 times as many** as the EU. Yet, small and targeted interventions can sometimes tip the scales in a (post-) crisis situation. And there are situations where the EU is better placed to intervene. One has to keep in mind, moreover, that EU Member States provide important parts of NATO troops and pay a large chunk of the costs of UN peacekeeping operations.

⁵ UN Peacekeeping Factsheet 30 September 2012, available at <<http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>>.

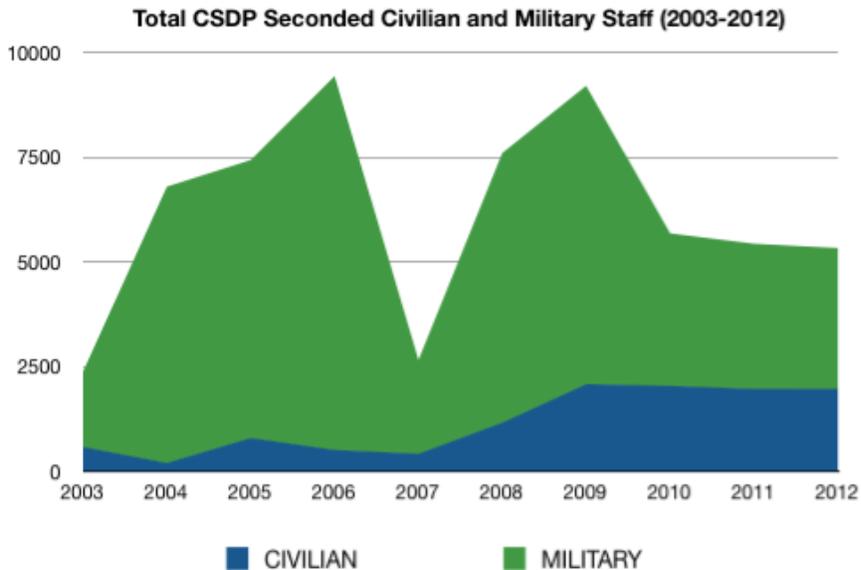


Figure 1. Source: data compiled and calculated by author on basis of statistics provided by CPCC, EUMS, CMPD. Peaks: 2004 EUFOR Althea, 2006 EUFOR RDC, 2009: EUFOR Tchad and EULEX Kosovo.

Similar to the EU, the UN is deploying more and more civilian (police) missions, a growth of 80% over the past years compared to 13% growth of UN military operations.⁶

How could we **measure** the EU's CSDP contribution to protection and promotion of human rights? First, this would need to be seen as part of what is typically and increasingly a **comprehensive EU approach**, which also includes development, humanitarian or other assistance. Some funding will usually be dedicated to human rights promotion specifically, usually through the Instrument for Stability or the European Initiative for Democracy and Human Rights. A good example is the funding of justice and police reform in Kenya through UNODC and UNDP as part of the comprehensive approach to the fight against piracy. Conversely, funding or trade benefits may be withheld on human rights grounds, e.g. Syria. Some policies internal to the EU, for instance aimed against corruption or human trafficking, also have a clear human rights dimension with a link to crisis management, as in the Balkans.

Secondly, the EU's contribution would be difficult to measure in isolation of what **other actors** do—most importantly domestic actors—so we endeavor to work closely together with all concerned to ensure a unity of purpose.

In sum, and while more research would be useful in this area, I would say that through their wide variety of mandates, **CSDP missions and operations are making an important contribution to human rights protection.** There

⁶ *Annual Review of Global Peace Operations 2012*, Center on International Cooperation, available at < http://www.cic.nyu.edu/peacekeeping/docs/gpo_2012.pdf>.

is thus a connection even if the EU may be perceived as being a bit implicit about it: oftentimes one has to look at the (restricted) detailed operational plans or the programmes funded to flank CSDP measures to find the 'h' word.

3. A DECADE OF MAINSTREAMING: WHAT IMPACT ON CSDP?

Now, what have we learned from ten years of mainstreaming human rights into CSDP? The EU Guidelines on Children and Armed Conflict were drafted around the same time as the first EU deployment of soldiers to the Congo in 2003. For the first time the question came up how EU staff should react when facing a **child soldier**.⁷ Today, the question is what to do with **children among the pirates** that are captured at sea off Somalia.⁸ Detailed operating procedures outline how to deal with them on the ships and when handing them over to other authorities for prosecution. Human rights are a leading principle for the treatment and transfer of the captured pirates.

While **new questions keep arising**, over time, we did manage to **raise awareness** of the importance of paying due attention to human rights issues across the EU crisis management establishment. This was done through a variety of ways, within the framework of the human rights provisions in the Treaty of Lisbon that apply to CFSP and thus CSDP.⁹

First, the Council adopted a series of relevant **policy documents**, making the *direct* link between human rights policy and crisis management. Those EU Guidelines on Children and Armed Conflict from 2003 were followed by guidelines on the implementation of UN Security Council Resolutions on Women, Peace and Security, by Generic Standards of Behaviour, Guidelines on the promotion of International Humanitarian Law, Protection of Civilians, Co-operation with NGOs, transitional justice and others. Some of these documents have been regularly updated or further operationalised through checklists. They were drawn up in close consultation with the UN and with non-governmental organisations. In 2008, all relevant documents with examples were compiled, aiming at facilitating their use by planners and mission staff.¹⁰ In July 2012 the Council adopted an action plan on human rights that refers to specific actions in the context of CSDP.

Secondly, the EU started to address these issues with its **partners**. Agreements on co-operation were for instance signed with the International Criminal Court, as well as with Interpol and most recently the International Maritime

⁷ A special Annex to the Operational Plan outlines in detail how to deal with Child soldiers. This Annex was later also used as a basis for EUFOR Tchad.

⁸ For instance five among the eleven captures pirates by the Dutch fregate 'De Amstel' were minors.

⁹ Articles 2, 3, 6, 21TEU.

¹⁰ See 'Compilation of relevant Documents: Mainstreaming Human Rights and Gender into ESDP' available at the Council's website. For an overview of mainstreaming activities from 2003 to 2009, see H. Hazelzet, 'Mainstreaming human rights and gender into the Common Security and Defence Policy: The case of the EU Monitoring Mission in Georgia', in S. Blockmans, J. Wouters and T. Ruys (eds.), *The European Union and Peacebuilding. Policy and Legal Aspects* (The Hague: T.M.C. Asser Press 2010), 341-352.

Organisation. Related topics were discussed more than once at the EU-UN Steering Committee. Agreements on the transfer of pirates now seek guarantees that the death penalty is not sought against them and that they will not be subject to torture or other degrading and inhuman treatment. In one exceptional case (Indonesia), the EU made the deployment of a monitoring mission conditional upon the signature of the main UN human rights instruments. There are close contacts between EU Human Rights and Gender experts with those from the UN, NATO, OSCE and other organisations. There is a lot we can learn from these organisations. Indeed, NATO appointed a Special Representative on UNSCR 1325 in August 2012, as the High Representative appointed an EU Special Representative on Human Rights. As said, the EU also funds many UN and other organisations working on human rights protection and the rule of law in countries where CSDP missions and operations are deployed.

Thirdly, **internal** to the EU, references to human rights law were written into the mandates of EU Special Representatives from 2005 onwards and into **planning and lessons learnt documents**. Many strategic and conceptual planning documents contain the reference documents included in the 2008 compilation. If they are not included in the first draft, Member States can demand to add them as they go through an elaborate process of consultations with experts. At the more detailed level, the Operation Commanders and Heads of Mission need to provide detail on how their staff is to deal in practice with issues related to humanitarian and human rights law in the **operational plans** in function of the mandate. A number of Heads of Mission were briefed by human rights experts in the past. Military staff and Operation Commanders tend to be familiar with international humanitarian law. The European Security and Defence College (ESDC), Member States and some CSDP missions started to offer more and more **training** modules and seminars on human rights and gender to CSDP staff. Some operations, notably EUFOR RDC and EUFOR Tchad, produced pocket cards outlining *inter alia* the main human rights duties and the rules of engagement. Also, as of 2005 (Aceh), the first **human rights advisors** were appointed to EU missions, followed by **gender advisors** as of 2006. A professional network is in place to share expertise and lessons amongst these advisors. Since 2009, they have met annually in Brussels. Finally, **focal points** were also appointed in headquarters.

Looking at figure 2 below, we see a quite impressive **upward trend in the number of human rights and gender advisors** as the number of CSDP missions and operations increased. Today, there is hardly any mission or operation without at least a part-time human rights or gender advisor. Sometimes these issues are covered by the legal advisor. Interestingly, there are now more gender than human rights advisors. The work of these advisors is often impressive even if the focus varies. To mention just a few examples: in Afghanistan they work closely together with the national human rights institution and public prosecutors and a hotline was set up to protect female police officers. In the Palestinian Territories a pilot female police unit was set up to address domestic violence; in Georgia human rights training and monitoring is provided; in the DRC our experts work closely together with women's groups, including in the East, to combat sexual violence and impunity within the armed forces.

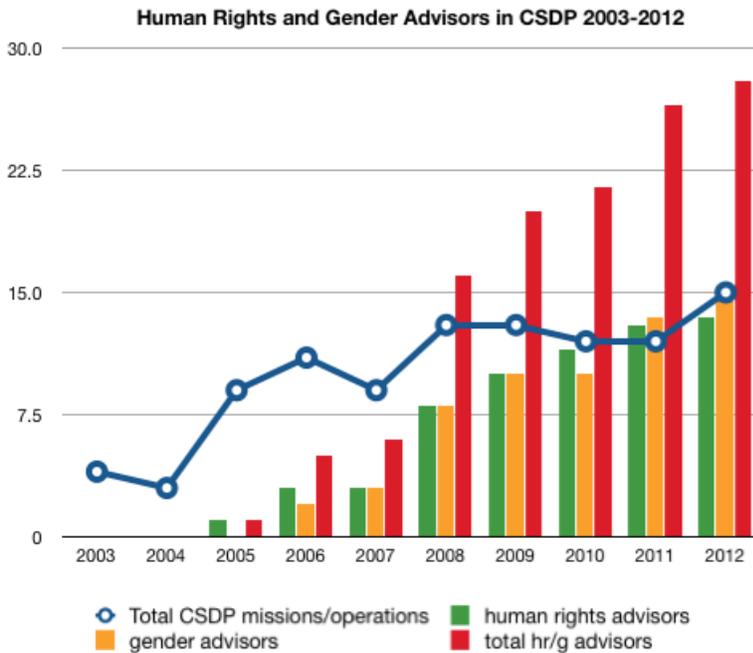


Figure 2. Source: data compiled by author on basis of statistics provided by CPCC, EUMS, CMPD.

4. MAKING UP THE BALANCE: WHAT CHALLENGES AND OPPORTUNITIES?

We could conclude from the analysis of a decade of both CSDP and mainstreaming of human rights that—through its crisis management activities as part of a comprehensive policy response—CSDP has both **a direct and an indirect impact on the promotion and protection of human rights**. Over time, policies, operating procedures and advisors have been put in place to formally link CSDP and human rights in a variety of ways.

What challenges and opportunities do we then still have ahead of us? One challenge is—as is so often the case in the EU—that Brussels is very **good at devising policy guidelines but that it takes more work to fully implement** them, including in the field. Most guidelines were prepared with the Council’s Human Rights working group (COHOM) in the lead, albeit typically with the involvement of the Committee on Civilian Crisis Management (CIVCOM), the Politico-Military Group (PMG) as well as the EU Military Committee (EUMC). On the other hand, COHOM does not see the detailed operational and planning documents, contrary to CIVCOM and EUMC.¹¹ The biggest challenge is that

¹¹ The same seems true in most capitals—instructions provided to delegates in CIVCOM, PMG and EUMC may not necessarily have been seen by the human rights departments so as to monitor implementation of the guidelines into these planning documents.

others are responsible for their implementation, often under stress: strategic and operational planners in Headquarters, Heads of Mission, Operation Commanders, EU Delegations, advisors on the ground. A report with lessons and best practices of mainstreaming that was adopted in November 2010 includes a number of good recommendations, but no timelines or assignment of responsibility for follow-up.

At the policy level, not many of those in charge of follow-up may be really familiar with the guidelines, checklists and manuals, and their priorities may lay elsewhere. Focal points in Headquarters are few, have other responsibilities too and are usually not trained human rights experts as their counterparts are in the field. In 2012 the EU deployed three new **missions** to Niger, the Horn of Africa and South Sudan: special advisors were thus far appointed in two out of three missions. Incidentally, Niger, Sudan and Somalia are among those with the worst track-records in ratifying the key UN human rights instruments and treaties in the world.

Of course, correct references in the planning documents and the appointment of an advisor would not simply do the connection trick—like ticking the box. But without them, the contribution of CSDP to human rights will remain indirect at best. If key issues are not included at strategic level, it is usually difficult to get attention paid to them at a later stage. **This may come at a price.** Neglecting to pay proper attention to human rights aspects could lead to continued impunity and thus ultimately failure of EU's efforts to sustainably contribute to stabilisation and the rule of law in post-crisis situations.

Now, what could be done to reinforce the connection between security (CSDP) and human rights? **High level political involvement would help** to reinforce the message—both internally and externally.

Internally, human rights indicators could be part of the benchmarks of progress for a mission or operation and its management in the context of the mandate. Also, as part of the comprehensive approach, more efforts could be made to ensure flanking measures in this area. Training of those in charge of planning and follow-up would be useful too. More needs to be done to show concretely how mainstreaming adds to the operational success of CSDP so as to convince the 'non-converted'.

Externally, lessons identified from past and ongoing CSDP missions and operations consistently point to the fact that to be successful, the **host-country needs to be committed to reform** and needs some minimal capacity to help carry it out—both in the short and the long term. Commitment to reform could for instance be discussed at political dialogue meetings, such as under Article 8 of the Cotonou Agreement. A willingness of host governments to at least sign and ratify the key UN human rights instruments would be a good sign of such commitment.¹² It would also enhance the credibility of the EU's action.

¹² The difficulty is of course if the EU is seen to be more keen to intervene—say to combat piracy—than the country involved. This is one reason why not all transfer agreements have found the exact same formula on seeking human rights protection of detained pirates. The host country should be at least as if not more interested in fighting piracy along its shores.

We could train, monitor and mentor justice, police and military staff in countries like the DRC, Sahel, Middle East, Horn of Africa, Afghanistan or elsewhere for another decade—it could well be in vain if there is no political will in the host countries to reform state structures in conformity with the rule of law. Scarce EU resources would thus have been wasted. Ongoing human rights abuse by forces trained by the EU would also dent the EU's credibility.

5. CONCLUSION: THE NEXUS BETWEEN HUMAN RIGHTS AND SECURITY

The Lisbon Treaty and the European External Action Service offer unique opportunities to ensure a linked-up approach—using all the tools at our disposal in a comprehensive manner. The High Representative but also Member States could play a crucial role in reinforcing the message politically. The newly appointed EU Special Representative for Human Rights could play a role too. **The EU should no longer be willing to pay the price for neglect. Actually, we cannot afford it—not principally and not financially.** In this time of financial austerity, the EU needs to focus on what it does best, show results from its actions and, by doing so, continue to attract scarce civilian and military capabilities from Member States and generate public support for its foreign and security policy. Results, and thus exit strategies, are most promising when working with willing partners.

A recent EU policy shift following the Arab Spring was labeled 'more for more' and 'less for less' in our neighborhood: those governments committed to democracy and the rule of law get more support, those less committed, get less. Could the same go for CSDP engagement? Lady Ashton already said in a speech to the European Parliament in May last year that 'human rights are the silver thread across our actions'. The **paradox** and thus dilemma is of course that—if this advice would be taken to the extreme—the EU could end up training and reforming those that need it least and stay clear from those that most need it. We may thus well need to find some middle way, which is, luckily, one of the great strengths of the EU.

In sum, the message to get across to the CSDP establishment is that the **nexus between human rights and security is as fundamental as the one between security and development.** Kofi Annan's famous statement in his 2005 report on UN reform is a reminder: 'we will not enjoy development without security, we will not enjoy security without development, *and we will not enjoy either without respect for human rights*'. Indeed, the last part of that sentence is too often forgotten.

I hope today's conference will help to re-establish this link. Within the EU, the nexus between security and development is well-recognised, adding the human rights dimension would complete the comprehensive approach—the supposed trade mark of the European External Action Service.

After ten years, **time has come to make CSDP's contribution to human rights explicit:** from providing training and advise to helicopter attacks, utmost care will be expected and will be taken to protect civilians and promote human

rights standards in line with what we stand for and are bound by. As the EU is keen to show its muscle as a **'hard' security provider** on the world stage, it could do so all the more effectively and convincingly if it would stick **closely to its 'soft' power convictions**.

THE APPLICABILITY OF GENERAL PRINCIPLES AND INSTRUMENTS OF INTERNATIONAL LAW TO PEACE MISSIONS OF THE EUROPEAN UNION

Gentian Zyberi*

1. INTRODUCTION

This paper focuses on the applicability of general international law principles and instruments to European Union (EU) peace missions (also known as crisis management operations). First, the paper shall address the legal framework applicable to EU peace missions, including general principles and instruments of international human rights and humanitarian law. Subsequently, the focus will shift to difficulties which arise in this regard, before providing some concluding remarks. Evidently, in view of the nature of peace missions, the most relevant general principles and instruments applicable are those pertaining to international human rights and international humanitarian law. Although not discussed here, general principles applying to internally displaced persons (IDPs) are also relevant.¹ The applicability of general international law principles and instruments to EU peace missions is a fairly complex, but not entirely new issue. A number of closely related questions with regard to peace missions established by the United Nations (UN) have been raised and have been largely dealt with.² Over the last couple of decades the African Union (AU) and

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¹ See *inter alia* UN Economic and Social Council (ECOSOC), *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2 of 17 April 1998. The UN Human Rights Commission has taken note of these Guiding Principles in its Resolution 1998/50 of 17 April 1998. More generally on this issue see also *Protecting Internally Displaced Persons: A Manual for Law and Policymakers* (Brookings Institution and the University of Bern 2008), available at <www.brookings.edu/research/papers/2008/10/16-internal-displacement>; the special issue of 91 *International Review of the Red Cross* 2009 on Displacement; see also <www.icrc.org/eng/war-and-law/protected-persons/refugees-displaced-persons/index.jsp>.

² See *inter alia* M. Zwanenburg, 'Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces', 11 *Leiden Journal of International Law* 1998, 229-245; R. Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?', 14 *Criminal Law Forum* 2003, 153-194; N. Azimi and Ch. Li Lin (eds.), *The Nexus Between Peacekeeping and Peace-Building: Debriefing and Lessons* (London: Kluwer Law International 2000); M. Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations* (The Hague/New York: Martinus Nijhoff 2002); T. Findlay, *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press 2002); R. Arnold and G.-J. Kooops (eds.), *Practice and Policies of Modern Peace Support Operations under International Law* (Ardsey: Transnational Publishers 2006); R. Thakur, *The United Nations, Peace and Security* (Cambridge: Cambridge University Press 2006); L.M. Howard, *UN Peacekeeping in Civil Wars* (Cambridge: Cambridge University Press 2008); R. Murphy and K. Mansson (eds.), *Peace Operations and Human Rights* (London: Routledge 2008); K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge: Cambridge University Press

other regional organisations too have established peace missions in countries facing serious crisis situations, such as for example the AU's missions in Somalia and Sudan, and Darfur.³ The increasing involvement of regional organisations seems to signal an ongoing process of 'regionalisation' of political and military responses to crisis situations, which in turn requires better coordination among different international organisations.⁴ Admittedly, general principles and instruments of international law would be applicable to peace missions launched by regional organisations.

What are general principles of international law?⁵ While scholarly discussion on this issue still continues, it is commonly accepted that general principles are norms recognised as such by the international community, usually derived from domestic law.⁶ Brownlie has listed the principles of consent, reciprocity, equal-

2012); United Nations. *Handbook on United Nations Multidimensional Peace Operations* (United Nations, Peacekeeping Best Practices Unit 2003); United Nations, *United Nations Peace Operations: Principles and Guidelines* (United Nations 2008); V. Holt and G. Taylor, *Protecting Civilians in the Context of UN Peace Operations: Successes, Setbacks and Remaining Challenges* (New York: United Nations, UNOCHA 2009), available at <www.unprh.unlb.org>.

³ See *inter alia* P.D. Williams, 'The African Union: Prospects for Regional Peace after Burundi & Sudan', 33 *Review of African Political Economy* 2006, 352-357; T. Murithi, 'The African Union's Evolving Role in Peace Operations: the African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia', 17 *African Security Review* 2008, 70-82; R.L. Feldman, 'Problems Plaguening the African Union Peace Forces', 24 *Defense and Security Analysis* 2008, 267-279; T. Murithi, 'The African Union's Foray into Peace: Lessons from the Hybrid Mission in Darfur', 14 *Journal of Peace, Conflict and Development* 2009, 1-19; A. Jeng, 'Enforcing the African Union Peace and Security Framework in Burundi', 2 *Journal of Law and Conflict Resolution* 2010, 116-128; M. Affa'a Mindzie, 'Intervention and Protection in African Crisis Situations: Evolution and Ethical Challenges', 29 *Criminal Justice Ethics* 2010, 174-193; Linnéa Gelot, Ludwig Gelot and C. de Coning (eds.), *Supporting African Peace Operations* (Uppsala: NUPI, The Nordic Africa Institute, Dag Hammarskjöld Foundation 2012), available at <<http://english.nupi.no/Publications/Books-and-reports/2012/Supporting-African-Peace-Operations>>. For the AU mission in Somalia see <<http://amisom-au.org>>; for the joint UN-AU mission in Darfur see <www.un.org/en/peace/missions/unamid>. For more information on Peace and Security within the AU see <<http://au.int/en/dp/ps>>.

⁴ See *inter alia* K. Seaman, 'The Regionalization of the Responsibility to Protect' in D. Fiott, R. Zuber and J. Koops (eds.), *Operationalizing the Responsibility to Protect: A Contribution to the Third Pillar Approach* (Brussels: Madariaga – College of Europe Foundation, Global Action to Prevent War, the Global Governance Institute and the International Coalition for the Responsibility to Protect 2012), 17-27.

⁵ Article 38(1)(c) of the statute of the International Court of Justice (ICJ) lists general principles of law recognised by civilised nations as one of the sources of international law. General principles are intended to fill in the gap when there are no treaty or customary norms applicable to a certain situation brought for settlement before the ICJ.

⁶ See *inter alia* P. Hulsroj, 'Three Sources – No River: A Hard Look At the Sources of Public International Law with Particular Emphasis on Custom and "General Principles of Law"', 54 *Zeitschrift für öffentliches Recht* 1999, at 245; see also B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles', 12 *Australian Yearbook of International Law* 1991, at 102. See also Art. 21, paras. b and c, of the Statute of the International Criminal Court (ICC), on the applicable law which provide for applying, '(b) In the second place, where appropriate, applicable treaties and the *principles and rules of international law*, including the established principles of the international law of armed conflict; (c) Failing that, *general principles of law derived by the Court from national laws of legal systems of the world* including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.' See also F.O. Raimondo, *General Principles of*

ity of States, finality of awards and settlement, the legal validity of agreements, good faith, domestic jurisdiction and the freedom of the seas as some of these general principles.⁷ These general principles emanate from justice, equity or considerations of public policy.⁸ Most important for EU peace missions would be certain general principles of international law such as consent, good faith, the emerging principle of solidarity,⁹ and the responsibility to protect,¹⁰ complemented by more specific general principles of international humanitarian law and international human rights law, such as that of distinction, proportionality, non-adverse discrimination and humane treatment. The relevant general international law instruments which may be applicable are the Geneva Conventions of 1949 and the 1977 Additional Protocols, as well as the main international human rights treaties.

Crisis management is an important tool under the EU's Common Security and Defence Policy (CSDP).¹¹ Over the last nine years the EU's support for international peace and security through its own missions and through support

Law in the Decisions of International Criminal Courts and Tribunals (The Hague: Martinus Nijhoff 2008), 40-76, also available at <<http://dare.uva.nl/document/53312>> (page numbers on the basis of the electronic version).

⁷ I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 6th edition 2003), at 18.

⁸ M.N. Shaw, *International Law* (Cambridge: Cambridge University Press, 6th edition 2008), at 98.

⁹ See *inter alia*, R. St. J. MacDonald, 'Solidarity in the Practice and Discourse of Public International Law', 8 *Pace International Law Review* 1996, 259-302; R. Wolfrum and Ch. Kojima (eds.), *Solidarity: A Structural Principle of International Law* (London: Springer 2010). See also Arts 3(5) and 21(1) TEU which make reference to the principle of solidarity.

¹⁰ See *inter alia* D. Fiott and M. Vincent, 'The European Union' in G. Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect* (Cambridge: Cambridge University Press, forthcoming 2013); D. Fiott, R. Zuber and J. Koops (eds.), *Operationalizing the Responsibility to Protect: A Contribution to the Third Pillar Approach* (Brussels: Madariaga – College of Europe Foundation, Global Action to Prevent War, the Global Governance Institute and the International Coalition for the Responsibility to Protect 2012) available at <www.madariaga.org/events/past-events-2012/640-operationalising-the-responsibility-to-protect-the-civilian-and-military-challenges-of-the-third-pillar-approach>; A. Zimmermann, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press 2011), 629-645; J. Genser and I. Cotler (eds.), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (Oxford: Oxford University Press 2011); J. Hoffmann and A. Nolkaemper (eds.), *Responsibility to Protect: From Principle to Practice* (Amsterdam: Amsterdam University Press 2012). See also <www.responsibilitytoprotect.org/index.php/europe>.

¹¹ For more information see 'European Security and Defence Policy: The Civilian Aspects of Crisis Management', civ/03, August 2009, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/090702%20Civilian%20aspects%20of%20crisis%20management%20-%20version%203_EN.pdf>. See also V. Kroneberger and J. Wouters (eds.), *The European Union and Conflict Prevention: Policy and Legal Aspects* (The Hague: T.M.C. Asser Press 2004); M. Merlingen and R. Ostrauskaite, *European Union Peacebuilding and Policing: Governance and the European Security and Defence Policy* (New York: Routledge 2006); S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (The Hague: T.M.C. Asser Press 2008); A. Björkdahl and M. Strömvik, *EU Crisis Management Operations – CSDP Bodies and Decision-Making Procedures* (Copenhagen: Danish Institute for International Studies Report 2008); J. Rehr and H.-B. Weisserth (eds.), *Handbook on CSDP: The Common Security and Defence Policy of the European Union* (Vienna: Federal Ministry of Defence and Sports of the Republic of Austria 2010).

for missions of other organisations has grown, expanded and diversified. Thus, the EU has launched missions in different parts of the world, from the Western Balkans to the South Caucasus, from Africa to the Middle East and Asia. That means that the activity of these peace missions extends well-beyond the European *espace juridique*. Many EU missions would qualify as multidimensional in view of the different components and aspects of their mandates.¹² Indeed, the activities undertaken by the EU in the framework of these missions are varied and range from strengthening police capabilities and supporting the wider rule of law sector to monitoring borders and peace agreements to fighting piracy and terrorism. It must be kept in mind, however, that support for international peace and security through its own missions is a relatively new field for the EU.

This paper will discuss the applicability of a limited number of selected general principles and instruments of international law applicable to EU peace missions. While noteworthy, issues pertaining to the law of international responsibility and how that part of international law applies to EU missions will not be discussed in much detail.¹³ The paper is based on three premises. First, the main international human rights instruments adopted in the framework of the UN lay down applicable general principles of international human rights law which should be taken into account by the relevant EU authorities when designing, planning, and deploying a mission. Many, if not all, EU States are parties to the nine main international human rights instruments and all of them are parties to the ECHR. Second, the main international humanitarian law instruments, that is, the 1949 Geneva Conventions and the 1977 Additional Protocols, lay down general principles of international humanitarian law which are applicable to EU missions of a military nature.¹⁴ Third, while the EU itself as an organisation is not a party to these international law instruments, its founding Treaty includes references implying that general principles of international law are to guide the external actions of the EU.¹⁵ Based on these three premises, it follows that individuals should have the right to a remedy and reparations in case their rights are negatively affected due to the operational activities of an EU peace mission. While such a proposition would be generally acceptable, as discussed in section four of this paper, the main issues are of a practical nature and relate to difficulties in organising and guaranteeing access to justice

¹² See *inter alia* United Nations, *Handbook on United Nations Multidimensional Peace Operations* (United Nations: Peace Best Practices Unit 2003), available at <<http://www.peacekeepingbestpractices.unlb.org/Pbpps/library/Handbook%20on%20UN%20PKOs.pdf>>. As noted in the foreword to this document, 'peace operations have become multidimensional in nature, composed of a range of components, including military, civilian police, political affairs, rule of law, human rights, humanitarian, reconstruction, public information and gender.'

¹³ See *inter alia* J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press 2010), especially chapter 55, J.-M. Thouvenin, 'Responsibility in the Context of the European Union Legal Order', 861-877 and chapter 51.3, J.-P. Costa, 'Responsibility for Violations of Human Rights Obligations: European Mechanisms', 763-774.

¹⁴ Evidently, a number of essential conditions must be met, especially those relating to the existence of an armed conflict and the participation of EU troops in it.

¹⁵ See Title V of the Treaty of Lisbon, 'Provisions on a Common Foreign and Security Policy', especially Arts 11-17.

in complex situations, where State structures are weak or have stopped operating altogether due to violent and protracted conflicts.

2. BRIEF OVERVIEW OF EU RESPONSES TO CRISIS SITUATIONS AND THE APPLICABLE LAW

The law applicable to EU peace missions can be divided into the internal legal framework (EU law) and the external legal framework (international law and, to the extent agreed, the national law of the host country).¹⁶ General principles and instruments of international law applicable to EU peace missions could potentially fall both under the internal and the external legal framework, since they may to some extent be considered to be part of EU law, but at the same time retain their separate existence. A general distinction can be drawn between the legal framework applicable to EU missions of a civilian nature and that applicable to missions of a military nature. Nevertheless, this binary approach is not always readily applicable, since the EU has also launched a mission of a mixed nature.¹⁷ Much will depend on the situation faced by an EU peace mission, based on a 'sliding scale' approach between law enforcement-like operations triggering the application of general international law principles and instruments pertaining mainly to international human rights law and operations of a military nature triggering the application of general international law principles and instruments pertaining mainly to international humanitarian law. Evidently, while this approach might provide some overall guidance, addressing crisis situations fluctuating between internal disturbances and tensions to armed conflict remains difficult. In any event, these general principles and instruments are useful and should guide the process of preparation of suitable rules of engagement for the national troops serving in an EU peace mission.

The conduct of the EU's crisis management operations raises a number of important questions regarding the applicable legal framework and the mechanisms available for its enforcement. Two cross-cutting themes are important in this regard, namely:

- (1) ensuring respect for human rights and fundamental freedoms in EU crisis management missions; and
- (2) strengthening further the contribution of these missions to the EU's policy of promoting human rights at the international level.

Over the course of the last decade, the EU has acquired an operational capability enabling it to deploy military and civilian crisis management missions in third countries in pursuit of its Common Security and Defence Policy (CSDP).

¹⁶ See *inter alia* F. Naert, 'Legal Aspects of EU Operations', 15 *Journal of International Peacekeeping* 2011, 218-242.

¹⁷ Namely the EU mission lasting from 2004 to 2007 in support of the African Union mission in Sudan (AMIS). For more information see Council of the European Union, 'EU support to the African Union Mission in Darfur – AMIS', *Factsheet AMIS II/08* (January 2008), available at <www.consilium.europa.eu/uedocs/cmsUpload/080109-Factsheet8-AMISII.pdf>.

Since 2003, the EU has launched twenty-six CSDP missions, ranging from large-scale military and civilian deployments in the Balkans to more modest security sector reform and monitoring missions in Georgia, Guinea Bissau, Chad, Niger and other countries.¹⁸ The EU has decided to develop the civilian aspects of crisis management in four priority areas defined by the Feira European Council in June 2000, namely police,¹⁹ strengthening of the rule of law,²⁰ strengthening civilian administration and civilian protection.²¹ With regard to the military aspects of crisis management the EU Military Committee (EUMC) is the highest military body set up within the Council and directs all EU military activities and provides the Political and Security Committee (PSC) with advice and recommendations on military matters.²² An important part of the military capabilities available for EU peace-enforcing missions are the EU Battlegroups, which still have to be deployed.²³

When speaking about the applicability of general principles and instruments of international law to EU peace missions, it is fairly evident that the legal framework applicable to the EU civilian mission on supporting the rule of law in Kosovo (EULEX), would differ significantly from the EU military missions in Macedonia (FYROM), Chad, the Democratic Republic of Congo, or the more recent EU NAVFOR – ATALANTA in Somalia. Since each mission is meant to deal with a specific situation, there are differences not only between EU civilian and military missions, but also within each of these two categories and perhaps more in terms of the internal than the external legal framework. In relative terms, it seems that EU missions of a military nature remain of a more modest scale, compared with civilian missions. The EU is cautious about launching purely

¹⁸ For more information and a general overview of EU civilian and military missions see <www.consilium.europa.eu/eeas/security-defence/eu-operations>. As of October 2012 there are eleven civilian missions ongoing, respectively in Bosnia and Herzegovina; Kosovo (largest); Moldova and Ukraine; Palestinian territories (two); Georgia; Afghanistan; Iraq; the Democratic Republic of Congo (two); and Niger. Seven missions have been completed, respectively in the Former Yugoslav Republic of Macedonia (two); Bosnia and Herzegovina; Georgia; Guinea Bissau; the Democratic Republic of Congo and Aceh, Indonesia. There are three military missions ongoing (EUFOR ALTHEA in Bosnia and Herzegovina, and EUTM SOMALIA and EUNAVFOR-ATALANTA in Somalia) and four completed, respectively in the Former Yugoslav Republic of Macedonia; Chad and the Central African Republic; and the Democratic Republic of Congo (two). There was a mission of a dual nature in Darfur, Sudan, in 2005-2006 in support of AMIS II. That makes for a total of 26 EU missions by November 2012.

¹⁹ See *inter alia* also B.K. Greener, 'The Rise of Policing in Peace Operations', 18 *International Peacekeeping* 2011, 183-195.

²⁰ Also the UN puts an emphasis on the relationship between peace and the rule of law. For more information see among others <www.un.org/en/peace/issues/ruleoflaw.shtml> and <www.unrol.org>.

²¹ See Santa Maria da Feira European Council, *Conclusions of the Presidency*, Annex I Presidency Report on Strengthening the Common European Security and Defence Policy, Appendix III 'Study on Concrete Targets on Civilian Aspects of Crisis Management' (19 – 20 June 2000), available at <www.europarl.europa.eu/summits/fei2_en.htm#an1>. More information is also available at <www.consilium.europa.eu/eeas/security-defence/civilian-crisis-management?lang=en>.

²² For more information on the CSDP structures and instruments visit <www.consilium.europa.eu/eeas/security-defence/csdp-structures-and-instruments?lang=en>.

²³ For more information visit <www.consilium.europa.eu/uedocs/cmsUpload/090720-Fact-sheet-Battlegroups_EN.pdf>.

EU-led missions in strategic regions due to high political, military, and economic risks associated with such missions. At the same time, the considerable budget cuts with regard to military expenses mean that EU countries are going to be generally less prone and able to undertake or become part of large-scale military operations. The military interventions in Afghanistan and Libya indicate that NATO remains the primary choice for dealing with more serious situations involving issues of security and gross violations of human rights and humanitarian law.

EU military operations operate on the basis of a mandate adopted through an EU Council decision (previously a Council Joint Action) based on the relevant provisions of the EU Treaty.²⁴ These EU operations are usually launched in support of existing UN missions or on the basis of invitations by the UN Security Council. Although the Council decisions do not directly refer to relevant general principles of international law, those principles and instruments are taken into account in the preparation of the Operation Plan and the Rules of Engagement of an EU mission. A very important instrument for any mission is also the relevant Status of Forces or Status of Mission Agreement between the EU and the host State.²⁵ These are some of the main legal instruments which regulate the legal framework applicable to any given EU peace mission.

EU missions of a military nature need to comply with international humanitarian law rules and principles when such rules and principles are clearly applicable based on an assessment of the specific situation on the ground. Such an obligation is recognised by the EU in its initial 2005 and the updated 2009 Guideline on Promoting Compliance with International Humanitarian Law (IHL), which note that all EU Member States are Parties to the Geneva Conventions and their Additional Protocols and thus under the obligation to abide by their rules.²⁶ The Guidelines state that the goal of promoting compliance with IHL is included under the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, upon which the EU is founded.²⁷ Under Part III, entitled 'Operational Guidelines', the document provides a non-exhaustive list of actions that could be undertaken by the EU to ensure respect for international humanitarian law by third States and non-State actors, which

²⁴ See *inter alia* Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina (EUFOR ALTHEA); Council Decision 2011/483/CFSP of 28 July 2011 amending and extending Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia); Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO).

²⁵ For more details on this issue see A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice', 19 *European Journal of International Law* 2008, 67-100.

²⁶ European Union Guidelines on promoting compliance with international humanitarian law (IHL) (OJ 2005 C 327/4, updated in 2009, see OJ 2009 C 303/12) and various other EU human rights guidelines. For a general overview of similar relevant instruments see Council of the European Union, *EU Guidelines Human Rights and International Humanitarian Law*, March 2009, available at <www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QC8308123ENC.pdf>.

²⁷ Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) (2009/C 303/06), para. 3.

includes political dialogue, general or specific public statements, sanctions, cooperation with other international bodies, crisis-management operations, ensuring accountability for war crimes, providing training, and safeguards with regard to the export of arms.²⁸ In an annex, these Guidelines also include an extensive list of the main legal instruments of international humanitarian law and other relevant legal instruments. As noted in paragraph 1, 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,²⁹ and aimed at addressing compliance with IHL by third States, and, as appropriate, non-State actors operating in third States. These IHL Guidelines 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.³⁰

3. THE APPLICABILITY OF GENERAL INTERNATIONAL LAW PRINCIPLES AND INSTRUMENTS TO EU PEACE MISSIONS

What are the legal sources applicable to EU crisis management missions?³¹ Generally speaking, these missions are governed by the traditional sources of international law contained in Article 38 of the Statute of the International Court of Justice (ICJ). Article 38 includes an authoritative but incomplete list, which includes as primary sources treaties, customary international law, and general principles of law and as secondary sources judicial decisions and publications by well-known scholars. An important basis from which to draw general principles applicable to EU peace missions is the constitutional heritage of EU Member States. Article 21, paragraph 1, of the EU Treaty provides that the EU in its external actions shall be guided by the principles of 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* (emphasis added). So, general principles and instruments of international law serve as a guide in EU external actions and specifically with regard to the activity of EU peace missions.³² Paragraph 2 of Article 21 provides that the EU defines and pursues common policies and actions, and works for a high degree of cooperation in all fields of international relations, in order to consolidate and support democracy, the rule of law, human rights and the *principles of international law*

²⁸ *Ibid.*, para. 16 (a-i).

²⁹ *Ibid.*, para. 1.

³⁰ *Ibid.*, footnote omitted.

³¹ For a detailed discussion see F. Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement', *Working Paper No. 151* (KU Leuven, Institute for International Law 2011) 4-7, available at <www.law.kuleuven.be/iir/nl/onderzoek/wp/wp151e.pdf>.

³² For a detailed discussion of rules and principles governing international military operations see T.D. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press 2010); for a discussion of the concept and sources of the international law of military operations see 3-11.

and to preserve peace, prevent conflicts and strengthen international security, in accordance with the *purposes and principles of the United Nations Charter* (emphasis added).³³ Some of the general principles of EU law which can be seen as general principles of international law are the principles of proportionality, legitimate expectations, and non-discrimination.³⁴ Paragraph 3 of Article 21 provides that the EU shall respect these principles in the development and implementation of the different areas of the Union's external action.

The European Court of Justice (ECJ) has found that fundamental rights form an integral part of the general principles of [Community] [now Union] law, the observance of which it ensures, and that international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.³⁵ With regard to the applicability of customary international law the ECJ has held as follows:

Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.³⁶

The activities undertaken under the Common Security and Defence Policy (CSDP) are regulated more specifically by Article 42(1) of the post-Lisbon EU Treaty, which provides that 'the common security and defence policy ... shall provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter'. The last reference to the principles of the UN Charter is meant to link and subject such missions to the collective security system under the UN Charter.

The nature of EU missions is further defined in Article 43 of the EU Treaty, which provides that they 'shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation' and may 'contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories'. The EU will normally conclude a Status of Forces/Mission Agreement (SOFA/SOMA) with the host State which regulates the status and activities of an operation in the host State and typically contains,

³³ See also Article 3(5) TEU.

³⁴ See generally P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2nd edition 1998), 296-371.

³⁵ *Ibid.*, 303-307. See among others Case 4/73, *Nold v. Commission*, [1974], ECR 491, [1974] 2 CMLR 338. See also cases C-286/90 *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, [1992] ECR, para. 9 and C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport*, [2008] ECR, para. 51.

³⁶ ECJ, Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v. Secretary of State for Energy and Climate Change*, [2011] ECR, para. 101, available at <http://curia.europa.eu/jcms/jcms/j_6>.

amongst others, provisions on the wearing of uniforms and carrying of arms, the exercise of criminal jurisdiction, privileges and immunities of the operation and its personnel, security of the mission and its personnel, handling of claims, implementing arrangements and the settling of disputes.³⁷

The application of general principles and instruments of international law to EU peace missions is important during both phases, that is, planning and implementation.³⁸ Proper planning of a mission is crucial, although changes might be made at a later stage, since it is difficult to know beforehand what the proper response is to fast-changing crises and volatile human environments. The planning of an EU peace mission is the phase where the relevance and applicability of general principles and instruments of international law should be discussed and eventually incorporated into the relevant substantive, procedural and institutional law. The Council decisions and Joint Actions generally set out the mission and mandate, political and, where applicable, military control and direction, specify the command and control relations and contain provisions on the status of the mission, participation of third States (i.e. non-EU Member States), relations with other actors, handling of EU classified information and the launching and termination/duration of the operation.³⁹ In military operations, the Council usually adopts a further separate decision launching the operation, together with the approval of the Operation Plan and, where applicable, the Rules of Engagement (RoE).⁴⁰

The second phase, where the applicable general principles of international law are translated into action, is the implementation by the EU peace mission of its mandate. The relevant EU peace mission structures need to implement these general principles, which can be of a substantive nature, of a procedural nature, or of an interpretive nature.⁴¹ The EU has legal personality and through its peace missions engages in and carries out those inter-connected international obligations in certain areas of State activity generally in a supporting role to existing State structures, but sometimes also in a leading role, when those State structures are largely missing.⁴² From a general perspective, the typology of State obligations under international human rights law instruments—which includes the obligation to respect, to protect, and, depending on avail-

³⁷ See A. Sari, *supra* note 25, 68-70.

³⁸ See F. Naert, *supra* note 31, at 6; F. Naert, *supra* note 16, 218-242.

³⁹ F. Naert, *supra* note 31, at p. 5.

⁴⁰ *Ibid.* For examples, see Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), OJ 2008 L 330/19 and Council Decision 2010/197/CFSP of 31 March 2010 on the launch of a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia), OJ 2010 L 87/33.

⁴¹ For a detailed discussion on the legal framework applicable to EU missions and responsibility for violations see the 'Code of Conduct for CDSP Operations Personnel', available at <www.drept.unibuc.ro/dyn_doc/cercetare/Code-of-Conduct.pdf> and <<http://projetatlas.univ-paris1.fr/spip.php?article74>>.

⁴² For a discussion of the extraordinary situations when the international community assumes powers of a national government see *inter alia* G.H. Fox, *Humanitarian Occupation* (Cambridge: Cambridge University Press 2008).

able resources, to fulfill—seems to be generally applicable to EU peace missions. The extent to which an EU mission can discharge those obligations will differ from one situation to another, depending on the mandate of the mission, the capacities made available to it, and the arrangements with the host State. Evidently, the host State remains the primary bearer of human rights obligations towards its own population.

While there is general agreement with regard to the applicability of general principles and instruments of international law to EU peace missions, questions remain regarding the scope of application and the rights accruing to individuals whose rights might be affected by operational activities carried out in the framework of a given mission.⁴³ Notably, the EU missions in Bosnia and Kosovo have been vested with vast powers for the administration of territory, to such an extent that it is no exaggeration to say that they receive veritable ‘sovereignty rights’ or ‘prerogatives of public power’.⁴⁴ While missions as these which can be defined as international transitional civil administration are not the norm, they provide the most interesting case-studies with regard to the application of general principles and instruments of international law.⁴⁵ The following two subsections focus on issues arising in the exercise of functions that give EU peace missions direct power over individuals, from the perspective of the application of general principles and instruments of international human rights and humanitarian law.

3.1. The applicability of general principles and instruments of International Human Rights Law

As an international organisation the EU has legal personality and is considered to be a subject of international law. In certain circumstances, the EU can become the addressee of international human rights norms due to its competences and the degree of control it exercises over the territory and the population of a host State or a part thereof. Consequently, in addition to any obligations of its Member States or States contributing to the operation which would apply in parallel, the EU becomes an addressee of the rights and obligations deriving from in-

⁴³ See *inter alia* V. Falco, ‘Human Rights and International Humanitarian Law in the Common Security and Defence Policy: Legal Framework and Perspectives for PMSC Regulation’, 25 *EUI Working Papers* (2009), available at <http://cadmus.eui.eu/bitstream/handle/1814/13573/AEL_2009_25.pdf>; G. Porretto and S. Vité, ‘The Application of International Humanitarian Law and Human Rights Law to International Organizations’, *Research Paper Series* No. 1 (Geneva University Centre for International Humanitarian Law 2006), available at <www.adh-geneva.ch/docs/projets/CTR_application_du_DIH.pdf>; see also ‘Promoting Compliance with International Humanitarian Law (IHL) (2005)’, 76-80, in Council of the European Union, *EU Guidelines on Human Rights and International Humanitarian Law* (European Communities 2009), available at <<http://consilium.europa.eu/uedocs/cmsUpload/QC8308123ENC.pdf>>.

⁴⁴ G. Porretto and S. Vité, *ibid.*, at 7.

⁴⁵ See respectively the constitutions of Bosnia and Herzegovina and that of Kosovo for the direct incorporation of a broad range of general principles and instruments of international human rights law.

ternational human rights norms.⁴⁶ The main international human rights instruments adopted over the years and to which the majority, if not all EU Member States are a party to, should inform the activity of an EU peace mission.⁴⁷

There are a number of general principles of international human rights law which are applicable to EU peace missions both as a matter of treaty law, because they are codified in relevant treaties to which EU Member States are party, and as a matter of them being part of customary international law.⁴⁸ Of primary importance with regard to EU peace operations are the principle of security and liberty of persons, including the corollary principle of due process holding that no one shall be subjected to unlimited arrest or detention and that no condemnation shall occur without the accused being given a fair opportunity to be heard.⁴⁹ The EU needs to ensure that persons detained during its operations are treated humanely and are given a fair trial for alleged breaches of the law, or otherwise released. Other relevant general principles applicable to EU peace missions are the prevention and repression of (sexual) violence, exploitation, and abuse in the context of peace operations;⁵⁰ ensuring individual criminal responsibility for internationally recognised crimes;⁵¹ and the principle of non-discrimination. The applicability of some of these principles, especially those related to the administration of justice, is reflected in that part of the EU peace missions' work in supporting and strengthening law enforcement structures in the host countries, as a contribution of the EU towards upholding the rule of law at an international level.⁵²

A fundamental principle of international human rights law, which underlies this branch of international law in its entirety, is the general principle of respect

⁴⁶ G. Porretto and S. Vité, *supra* note 43, at 40. See also F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp: Intersentia 2010); F. Naert, 'Accountability for Violations of Human Rights Law by EU Forces', in S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (The Hague: T.M.C. Asser Press 2008), 375-393; F. Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds.), *International Law as Law of the European Union* (Leiden/Boston: Martinus Nijhoff 2011), 208-209.

⁴⁷ See J.K. Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in T.D. Gill and D. Fleck (eds.), *supra* note 32, 65-77.

⁴⁸ See also F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations', in J. Wouters *et al.* (eds.), *Accountability for Human Rights Violations by International Organizations* (Antwerp: Intersentia 2010), 129-168.

⁴⁹ See J.K. Kleffner, 'Operational Detention and the Treatment of Detainees' in T.D. Gill and D. Fleck, *supra* note 32, 465-479. See also The Copenhagen Process on the Handling of Detainees in International Military Operations: The Copenhagen Process: Principles and Guidelines (October 2012).

⁵⁰ B. Klappe, 'The Prevention and Repression of (Sexual) Violence, Exploitation, and Abuse in the Context of Peace Operations' in T.D. Gill and D. Fleck, *supra* note 32, 495-499.

⁵¹ See W.J. Fenrick, 'The Prosecution of International Crimes in Relation to the Conduct of Military Operations', in T.D. Gill and D. Fleck, *supra* note 32, 501-513. See W. Friedmann, 'The Uses of "General Principles" in the Development of International Law', *57 American Journal of International Law* 1963, at 290.

⁵² See *inter alia* J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights: Building the Rule of Law After military Interventions* (Cambridge: Cambridge University Press 2006).

for human dignity.⁵³ As the International Criminal Tribunal for the former Yugoslavia (ICTY) has pointed out in the *Furundžija* case, this principle

'[i]s the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed, in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity.'⁵⁴

Another important general principle is that laid down in the *Chorzow Factory* case of the Permanent Court of International Justice (PCIJ), namely that any breach of an engagement involves an obligation to make reparation.⁵⁵ Evidently, attribution is a crucial element of the law of international responsibility.⁵⁶ The EU needs to provide a remedy and reparations for potential violations committed in the framework of its peace missions, which are attributable to its actions or omissions.⁵⁷ In this regard, it is also necessary to take into account possible instances of shared responsibility between the EU and specific States participating in a given mission.⁵⁸ These related principles can be worked out and need to be implemented through standard procedures and mechanisms to be included in the Status of Forces or Status of Mission Agreement (SOFAs/SOMAs) concluded with the host country. Nothing erodes more quickly the legitimacy and standing of a peace mission than a perception on the part of the population of the host country of an EU police or military force acting with impunity and not remedying damages caused in the course of carrying out their legitimate mandate of ensuring law and order and supporting host country security structures.

Finally, the expected accession of the EU to the European Convention on Human Rights (ECHR) in the near future potentially means that the general principles of international human rights law enshrined in this Convention would be applicable to EU peace missions.

⁵³ See the reference to 'respect for human dignity' in Article 21(1) of the TEU.

⁵⁴ ICTY, Case No. IT-95-17/1, *Prosecutor v. Anto Furundžija*, [1998], Trial Chamber II, Judgment of 10 December 1998, para. 183.

⁵⁵ PCIJ, *Factory at Chorzow* (Germany v. Poland), [1928], Series A., No. 17, at 29.

⁵⁶ See generally chapters 18, 19, 20, and 22 in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press 2010).

⁵⁷ See B. Kondoch, 'The Responsibility of Peacekeepers, Their Sending States, and International Organizations' in T.D. Gill and D. Fleck, *supra* note 32, 516-534. See and compare F. Naert, 'The International Responsibility of the Union in the Context of Its CSDP Operations', in P. Koutrakos and M. Evans (eds.), *The International Responsibility of the European Union* (Oxford: Hart Publishing, forthcoming 2013) and A. Sari and R.A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B. van Vooren, S. Blockmans and J. Wouters (eds.), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, forthcoming 2013), draft available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152897>.

⁵⁸ For a discussion of the issue of shared responsibility see *inter alia* A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', *SHARES Research Paper* No. 03 (2011); F. Messineo, 'Multiple Attribution of Conduct', *SHARES Research Paper* No. 11 (2012), available at <www.sharesproject.nl>.

3.2. The applicability of general principles and instruments of International Humanitarian Law

What are the general principles of international humanitarian law (IHL) applicable to EU peace missions?⁵⁹ First, it is generally accepted that IHL instruments are binding and, in principle, applicable during EU military operations.⁶⁰ As the 2005 Guideline on International Humanitarian Law notes, 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.⁶¹ Furthermore, according to the 2005 IHL Guideline, 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.⁶² It should be recalled, though, that these Guidelines aim to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States.⁶³ The main problems arising in such missions include among others those relating to the detention of individuals (combatants or otherwise posing a serious risk to the mission), the prohibition of torture and inhuman treatment, and ensuring the right to a fair trial.

Some of the relevant general principles of IHL applicable during EU peace missions involving the use of military force include the principle of distinction

⁵⁹ See generally J.K. Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in T.D. Gill and D. Fleck, *supra* note 32, 51-65.

⁶⁰ All EU Member States are Parties to the Geneva Conventions and their Additional Protocols and thus under the obligation to abide by them. See *inter alia* G.-J. van Hegelsom, 'International Humanitarian Law and Operations Conducted by the European Union', 107-115 and M. Bothe, 'The Responsibility to Protect and International Humanitarian Law', 228-232, in G.L. Beruto (ed.), *International Humanitarian Law Human Rights and Peace Operations* (Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law Sanremo, 4-6 September 2008), available at <www.icrc.org/eng/assets/files/other/sanremo-2008_peace_ops.pdf>. See also F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp: Intersentia 2010), 463-540; A.-S. Millet-Devalle (ed.), *L'Union européenne et le Droit International Humanitaire* (Paris: Pedone 2010); M. Zwanenburg, 'Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations', in S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (The Hague: T.M.C. Asser Press 2008), 395-416. Para. 3 of the updated 2009 Guideline provides that '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'. Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) (2009/C 303/06). See also 'Application of the Law of Armed Conflict During Peace Support Operations' in UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press 2004), 377-381.

⁶¹ Promoting Compliance with International Humanitarian Law (IHL) (2005) in *EU Guidelines on Human Rights and International Humanitarian Law* (European Communities 2009), at 78, available at <http://eeas.europa.eu/human_rights/docs/guidelines_en.pdf>.

⁶² *Ibid.*

⁶³ *Ibid.* Para. 2 of the Guidelines provides that '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'.

between civilians and combatants, the principle of precautions in attack, the principle of proportionality and the overarching principle of humanity.⁶⁴ These are in fact some of the fundamental principles of IHL which are part of the military training and drills that EU troops would get in their respective home countries. These general principles are generally translated into the rules of engagement, which are an important element of the legal framework which guides the activity of EU military forces on the ground. It is the duty of each EU Member State to train its armed forces so that they are able to comply with IHL and to respond to complex situations.

4. PROBLEMATIC ASPECTS CONCERNING THE ENFORCEMENT OF THE APPLICABLE GENERAL PRINCIPLES AND INSTRUMENTS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

The implementation of the obligation to ensure respect for and to promote respect for human rights and humanitarian law in the field of crisis management encounters a number of difficulties in practice. These difficulties have to do with internal limitations based on the EU's institutional characteristics and limited human and financial resources available, as well as challenges posed by external factors. Problems concerning enforcement of applicable general principles and instruments of international human rights and humanitarian law are caused among others by a lack of sufficient knowledge and adequate training at the operational level, as well the lack of specific accountability mechanisms and the high threshold of access to justice for the individuals affected during EU peace missions. Another challenge for the EU is gender mainstreaming in CSDP missions, as an important aspect of addressing exploitation and abuses of local populations, especially of local women.⁶⁵ The use of Private Military and Security Contractors (PMSCs) in discharging some of the functions of peace operations would raise serious issues relating to the accountability and responsibility of both the PMSC and the EU for violations of human rights law and international humanitarian law.⁶⁶ Notwithstanding the EU's internal limitations and additional challenges posed by external factors, it is important that EU peace missions are planned and carried out in accordance with relevant general principles and instruments of international law. Careful planning and adequate implementation mechanisms help avoid serious breaches of inter-

⁶⁴ See also J.K. Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in T.D. Gill and D. Fleck, *supra* note 32, at 52.

⁶⁵ See J. Valenius, 'Gender Mainstreaming in ESDP Missions', *Chaillot Paper* No. 101 (EU Institute for Security Studies 2007), available at <www.iss.europa.eu/fr/publications/detail-page/article/gender-mainstreaming-in-esdp-missions>; J. Boehme, 'Human Rights and Gender Components of UN and EU Peace Operations: Putting Human Rights and Gender Mandates into Practice' (Berlin: German Institute for Human Rights 2008), available at <http://humansecuritygateway.com/documents/GIHR_GenderHumanRights_UN-EUPeaceOperations.pdf>.

⁶⁶ N.D. White and S. MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility', 19 *European Journal of International Law* 2008, 965-988; see also T.D. Gill and D. Fleck, 'Private Contractors and Security Companies' in T.D. Gill and D. Fleck, *supra* note 32, 489-493.

national law. When left unaddressed, even minor breaches of international law by EU peace forces have the potential to negatively affect the legitimacy of the relevant mission, as well as to taint the efforts of the EU to promote human rights and the rule of law at an international level.

As noted above, an important challenge for the EU is that of addressing human rights and humanitarian law violations which occur in the course of the carrying out of EU peace missions.⁶⁷ On the basis of Articles 37 EU Treaty and 218 Treaty of the Functioning of the European Union (TFEU) (previously Article 24 EU Treaty), the EU, as a separate legal person, can conclude international agreements relating to its crisis management operations. The EU's activity engages its contractual or non-contractual responsibility.⁶⁸ The non-contractual responsibility of the Union extends to injuries caused by its institutions or its agents in the exercise of their functions.⁶⁹ The plaintiff will need to prove three inter-related elements, namely that the act or omission is attributable to the EU, the wrongfulness of the act, and the existence of the causal link between the wrongful act and the damage. On the basis of the *Brasserie de Pecheur* case, engaging the responsibility of the EU requires a breach of a rule conferring rights on the individual.⁷⁰ It should be noted, however, that the ECJ does not have jurisdiction over the CSDP area. The general principle of the obligation to make reparations for violations of international law would impose on the EU also the responsibility to create the necessary rules and mechanisms to comply with this principle.⁷¹ The non-contractual responsibility of the EU as an international organisation extends according to Article 340(2) (ex 288(2)) of the Treaty, to injuries caused by its institutions or its agents in the exercise of their functions.⁷² According to this article, in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its

⁶⁷ See among others M.C. Trascasas (coord.), 'Compilation of Best Practices on the Integration of Human Rights and Humanitarian Law Component on EU PKO', (Universitat Jaume I Castellón 2011), available at <http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS-BPG_I_.pdf> and 'Best Practices and Main Constraints on the Integration of the Human Rights and International Humanitarian Law Component and Their Oversight', available at <http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS-BPG_I_2-2.pdf>.

⁶⁸ J.-M. Thouvenin, 'Responsibility in the Context of the European Union Legal Order', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press 2010), at 867.

⁶⁹ See article 340(2) of the Treaty, formerly Article 288(2). For a discussion focused on CSDP missions see also G. Marhic, 'Violations of Human Rights and International Humanitarian Law in the Context of Missions: Assessing the Responsibility of the European Union', in M. Aznar and M. Costas (eds.), *The Integration of the Human Rights Component and International Humanitarian Law in Peace Missions Led by the European Union* (Valencia: CEDRI/ATLAS 2011), 111-118.

⁷⁰ Joined cases C-46/98 and C-48-93, *Brasserie de Pecheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR-I-1029, paras. 51-53.

⁷¹ See also Article 31(1) of the Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission, *Yearbook of the International Law Commission* 2011, vol. II, available at <http://untreaty.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf>. This article provides that the responsible international organisation is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

⁷² J.-M. Thouvenin, *supra* note 68, at 867.

servants in the performance of their duties. The acts of organs to which powers have been delegated by the EU are attributable to the EU.⁷³

5. CONCLUDING REMARKS

EU crisis management missions play an important role in ensuring respect for human rights and humanitarian law and in promoting the rule of law at the international level. Over the last nine years the EU has launched missions in different parts of the globe in order to address various threats to international peace and security. As the EU's involvement in crisis situations expands and diversifies, the EU needs to address in a comprehensive and structural manner issues related to accountability of its peace missions towards the individuals or the population affected by its operational activities.⁷⁴ A considerable number of general principles and instruments of international human rights and humanitarian law are applicable and should guide the EU's activities in the CSDP area. These general principles can be drawn from international human rights and humanitarian law and transposed in the legal framework applicable to EU peace missions. These general principles and instruments need to inform the activity of the EU peace missions relating to the CSDP area at the strategic, operational and tactical level.

General principles allow international law to grow and to respond to modern challenges.⁷⁵ Notably, the principles of 'elementary considerations of humanity', 'human dignity' and 'equality before the law' have considerably broadened the scope of international human rights and humanitarian law and eventually have laid a minimum standard which needs to be respected in every given situation. Among others, general principles of international law provide an important dynamic element of international law which eventually could avoid specific EU law relating to its peace missions from becoming 'outdated and irrelevant'. These general principles provide guidance especially in those gray areas for which there is no specific international law regime applicable. Although they are generally applicable, general principles of human rights law are especially useful in those situations that while being dangerous, do not rise to the threshold of an armed conflict. General principles of international humanitarian law are applicable to situations where EU peace forces are involved in combat operations. Since the legal framework regulating different aspects of EU peace missions needs to respond to unfolding complex situations, general principles and instruments of international law are an important supplement and corrective to this body of law.

⁷³ See Article 6 of the Draft Articles on the Responsibility of International Organizations, in *Yearbook of the International Law Commission* 2011, vol. II, Part Two; available at <http://untreaty.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf>.

⁷⁴ See E. Johansson *et al.*, 'A New Start for EU Peacemaking? Past Record and Future Potential', *UCDP Paper No. 7* (Uppsala University, Department of Peace and Conflict Research 2010), available at <www.pcr.uu.se/digitalAssets/112/112149_ucdp_paper_7.pdf>.

⁷⁵ Ch. Voigt, 'The Role of General Principles in International Law and their Relationship to Treaty Law', 31 *RETFÆRD ÅRGANG* 2008, at 22.

LEGAL FRAMEWORK GOVERNING THE PROTECTION AND PROMOTION OF HUMAN RIGHTS IN EU MISSIONS – APPLICATION OF EU LAW PRINCIPLES AND INSTRUMENTS

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INTRODUCTION

This contribution reflects my oral intervention in the first session of the workshop on which this publication is based. That session addressed the ‘Legal Framework Governing the Protection and Promotion of Human Rights in EU Missions’ in general, and was followed by two other sessions which dealt with the duty to respect human rights and the promotion of human rights.

In this contribution I will therefore analyse the main EU law aspects relating to both respecting and promoting human rights in EU missions. I will do so at a fairly general level so as not to create too much overlap with the contributions which look at both these dimensions in greater detail. Furthermore, I will not address general international law,² which is covered by Gentian Zyberi in this volume. I have also attempted to limit the extent to which this contribution examines the case-law of the European Court of Human Rights (ECtHR) as Heike Krieger will discuss this in this volume. However, given the links between EU human rights law and the European Convention on Human Rights (ECHR), I will look at the ECHR to some extent.

In the first part, I will briefly analyse the main relevant provisions of the Treaty on European Union (TEU). In the second part, I will outline a number of aspects relating to the implementation of respecting and promoting human rights in EU CSDP missions.³

1. THE KEY PROVISIONS OF THE TREATY ON EUROPEAN UNION

Human rights are one of the values on which the EU is based. This is reflected in Article 2 TEU, which states that:

¹ The views expressed are solely the author’s and do not bind the Council or its Legal Service.

² For a more extensive analysis also covering international law aspects, see F. Naert, *International Law Aspects of the EU’s Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, (Antwerp: Intersentia 2010), especially chapter 9.

³ This contribution only covers missions conducted as part of the EU’s Common Security and Defence Policy (CSDP). The terms ‘missions’ and ‘operations’ are used interchangeably. See also generally F. Naert, ‘Accountability for Violations of Human Rights Law by EU Forces’, in S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (The Hague: T.M.C. Asser Press 2008), 375-393.

'The 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 in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.⁴ (emphasis inserted)

Furthermore, pursuant to Article 49 TEU, only a European State 'which *respects* the values referred to in Article 2 and is committed to *promoting* them' may apply to become a member of the Union.

The most important provision on human rights in EU law is Article 6 TEU, which reads as follows:

'1. The Union *recognises* the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

Article 51(1) of the Charter of Fundamental Rights of the European Union⁵ defines the field of application of this Charter in the following terms:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'.

It may be noted here that the European Court of Justice (ECJ) has essentially elevated EU human rights rules to the highest norms of primary EU law (see also below).⁶

The TEU also specifically refers to human rights in its provisions dealing with external relations, in particular in Articles 3(5) and 21 TEU. The former

⁴ Unless indicated otherwise, the emphasis (in italics) is mine.

⁵ *Official Journal of the European Union* (OJ) C 83, 30.3.2010, at 389.

⁶ See especially Joined Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission*, 3 September 2008, paras. 301-309.

provides that 'In its relations with the wider world, the Union shall *uphold and promote its values* and interests and contribute to the protection of its citizens. It shall contribute to peace, security, ... 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'. The latter elaborates on this and states that:

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

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) *safeguard its values*, fundamental interests, security, independence and integrity;

(b) *consolidate and support* democracy, the rule of law, *human rights* and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (...)

3. The Union shall *respect* the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.'

These articles, together with the Charter of Fundamental Rights of the European Union and the ECHR, put human rights at the heart of EU law. They require respect for human rights in all EU policies and demand respect for and promotion of human rights in the EU's external relations, including its Common Security and Defence Policy. Thus there is a solid basis in the TEU for both respect for and promotion of human rights in CSDP missions.

In the next part, I will briefly set out how the EU implements this and handles respect for and promotion of human rights in its CSDP missions.

2. IMPLEMENTATION – HOW DOES THE EU ENDEAVOUR TO RESPECT AND PROMOTE HUMAN RIGHTS IN ITS CSDP MISSIONS?

2.1. Respecting human rights

As explained above, pursuant to Articles 3(5), 6 and 21 TEU, the EU must respect human rights in its external relations, including in the CSDP. It results from these provisions that, unlike most international organisations, the EU itself,

which now has international legal personality,⁷ has extensive human rights obligations, including treaty-based ones. These obligations are especially set out at length in the Charter of Fundamental Rights of the European Union and in the ECHR. The latter is already fully part of EU law via Article 6(3) TEU. In addition, when the EU will have acceded to the ECHR as required by Article 6(3) TEU, it will also be bound by the ECHR as a matter of international law. This accession is currently under negotiation.⁸ It will constitute an important precedent for an international organisation to become a party to a key human rights treaty.⁹

Furthermore, these EU human rights rules bind not only the EU itself but also its Member States when they are implementing Union law (Article 51(1) of the Charter of Fundamental Rights). It can be argued that this includes situations in which Member States implement Council decisions (formerly Joint Actions) setting up CSDP missions, as such decisions are legal (albeit not legislative) acts under EU law^{10, 11}. Consequently, the EU has extensive treaty based human rights obligations which are to a great extent the same as those of its Member States and include notably the ECHR and, in the framework of the EU, the Charter of Fundamental Rights of the European Union. This means that in terms of substantive obligations, it is of little importance whether conduct relating to CSDP missions is attributable to the Union and/or to one or more Member States. By contrast, in relation to available remedies, this—complex and unsettled—question¹² remains important. However, once the EU will have

⁷ See Art. 47 TEU and the notification to third parties regarding the Treaty of Lisbon (EU Council Doc. 16654/1/09, available at <<http://www.consilium.europa.eu/documents/access-to-council-documents-public-register?lang=en>>) (unless indicated otherwise, all urls cited were last visited on 14 October 2012).

⁸ See also Protocol No 5 to the Treaty of Lisbon. From the ECHR perspective, see Article 17 of Protocol No 14 ECHR (Strasbourg, 13 May 2004), which inserted a new paragraph in Art. 59 ECHR stating that '*[t]he European Union may accede to this Convention*'. The negotiations on this accession are ongoing. See generally <<http://hub.coe.int/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention>>.

⁹ The EU is already a party to the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006) but this does not have the same significance.

¹⁰ On the legal framework of CSDP missions generally, see F. Naert, 'Legal Aspects of EU Military Operations', 15 *Journal of International Peacekeeping* 2011, 218-242.

¹¹ I will not enter into further details here on the precise scope of '*implementing Union law*' nor on the question whether this scope of application of the Charter is identical to that developed in the case-law of the ECJ for EU human rights law prior to the Charter and thereafter under paragraph 3 of Art. 6 TEU.

¹² See generally F. Naert, *supra* note 2, 355-357, 435-449, 506-526 and 641-646 and compare more extensively A. Sari and R. A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press 2013, forthcoming, draft available at <<http://ssrn.com/abstract=2152897>>). The question of attribution was addressed in Germany in a judgment of the Cologne administrative court of 11 November 2011 (available in German at <http://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html>). The court ruled that Germany was responsible for the transfer of suspected pirates held on board a German ship participating in the EU's operation Atalanta to Kenya on the basis of Germany's role in this transfer. The reasoning of the court is very narrow and the judgment is under appeal. It may be added that the question of Member State responsibility is wider than that of attribution, see F. Naert, 'Binding In-

acceded to the ECHR, the importance of this aspect of the question is likely to decrease significantly.¹³ In particular, the European Court of Human Rights will then have jurisdiction irrespective of whether the Union and/or one or more Member States are responsible for an alleged violation of the ECHR.

However, while the above-mentioned provisions establish the duty to respect human rights in the CSDP as a clear principle, a number of questions arise as regards the scope and extent of this duty. For instance, it may be asked whether the extent of the extraterritorial application of the ECHR¹⁴ is to be transposed fully to the EU context, or whether the particular nature of the EU's (functional¹⁵) competence and the transposition of ECHR rights into EU law¹⁶ may alter this scope of application.¹⁷

Similarly, questions on the impact of UN Security Council resolutions (having regard to Article 103 of the UN Charter) and possible (extraterritorial) derogations from certain human rights (see Article 15 ECHR),¹⁸ as well as the relationship between human rights and international humanitarian law¹⁹ when the latter is applicable,²⁰ which have arisen in the context of other peace/military operations, may also be relevant in the framework of CSDP missions.

In this respect, regarding the impact of UN Security Council resolutions, it should be noted that in the EU legal order, the European Court of Justice has given precedence to fundamental human rights over obligations under the UN

ternational Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations', in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations* (Antwerp: Intersentia 2010), 129-168.

¹³ Assuming the CFSP is not exempted from the EU's accession to the ECHR.

¹⁴ See especially the ECtHR judgment in *Al-Skeini v. UK*, 7 July 2011, which also extensively discussed the earlier case-law under the ECHR and which is the subject of an agora in 50 *Military Law and the Law of War Review* (2011), 315-445. See also the contribution by H. Krieger in this volume; F. Naert, *supra* note 2, 544-567; M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia 2009); M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011) and K. M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge: Cambridge University Press 2012).

¹⁵ Unlike States, the competence of international organisations is usually described as functional in nature. While the EU is a particularly well developed organisation, its competence remains functional.

¹⁶ This aspect will not concern the ECHR as such once the EU will have acceded to it.

¹⁷ For some reflections on this, see F. Naert, *supra* note 2, 644-646 and 649-651 and F. Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in E. Cannizzaro, P. Palchetti and R. Wessel (eds.), *International Law as Law of the European Union* (Leiden/Boston: Martinus Nijhoff 2011), 208-209.

¹⁸ See especially the ECtHR judgment in *Al-Jedda v. UK*, 7 July 2011, which is the subject of an agora in 50 *Military Law and the Law of War Review* (2011), 315-445. See also the contribution by H. Krieger in this volume and F. Naert, *supra* note 2, 577-580 and 585-588.

¹⁹ I use the term international humanitarian law interchangeably with the *ius in bello* or the law of armed conflict.

²⁰ On the relationship between the ECHR and international humanitarian law, see ECtHR, *Varnava and Others v. Turkey*, 18 September 2009, para. 185 and *Al-Jedda v. UK*, 7 July 2011, para. 107. See also F. Naert, *supra* note 2, 589-641, especially 607-615. On 13 December 2011, the ECtHR declared admissible the case of Georgia v. Russia (II) (Appl. No. 38263/08), relating to the armed conflict between Georgia and Russia in August 2008. The Court may have to further develop its views on this relationship in this case.

Charter.²¹ Furthermore, as regards the relationship between human rights and international humanitarian law, the EU Guidelines on promoting compliance with international humanitarian law (as updated in 2009) provide that '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'.²² This implies recognition of the potential concurrent application of international humanitarian law and human rights. The European view appears to recognise the *lex specialis* principle but as a principle to be applied on a case-by-case basis, e.g. leaving room for a possible distinction between international and non-international armed conflicts as regards issues such as detention.

Turning to CSDP operations, it is important to take into account the nature and scope of these operations, as these may affect the applicable law. Under Article 42(1) TEU, the EU's CSDP includes military and civilian 'missions outside the Union for peace-keeping, conflict prevention and strengthening international security'. These missions are further defined in Article 43 TEU as follows: they shall include a broad range of tasks, including 'peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation'.

The 'tasks of combat forces in crisis management, including peace-making' cover peace enforcement and hence potentially high intensity operations involving combat. Therefore these tasks may entail the applicability of international humanitarian law.²³ However, given the wide range of CSDP operations, only some of those operations might involve combat and international humanitarian law is therefore likely to be applicable only in few CSDP operations. EU policy is therefore that international humanitarian law does not necessarily apply in all CSDP operations as a matter of law nor is it necessarily the most appropriate standard as a matter of policy in all CSDP operations. Therefore, especially when international humanitarian law does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct for CSDP operations (that is not to say that human rights law is not relevant when international humanitarian law does apply; see the brief comments above on the relationship between human rights and international humanitarian law).

However, as indicated above, some controversies regarding the applicability of human rights law *de iure* are 'imported' into the EU framework and potentially affect the application of human rights in CSDP operations. While divergences are limited as Member States and the Union broadly have the same European and international human rights obligations (see above), Mem-

²¹ See Joined Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission*, 3 September 2008. For the follow-up to this case, see the General Court's judgment of 30 September 2010 in Case T-85/09, *Yassin Abdullah Kadi v. Commission*, currently under appeal (Cases C-595/10 P, C-593/10 P and C-584/10 P).

²² OJ C 303, 15.12.2009, at 13, para. 12.

²³ See the contribution by M. Zwanenburg, 'The duty to respect International Humanitarian Law during European Union-led operations', in this volume; as well as F. Naert, *supra* note 2, 463-540; A.-S. Millet-Devalle (ed.), *L'Union européenne et le droit international humanitaire* (Paris: Pedone 2010) and M. Zwanenburg, 'Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations', in Blockmans (ed.), *supra* note 3, 395-416.

ber States' obligations are not fully identical and they may interpret some of their shared obligations differently.

In any event, and despite such differences, as a matter of *policy* human rights provide significant guidance in CSDP operations and in practice, EU operational planning and rules of engagement take into account internationally recognised human rights standards.²⁴ This is also explicitly reflected in legal instruments relating to some CSDP operations. E.g., EULEX Kosovo is to 'ensure that all its activities respect international standards concerning human rights and gender mainstreaming'.²⁵ Also, suspected pirates or armed robbers at sea captured by the EU's counter-piracy operation *Atalanta* may not be transferred to a third State 'unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment'.²⁶ The latter provision has led to the conclusion of the transfer agreements between the EU and third States in the region (Kenya,²⁷ the Seychelles²⁸ and Mauritius²⁹) and arrangements with third States participating in *Atalanta* (e.g. Croatia³⁰), which contain substantial provisions aiming to ensure respect for human rights.³¹ Furthermore, the Council Joint Action setting up operation *Atalanta* sets out the mandate of the operation in greater detail than is usually the case for military CSDP operations in the legal act and specifically mentions the use of force, arrest, detention and transfer of suspected pirates and armed robbers at sea, as well as the transmission of personal data.³² Furthermore, human rights considerations have played and continue to play an important role throughout the planning for and conduct of operation *Atalanta*. For instance, it was only after extensive planning and careful deliberations, including on human rights aspects, that the operation was mandated to conduct some operations against pirate supplies on Somali coast-

²⁴ See more extensively F. Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement', in M. Aznar and M. Costas (eds.), *The Integration of the Human Rights Component and International Humanitarian Law in Peacekeeping Missions Led by the European Union* (CEDRI/ATLAS, 2011), 61-71 (also available as KU Leuven Institute for International Law Working Paper No. 151 available at <<http://www.law.kuleuven.be/iir/eng/research/wp.html>>).

²⁵ Article 3(i) of Council Joint Action 2008/124/CFSP of 4 February 2008, OJ L 42, 16.02.2008, at 92.

²⁶ Art. 12 Council Joint Action 2008/851/CFSP of 10 November 2008, OJ L 301, 12.11.2008, at 33 (*corrig.* OJ L 253, 25.9.2009, at 18).

²⁷ OJ L 79, 25.3.2009, at 49 (agreement no longer in force).

²⁸ OJ L 315, 2.12.2009, at 37.

²⁹ OJ L 254, 30.9.2011, at 3.

³⁰ See Art. 3 Agreement on the participation of Croatia in Operation *Atalanta*, OJ L 202, 4.8.2009, at 84, and the Annex.

³¹ On this operation, see generally F. Naert, *supra* note 2, 179-191 and <<http://www.eunavfor.eu/>>.

³² See more extensively F. Naert and G.-J. Van Hegelsom, 'Of Green Grass and Blue Waters: A Few Words on the Legal Instruments in the EU's Counter-Piracy Operation *Atalanta*', 25 *NATO Legal Gazette* (2011), 2-10 (available as KU Leuven Institute for International Law Working Paper No. 149 available at <<http://www.law.kuleuven.be/iir/eng/research/wp.html>>).

al territory and such operations are subject to strict conditions *inter alia* designed to ensure respect for human rights.³³

To conclude this section, I will very briefly identify some EU specificities as regards remedies and responsibility.³⁴ First, the EU has a specific system of remedies with a role for Member State courts given lack of jurisdiction of the European Court of Justice in relation to the CSDP.³⁵ Second, the EU has no immunity from *jurisdiction* (as opposed to execution) before the courts of its Member States, except where European Court of Justice has jurisdiction.³⁶ Third, like many other organisations, the EU usually sets up specific claims mechanisms in its operations as part of status of forces/mission agreements.³⁷

2.2. Promoting human rights

The EU has a well developed policy of promoting human rights in its external relations.³⁸ This includes a wide variety of measures, including the inclusion of human rights clauses³⁹ in framework agreements⁴⁰ between the EU and third⁴¹ States, the taking into account of human rights considerations in the EU's development policy, and a number of measures in the area of the Common Foreign and Security Policy (CFSP). The latter include a series of guidelines on promoting specific human rights issues,⁴² raising human rights issues as part of political dialogues with third countries, the recent appointment of an EU Special Representative for Human Rights,⁴³ the adoption of restrictive measures

³³ At the time of writing, one such operation of a limited scale had been conducted (on 15 May 2012), see <<http://www.eunavfor.eu/2012/05/eu-naval-force-delivers-blow-against-somali-pirates-on-shoreline/>>.

³⁴ See generally F. Naert, 'The International Responsibility of the Union in the Context of Its CSDP Operations', forthcoming in P. Koutrakos and M. Evans (eds.), *The International Responsibility of the European Union* (Oxford: Hart 2012).

³⁵ See Art. 24(1) TEU and Arts. 275 *juncto* 340 and 19(1) Treaty on the Functioning of the European Union (TFEU).

³⁶ Pursuant to Art. 343 TFEU the Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol (No. 7) on the privileges and immunities of the EU. This Protocol does not grant the EU immunity from *jurisdiction* before the courts of its Member States (as opposed to its property and assets being exempt from any measure of constraint without the authorisation of the ECJ). Article 274 TFEU adds that '*Save where jurisdiction is conferred on the [ECJ] by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States*'.

³⁷ See F. Naert, *supra* note 34 and A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: the EU's Evolving Practice', 19 *European Journal of International Law* 2008, 67-100.

³⁸ See generally <http://eeas.europa.eu/human_rights/index_en.htm>.

³⁹ In essence, such clauses provide that respect for human rights is an essential element of the agreement. They are systematically included in framework agreements between the EU (often together with its Member States) and third States.

⁴⁰ I.e. agreements covering overall relations and a wide range of policies/subjects, such as association agreement and partnership and cooperation agreements.

⁴¹ I.e. States which are not member of the EU.

⁴² See <http://eeas.europa.eu/human_rights/guidelines/index_en.htm>.

⁴³ Council Decision 2012/440/CFSP of 25 July 2012 appointing the European Union Special Representative for Human Rights, *OJ L* 200, 27.7.2012, at 21.

(often called ‘sanctions’) against regimes/persons responsible for serious human rights violations,⁴⁴ support for international criminal justice (including to the International Criminal Court⁴⁵),⁴⁶ and measures in the area of the CSDP. There is also a Council preparatory body specifically mandated to deal with human rights issues in the EU’s external relations, namely the Human Rights Working Group (COHOM).⁴⁷

In relation to the CSDP, two main measures merit mention. The first is efforts to mainstream human rights in the CSDP. The EU has developed policy documents on this mainstreaming and is working on implementing this policy.⁴⁸ This is addressed at some length in Hadewych Hazelzet’s contribution,⁴⁹ so I will not elaborate on it here. The second is the promotion of human rights by CSDP missions. There is much to say about this, but it may suffice to make a few general points here. First, the extent to which CSDP missions pursue the promotion of human rights will depend very much on their mandate and means. Perhaps advisory and training missions, including security sector reform missions, are more likely or generally more suited to include the promotion of human rights than missions with an executive mandate. EUSEC RD Congo is an example of a mission with a mandate which explicitly includes the promotion of human rights,⁵⁰ as is EUJUST LEX Iraq.⁵¹ Furthermore, it is necessary to

⁴⁴ On EU restrictive measures generally, see <http://eeas.europa.eu/cfsp/sanctions/index_en.htm> (note that the EU also adopts restrictive measures for other reasons).

⁴⁵ In 2006, the EU concluded a cooperation agreement with the ICC (Agreement between the International Criminal Court and the European Union on cooperation and assistance, *OJ L 115*, 28.04.2006, at 50). It also has a common position in support of the ICC (currently Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, *OJ L 76*, 22.3.2011, at 56). Furthermore, there is an International Criminal Court sub-area formation of the public international law working party (COJUR ICC) within the Council. See also *The European Union and the International Criminal Court* (General Secretariat of the Council of the EU, 2008, <http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf>).

⁴⁶ See generally <http://eeas.europa.eu/human_rights/icc/index_en.htm>.

⁴⁷ See <http://eeas.europa.eu/human_rights/workgroup/index_en.htm>.

⁴⁸ See the compilation available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news144.pdf> (dated 2008). For more recent information, see e.g. Council Doc. 17138/1/10 of 30 November 2010, *Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions*, available in the Council’s register, available at <<http://www.consilium.europa.eu/documents/access-to-council-documents-public-register.aspx?lang=EN>>.

⁴⁹ See H. Hazelzet, ‘Common Security and Defence Policy: What nexus between Human Rights and Security?’, elsewhere in this volume.

⁵⁰ Pursuant to Council Decision 2010/565/CFSP of 21 September 2010 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (EUSEC RD Congo) (*OJ L 248*, 22.9.2010, at 59), this mission has the aim ‘of assisting the Congolese authorities in setting up a defence apparatus capable of guaranteeing the security of the Congolese people, *while respecting democratic standards, human rights and the rule of law*, as well as the principles of good governance and transparency’ (Art. 1, emphasis added) and to this effect it is to provide practical support in the field of security sector reform, including ‘pursuing activities relating to the campaign against impunity in the areas of respect for human rights, including sexual violence’ (Art. 2(1)e).

⁵¹ Pursuant to Article 2(2) of Council Joint Action 2009/475/CFSP of 11 June 2009 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX (*OJ L 156*, 19.6.2009, at 57), this mission ‘*shall promote closer collaboration between the different actors across the Iraqi criminal justice system and strengthen the management capacity of senior and high-potential*

look beyond the question whether promotion of human rights is explicitly mentioned in the mandate of a mission (in any event, the detailed mandate and tasks will in most cases be set out in classified planning documents). Promoting human rights may be included in other tasks without being explicitly referred to. For example, EUPOL COPPS has the aim 'to contribute to the establishment of sustainable and effective policing arrangements under Palestinian ownership *in accordance with best international standards*'.⁵² Best international standards undoubtedly include human rights aspects. Similarly, while the Council Decision setting up the EU military mission to contribute to the training of Somali security forces (EUTM Somalia) does not mention human rights, the training given does include international humanitarian and human rights law.⁵³ It should also be taken into account that missions with an executive mandate, even if they may not have a direct mandate to promote (or protect) human rights, may do so—or contribute to doing so—in the framework of their other mandated tasks. Thus, EUFOR Tchad/RCA provided security and thus contributed to the protection of civilians.⁵⁴ In the framework of this operation the EU also agreed to provide support, if requested, to the International Criminal Court on logistical and security issues.⁵⁵ Also, operation Atalanta protects the delivery of food to Somalia by the World Food Programme and has thus saved numerous lives. It also contributes to fighting impunity for acts of piracy and armed robbery at sea.

Moreover, one should not look at the missions in isolation and it may well be that other EU activities that take place in parallel pursue or contribute to the promotion of human rights more than a given mission does. For instance, operation Atalanta is accompanied by measures adopted under the EU's Instrument for Stability⁵⁶ which reinforce the capacity of several States in the region to prosecute suspected pirates in a manner consistent with human rights, thus

officials primarily from the police, judiciary and penitentiary and improve skills and procedures in criminal investigation in full respect for the rule of law and human rights' (emphasis added).

⁵² Art. 2 of Council Decision 2010/784/CFSP of 17 December 2010 on the European Union Police Mission for the Palestinian Territories (EUPOL COPPS), OJ L 335, 18.12.2010, at 60 (emphasis added).

⁵³ See the 6 December 2011 EUTM press release available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/Somali%20Recruits%20Cultural%20Training%20%20%20Press%20Release.pdf> ('The intensive military training includes ...classes i.e. about historical convergence between International Humanitarian Law and the laws of the war, the right to education, humanitarian aid and refugee law, It promotes and encourages respect for human rights, for fundamental freedoms and for all without distinction as to race, sex, language, or religion. In relation to human rights education focus will promote and encourage respect for life especially for women and children, as well as teaching the principles of equality, self determination and how is assimilate these principles into their societal and cultural norms with compromising their religious beliefs.').

⁵⁴ On protection of civilians in CSDP missions, see generally the *Revised Guidelines on the Protection of Civilians in CSDP Missions and Operations*, Council Doc. 15091/10 of 15 October 2010, available at <<http://register.consilium.europa.eu/>>.

⁵⁵ *The European Union and the International Criminal Court* (General Secretariat of the Council of the EU, 2010, <http://eeas.europa.eu/human_rights/icc/docs/2010_euandicc_en.pdf>), at 21.

⁵⁶ Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability, OJ L 327, 24.11.2006, at 1.

helping to avoid impunity. This short section does not offer a complete overview of the EU's efforts to promote human rights in its CSDP missions, but I hope it sets out the overall framework for these efforts and their main features. Several of the other contributions discuss some of these aspects more extensively.

EU MISSIONS AND THE EUROPEAN CONVENTION: RECENT CASES

Heike Krieger¹

In order to answer the question to what extent EU crisis management missions are required to respect and protect human rights it is particularly important to focus on the European Convention on Human Rights (ECHR). Since all EU Member States are Member States of the ECHR and Article 6 para. 2 TEU still promises that the EU itself will accede to the Convention, the European Court of Human Rights will *prima facie* have jurisdiction over human rights violations which occur during EU crisis management missions. However, the judicial enforcement of civilians' human rights during military operations abroad is a highly contentious issue. There are numerous unresolved legal issues implicated which might speak against the jurisdiction of the Court or even against the responsibility or accountability of the EU or its Member States. The most important issues include the extraterritorial application of the European Convention on Human Rights, the distribution of responsibility between participating Member States and authorising international organisations and the application of the *lex specialis* doctrine on the relationship of international human rights law and international humanitarian law. In 2011 two major decisions of the European Court on Human Rights have shed some light on these questions: the *Al Skeini*² and the *Al Jedda*³ Cases. Both cases deal with the UK's human rights obligations during the British military operation in Iraq.

1. AL SKEINI AND EXTRATERRITORIALITY

The first case, the *Al-Skeini* Case focuses on the extraterritorial applicability of the European Convention on Human Rights: does the Convention apply to actions of British soldiers patrolling in and around Basrah? In contrast to an earlier decision of the House of Lords the European Court held 'that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.'⁴ Given the circumstances of the case the Court concluded that the UK had violated its procedural duty under Article 2 ECHR because it

¹ Part II and III of this paper is based on H. Krieger, 'After Al Jedda: Detention, Derogation, and an Enduring Dilemma', 50 *Military Law and Law of War Review* (2011) at 419, *et seq.*

² ECtHR, *Al Skeini v. United Kingdom*, Appl. No. 55721/07, 7 July 2011.

³ ECtHR, *Al Jedda v. United Kingdom*, Appl. No. 27021/08, 7 July 2011.

⁴ *Al Skeini v. UK* (*supra* note 2), para. 149.

did not adequately investigate the deaths of five Iraqi civilians during British security operations in 2003.⁵

Apparently in response to prevailing criticism,⁶ the Court started its analysis by systematising its case-based approach on extraterritoriality. It aims to draw a dogmatic line between its earlier decisions and the *Al Skeini* case thus, in effect, broadening its approach to extraterritoriality. As in earlier decisions the Court based its reasoning on the assumption that jurisdiction as enshrined in Art. 1 ECHR is primarily territorial provided that none of the four exceptions developed by the Court in its case-law would apply. The first exception covers the 'acts of diplomatic and consular agents' abroad.⁷ The second one concerns a State's exercise, by consent, invitation or acquiescence, of 'public powers normally to be exercised by that government.'⁸ The third exception is based on the *Ocelan* case. Jurisdiction might arise where State agents in service outside its territory use force against an individual or take a person into custody.⁹ Here the Court bases jurisdiction on the personality principle. The fourth exception refers to the *Loizidou* constellation of the Turkish occupation of Northern Cyprus. Jurisdiction might arise where 'as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory.'¹⁰ This form of control can be described as a general overall control.

Most importantly, the Court made clear that the applicability of the Convention was not restricted to the regional realm of the Convention, i.e. to the *espace juridique* of the member, but might apply worldwide.¹¹ The assumption of its solely regional applicability dated back to the *Loizidou* case where the Court had argued that the Convention would apply when the army of one Member State occupied the territory of another lest the population would be denied the Convention's protection from which they benefitted before.¹² The Court applied this finding in *Bankovic*, arriving at the conclusion that 'the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.'¹³ In turn, the House of Lords held in *Al-Skeini* that the UK had no jurisdiction in Iraq because of the regional character of the Convention. To hold otherwise could have been seen as 'Human Rights imperialism' according to the House of Lords.¹⁴ This interpretation was heavily criticised by

⁵ *Al Skeini v. UK* (*supra* note 2), para. 177.

⁶ See, for instance, M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press 2011); A. Peters, 'Die Anwendbarkeit der EMRK in Zeiten komplexer Hoheitsgewalt und das Prinzip des Grundrechtstoleranz', 48 *Archiv des Völkerrechts* (2010), at 1 *et seq.*

⁷ *Al Skeini v. UK* (*supra* note 2), para. 134.

⁸ *Al Skeini v. UK* (*supra* note 2), para. 135.

⁹ *Al Skeini v. UK* (*supra* note 2), para. 136.

¹⁰ *Al Skeini v. UK* (*supra* note 2), para. 138.

¹¹ *Al Skeini v. UK* (*supra* note 2), paras. 141 *et seq.*

¹² ECtHR, *Loizidou v. Turkey (merits)*, Rep. 1996-VI, 18 December 1996, para. 78.

¹³ ECtHR, *Bankovic et al. v. Belgium et al.*, Appl. No. 52207/99, 12 December 2001, para. 80.

¹⁴ House of Lords, *Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant)*, *Al-Skeini and others (Appellants) v. Secretary of State for Defence (Respondent)*, [2007] UKHL 26, 13 June 2007, para. 78.

Judge Bonello in his Concurring Opinion.¹⁵ Indeed, it seems to be an odd understanding of imperialism when armed forces operating abroad are held accountable for human rights violations. To the contrary the experience in Kosovo and Afghanistan have already shown that a lack of responsibility and accountability on the side of the intervening states endangers the success of a crisis management mission.¹⁶ So it was high time for the Court to correct its findings. It held that the UK had jurisdiction because it 'had assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government... it had assumed authority and responsibility for the maintenance of security in South East Iraq ... which it exercised through its soldiers engaged in security operations in Basrah.'¹⁷

There has been some criticism that the Court did not develop a coherent system for the Convention's extraterritorial application. For instance, Judge Bonello in his separate opinion would have preferred to rewrite the Court's past jurisprudence because of its contradictions and its case-by-case approach.¹⁸ One might also question whether the situation of a military occupation is a situation where the UK assumes the exercise of some of the public powers normally to be exercised by the Iraqi government. A full military occupation would more appropriately be described as a situation of general overall control.

Still, it is clear for our purposes that EU crisis management missions might bring individuals within the jurisdiction of the EU Member States. Especially, jurisdiction might arise where EU mission are responsible for some of the public powers taken over from the local government. Accordingly, in those EU crisis management missions the Convention might apply where the missions are responsible for the security situation in a region, i.e. in operations such as Althea. Alternatively, there might also be jurisdiction where soldiers bring individuals under their direct control. This is decisive in the context of Atalanta when EU soldiers capture and detain Somalian pirates.¹⁹

2. AL JEDDA, ATTRIBUTION AND THE RELATION TO INTERNATIONAL HUMANITARIAN LAW

However, even if EU Member States exercise jurisdiction according to Art. 1 ECHR over a territory or over persons during an international crisis management mission they might still not be held responsible for human rights violations

¹⁵ ECtHR, *Al Skeini v. United Kingdom*, Appl. No. 55721/07, 7 July 2011, Concurring Opinion Judge Bonello, paras. 37 *et seq.*

¹⁶ See H. Krieger, 'Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslands-einsatz', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 669-702, at 702; H. Krieger, 'A Credibility Gap: The Behrami and Saramati Decision of the European Court of Human Rights', 13 *Journal of International Peacekeeping* (2009), 159-180, at 176.

¹⁷ ECtHR, *Al Skeini v. United Kingdom*, Appl. No. 55721/07, 7 July 2011, para. 149.

¹⁸ ECtHR, *Al Skeini v. United Kingdom*, Appl. No. 55721/07, 7 July 2011, Concurring Opinion Judge Bonello, para. 7 *et seq.*/20.

¹⁹ See on this a Judgment of a German Administrative Court: VG Köln, Judgment of 11. November 2011, 25 K 4280/09, available at <http://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html> [last visited on 15 October 2012].

because the violations occur during a mission authorised by the United Nations so that the acts might be attributable to the UN and not to the EU. Moreover, other legal regimes, such as the UN Charter or international humanitarian law could override the obligations enshrined in the European Convention on Human Rights. In the past the Court had already held in *Behrami and Saramati* that during the international administration of Kosovo acts of KFOR soldiers were attributable to the UN so that Member States of the Council of Europe could not be held responsible.²⁰ This jurisprudence is pertinent for EU crisis management missions since most of them are conducted on the basis of a Security Council mandate and often in co-operation with the UN. However, in the *Al Jedda* case the Court refused to apply the *Behrami* findings to the situation in Iraq.

What was the case about? From October 2004 to December 2007, the UK armed forces interned the applicant—Mr Al Jedda—in a British military facility in Iraq²¹ without any intention of bringing criminal charges against him.²² This kind of detention clearly contradicts the prerequisites of Article 5 ECHR.²³ Hence, the UK government had argued that the detention was attributable to the UN rather than to the UK on the basis of the pertinent SC Resolutions authorising the presence of the UK in Iraq.²⁴ The Court, however, rejected this argument. It held that ‘the United Nations did not... assume any degree of control over the force.’²⁵ The Court made clear that it did not overrule *Behrami* but that the facts of the cases differed. ‘The United Nations’ role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999.’²⁶ It confirmed that the decisive test for attribution was the effective control test. However, unlike in Kosovo ‘the Court considered that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops in Iraq and that the applicant’s detention was not, therefore, attributable to the United Nations.’²⁷ Consequently, the issue of attribution will have to be addressed on a case-by-case basis. It will depend on the language of the SC resolutions, the context of their adoption and manner of application whether in a given EU mission the conduct of the troop contributing States is attributable to the UN, to the States in questions or may be to both actors.

Even more importantly the Court also rejected the argument that in the circumstances of the specific case SC Resolution 1546 (2004) overrides obligations stemming from Art. 5 ECHR. The UK government refuted any violation of this article ‘because the UK’s duties under that provision were displaced by

²⁰ ECtHR, *Behrami and Saramati v. France and Norway*, Appl. No. 71412/01; 78166/01, 2 May 2007, para. 134.

²¹ *Al Jedda v. UK* (*supra* note 3) para. 59.

²² *Al Jedda v. UK* (*supra* note 3) para. 98.

²³ *Al Jedda v. UK* (*supra* note 3) para. 100.

²⁴ *Al Jedda v. UK* (*supra* note 3) para. 60.

²⁵ *Al Jedda v. UK* (*supra* note 3) para. 80.

²⁶ *Al Jedda v. UK* (*supra* note 3) para. 83.

²⁷ *Al Jedda v. UK* (*supra* note 3) para. 84.

the obligations created by SC Resolution 1546 (2004).²⁸ The government relied on Art. 103 of the UN Charter which states that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' The government put forward 'that, as a result of the operation of Article 103 of the United Nations Charter, the obligations under the Security Council Resolution prevailed over those under the Convention.'²⁹ However, the Court refused to accept that there was a conflict between the obligations stemming from the resolutions and the obligations under the ECHR at all: 'There must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. ...In the light of the United Nations' important role in promoting... human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.'³⁰ The Court could not find such language in the pertinent SC Resolution on Iraq.

Finally, the Court also rejected the argument that the authorising resolution embraced the UK's 'specific authorities, responsibilities and obligations' under international humanitarian law so that the UK's powers and obligations under international humanitarian law would operate to disapply Art. 5 ECHR.³¹ Thus, it did not accept the underlying argument that in Iraq the law of occupation as the applicable *lex specialis* would override international human rights law. It looked for a legal basis for the detention which would override Article 5(1) ECHR and thereby focused on the question whether 'international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial.'³² Since international humanitarian law only contains broadly framed powers to use indefinite internment which would only turn into an obligation under exceptional circumstances it is not surprising that the Court could not find any specific duty to use indefinite internment.

The Court was eventually right to argue that the law of occupation does not operate to disapply Article 5 ECHR in the *Al Jedda* constellation. The rationale of the *lex specialis* principle is based on the idea that the application of the special norm is more appropriate than the application of the general rule,³³ because the special norm is designed in particular for the specific circumstances of the case at hand.³⁴ Since the rationale of the *lex specialis* principle is based on the appropriateness of the specific rule, the principle itself must be

²⁸ *Al Jedda v. UK* (*supra* note 3) para. 100.

²⁹ *Al Jedda v. UK* (*supra* note 3) para. 100.

³⁰ *Al Jedda v. UK* (*supra* note 3) para. 102.

³¹ *Al Jedda v. UK* (*supra* note 3) para. 107.

³² *Al Jedda v. UK* (*supra* note 3) para. 107.

³³ M. Akehurst, 'The Hierarchy of the Sources of International Law', 47 *British Yearbook of International Law* 1974-75 (1977), 273-285, at 273.

³⁴ H. Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', 11 *Journal of Conflict and Security Law* (2006), 265-291, at 269.

understood as contextual.³⁵ Thus, the setting in which the norm operates is decisive for the application of the special rule. The decision to apply a rule as *lex specialis* depends on the character of the norm concerned, the interpretation of its purpose, the normative context, and the specific facts at issue. Consequently, international humanitarian law does not *per se* override human rights law.³⁶

One may indeed doubt, that the application of the laws of occupation to the internment of Al Jedda would be more appropriate than applying human rights law. Al Jedda was held in security detention because he was believed to participate in terrorist activities against the Multinational Forces in Iraq but no criminal charges were filed. Such an internment comes closer to the human rights paradigm where the legality of preventive detention of a terrorist suspect is questionable than to the issue of an occupying force responsibilities towards the inhabitants of the occupied territory. It appears to be a genuine human rights question whether abroad a State can detain its own nationals under different standards than at home, if it suspects that they participate in the preparation of terrorist acts.

3. WHAT ARE THE CONSEQUENCES FOR EU CRISIS MANAGEMENT MISSION?

To sum it up, both decisions have severe legal implications for any military mission conducted by EU Member States. Obligations under the European Convention on Human Rights will have to be respected during military crisis management operations abroad. Even if there are UN mandates this does not exclude EU Member States responsibility. Moreover, applicable international humanitarian law does not *per se* override obligations under the European Convention.

Did the European Court of Human Rights therefore get the balance between military effectiveness and human rights concerns wrong? Did it put a disproportionate burden on the Member States' military as some military and political observers claim? Will Member States now face a high risk of human rights litigations for violations occurring during military crisis management operations abroad? Will they entail high financial risks which might even impede their willingness to participate in such operation as implicated by the UK government in the *Bankovic* case?³⁷ However, the balance struck by the Court is not without alternative. Let us take the example of security detention of the *Al Jedda* case. If Member States want to arrange for lawful forms of preventive detention they will basically have two ways available: explicit authorisation in a Security Council mandate or derogations under Article 15 ECHR.

³⁵ W. Jenks, 'The Conflict of Law-Making Treaties', 30 *British Yearbook of International Law* (1953), at 447 and A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrines of *Lex Specialis*', 74 *Nordic Journal of International Law* (2005), at 42.

³⁶ H. Krieger (*supra* note 16), at 695 and H. Krieger (*supra* note 34) at 273.

³⁷ *Bankovic et al.* (*supra* note 13), para. 43.

3.1. Explicit authorisation in a Security Council mandate

Under the first option, Member States could try to obtain from the Security Council a sufficiently precise and clear authorisation in a resolution empowering an international security presence to use preventive detention in deviation from the Convention. The Court's findings suggest that Article 5 ECHR can be displaced by such an explicit authorisation.³⁸ Still, Member States should keep in mind that such a policy might be seen as circumvention of the Convention and might thus be of dubious legitimacy. In turn it might reflect badly on the United Nations itself when western democracies, which are bound by the rule of law, try to escape their human rights obligations by turning to the United Nations. Thus, any deviation should at least be framed akin to the competences granted under international humanitarian law as precise as possible so that the argument can be made that Member States only use competences which are available to them under other legal regimes.³⁹

This argument comes close to what the UK government tried to argue in *Al Jedda*. The difference, however, lies in the explicitness of deviation which the Court called for. Such precision serves interests of legal security and foreseeability. To ask for more precision in the resolution authorising an international security presence in post-conflict territories would be in line with other calls for accountability, such as the request for the establishment of a review mechanisms at the level of the United Nations or of individual missions.⁴⁰ Eventually, Security Council authorisations deviating from international human rights standards only shift the problem of preventive detention to another level. The *Behrami and Saramati* decision as well as the *Kadi* judgment of the ECJ⁴¹ have already revealed the necessity to intensify human rights protection against the decisions of the Security Council at the international level. With the Security Council increasingly exercising quasi-governmental authority with no practical and effective remedy for possible violation of norms, the Council's impunity becomes harder to accept.

Yet, the alternative suggested by the Court may prove to be difficult to achieve since Member States of the Convention would have to bring about an international diplomatic consensus on an explicit deviation from regional human rights law. From a practical point of view it is difficult to foresee how far States from other regions would be willing to use such an explicit and concrete form of authorisation. Explicit authorisations, which enumerate competences and their limits, may be seen as an undue restriction on the discretion of the Security Council and the authorised States and thus as a danger to the effectiveness of the United Nations.

³⁸ *Al Jedda v. UK* (*supra* note 3), para. 102.

³⁹ Cf. J. Kleffner, 'Operational Detention and the Treatment of Detainees', in T. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press 2010), 465-479, at 470.

⁴⁰ See H. Krieger (*supra* note 16), at 180.

⁴¹ ECJ Case C-402/05 P, *Kadi* [2008] ECR I-6351.

3.2. Derogations under Article 15 ECHR

Therefore, Member States might have to turn to the second option available and issue derogations according to Article 15 ECHR. The Court has accepted forms of preventive detention as lawful in national emergency situations if the State has lawfully derogated from Article 5 ECHR in line with requirements under Article 15 ECHR.⁴² According to this article, a State may take measures derogating from its obligations under the Convention to the extent strictly required by the situation in time of war or other public emergency threatening the life of the nation. However, there are a number of pitfalls which might explain why Member States have so far been reluctant to use this instrument for their military operations abroad.

At first, it is not certain that a derogation would at all be lawful in case of a military operation abroad. According to Article 15 ECHR, a derogation is permissible in time of war or other public emergency threatening the life of the nation. Thus, in cases of military crisis management operations the question arises whether such missions constitute an emergency which threatens the life of the nation. Since the *Lawless* case the Court has constantly required that an emergency referred to 'an exceptional situation of crisis ... which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'.⁴³ Even if terrorist activities had a local focus the Court used to emphasise the impact on the whole territory of the Member State issuing a derogation.⁴⁴ This understanding appears to lie behind Lord Bingham's reasoning in the House of Lords' decision on the *Al Jedda* case, where he held that a power to derogate:

'may only be exercised in time of war or other public emergency threatening the *life of the nation seeking to derogate*,⁴⁵ [...] It is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw.'⁴⁶

Similarly, NATO governments argued in the *Bankovic* case that:

'there is nothing in the text or application of Article 15 of the Convention to imply [...] that Article 15 § 2 refers to "war" or "public emergency" situations outside as well as inside the territories of the Contracting States.'⁴⁷

⁴² ECtHR, *Lawless v. Ireland (no. 3)*, Appl. No. 332/57, 1 July 1961; *Ireland v. the UK*, Application No. 5310/71, 18 January 1978, para. 243; *Brannigan and McBride v. UK*, Application No. 14553/89; 14554/89, 25 May 1993, para. 76.

⁴³ *Lawless v. Ireland (no. 3)* (*supra* note 42) para. 28; ECtHR, *A. and others v. UK*, Application No. 3455/05, 19 February 2009, para. 176.

⁴⁴ *Ireland v. the UK* (*supra* note 42) para. 212.

⁴⁵ Emphasis added by the author.

⁴⁶ House of Lords, *R. (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007, para. 38.

⁴⁷ ECtHR, *Bankovic et al. v. Belgium et al.*, Appl. No. 52207/99, 12 December 2001, para. 41. However, the argument was applied in a different context because it aimed to undermine the idea that the Convention would be extraterritorially applicable to the bombing of a radio and television station in Belgrade.

Thus, it seems doubtful that such a mission could ever qualify as an emergency. However, this interpretation is based on past experiences with emergencies occurring in the territories of the Member States. When the European Court of Human Rights referred to the life of the nation seeking to derogate it did not envisage the extraterritorial application of the convention during international military crisis missions. The argument concerning Article 15 ECHR was raised for the first time in the 2001 *Bankovic* case. Although the wording of Article 15(1) ECHR refers to the life of the nation seeking to derogate, it is not so strictly formulated that it could not allow for a dynamic interpretation of the Convention in response to the Court's decision in *Al Jedda*. Correspondingly, the Court seems to have assumed that a derogation of the UK in relation to Iraq was conceivable.⁴⁸ The application of the derogation clause to extra-territorial situations seems to be a logical consequence of the extraterritorial application of material human rights provisions. Otherwise situations might occur where the standard of protection would be higher abroad than at home. Accordingly, a state could lawfully derogate from the convention in case of an exceptional situation of crisis which affects the whole population and constitutes a threat to the organised life of the community in which the Member State conducts a military operation.

Admittedly, so far there has been no corresponding subsequent state practice according to Article 31 para. 3 lit. b) of the Vienna Convention on the Law of Treaties as pointed out by Lord Bingham in the House of Lords' decision on *Al-Jedda*.⁴⁹ Member States have not derogated from the Convention in view of any of their military operations abroad, even in security situations as severe as in Afghanistan. States had already raised this argument in the *Bankovic* decision⁵⁰ and the UK government repeated it in the *Al Jedda* case.⁵¹ Whilst the lack of subsequent State practice would not exclude a dynamic interpretation of the Convention if States changed their practice, it probably reflects the reason why derogations are generally not considered a readily available option for Member States participating in military missions abroad. Given the decision in *Bankovic*, where the Court held that 'Article 15 itself is to be read subject to the 'jurisdiction' limitation enumerated in Article 1 of the Convention',⁵² any derogation by a Member State deploying armed forces abroad arguably implies that the State accepts its extraterritorial jurisdiction under Article 1 ECHR. Although the decision in the *Al Skeini* case contributed to the clarification of the principle of extraterritorial application of the Convention, there is still room for discussions on whether the Convention would apply in a concrete situation. For example, Afghanistan is a case where the ECHR's extraterritorial application is disputed: Is the Convention applicable in Afghanistan outside the context

⁴⁸ *Al Jedda v. UK* (*supra* note 3) para. 100.

⁴⁹ *Al-Jedda* [2007] UKHL 58 (*supra* note 46), para. 38.

⁵⁰ *Bankovic* (*supra* note 13), para. 62.

⁵¹ *Al Jedda v. United Kingdom* (*supra* note 3), para. 92.

⁵² *Bankovic* (*supra* note 13), para. 62.

of detention? Do ISAF⁵³ or OEF⁵⁴ exercise—through the invitation of the Afghan Government—some of the public powers normally to be exercised by that Government?⁵⁵ Is it significant that ISAF—in line with the SC authorisation—is officially only providing assistance to the Afghan Government? Or does the situation in Afghanistan fall under the exception that ‘as a consequence of lawful or unlawful military action, a contracting State exercises effective control of an area outside that national territory’?⁵⁶ Do ISAF or OEF exercise sufficient effective control? Judicial answers can certainly be found but they would be subject to debate. So a Member State may be reluctant to put its jurisdiction beyond dispute by issuing a declaration of derogation. A way to circumvent this dilemma may be that of limiting derogations *ratione loci* to detention facilities. However, broader derogations from obligations under the European Convention on Human Rights, which might be in conflict with rules akin to those contained in the Geneva Conventions, would be difficult to phrase in such a manner as to leave open the issue of jurisdiction.

Moreover, derogation requires a formal declaration under Article 15(3) ECHR in order to operate.⁵⁷ In the *Isayeva* case the Court made clear that Article 15 ECHR will only take effect if the State issues such a declaration⁵⁸ informing the Secretary-General of the Council of Europe about the reasons thereof and the measures to be taken. In addition, the emergency must be publicly declared. Although this requirement is not explicitly mentioned, it stems from Article 4 ICCPR, which is decisive for the interpretation of Art. 15 ECHR because of the reference in Art. 15(1) ECHR to the consistency with a State’s other obligations under international law.⁵⁹ Accordingly, the Court insisted on a public declaration.⁶⁰ Both requirements aim to guarantee that the application of emergency rules is foreseeable and subject to domestic, as well as international public scrutiny.

These obligations might pose an obstacle to Member States to use derogations. Within European democracies the public and the parliamentary opposition might be highly critical of such a derogation. Especially in Member States, such as Germany, where prior parliamentary approval is a prerequisite for any military operation abroad,⁶¹ such a derogation might endanger the support for

⁵³ International Security Assistance Force for Afghanistan, established on the basis of UN SC Resolution 1386 of 20 December 2001.

⁵⁴ Operation Enduring Freedom is the US-led coalition fighting in Afghanistan on the basis of Article 51 of the UN Charter.

⁵⁵ *Al Skeini v. United Kingdom* (*supra* note 2), para. 135.

⁵⁶ *Ibid.*, para. 138.

⁵⁷ H. Krieger, ‘Notstand’ in R. Grothe and T. Maruhn (eds.), *EMRK/GG Konkordanzkommentar* (Tübingen: Mohr Siebeck 2006), para. 33.

⁵⁸ ECtHR, *Isayeva v. Russia*, Appl. No. 57950/00, 24 February 2005, para. 191.

⁵⁹ H. Krieger (*supra* note 57), para. 26.

⁶⁰ ECtHR, *Brannigan and McBride v. United Kingdom*, Appl. No. 14553/89 and 14554/89, 25 May 1993, para. 73 and *Isayeva v. Russia* (*supra* note 58), paras. 133, 191.

⁶¹ See, for instance, H. Aust and M. Vashakmadze, ‘Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case’, 9 *German Law Journal* (2008), 2223–2236, available at <http://www.germanlawjournal.com/pdfs/Vol09No12/PDF_Vol_09_No_12_2223-2236_Dev_Aust_Vashakmadze.pdf> (last accessed 15 October 2012).

the whole mission. It is doubtful that an explicit practice of preventive detention would be acceptable for the public. This might not only be politically burdensome but the issue is further complicated by the extraterritorial applicability of the German constitution according to its Article 1 which might constitutionally exclude the possibility of derogation at all.

Likewise, under the European Convention Member States must remain aware that measure taken in derogation from it will still be subject to the review of the Court. Although the Court has constantly accorded a broad discretion to the States it has nonetheless found a violation of the Convention especially in a number of Turkish cases.⁶² Thus, a declaration of derogation is not a complete disclaimer. Still, the Court appears to be willing to adapt its jurisprudence to the particular situation of military missions abroad in order to meet some of the concerns that it might impose impossible and disproportionate burdens on the military. The broad proportionality test under Article 15 ECHR⁶³ could give further room for consideration of military effectiveness. Here, the exigencies of the situation would result from the combination of severe security threats with the overall situation of extraterritoriality. In the *Al Skeini* decision the Court demonstrated a certain readiness to take specific circumstance of military operations abroad into account when applying its jurisprudence to situation of Iraq:

‘The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, [...] the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of the specific problems faced by investigators.’⁶⁴

At the same time, measures strictly required by the situation should at least be in line with international humanitarian law standards. It seems hard to argue that in a military operation abroad it would be required a measure that would fall below the international humanitarian law standards: standards which are particularly tailored for situations of armed conflict. In order to protect individuals from the risks related to armed conflicts, humanitarian law norms are already the result of a balance between exigencies of military necessity and humanitarian considerations.⁶⁵

⁶² ECtHR, *Aksoy v. Turkey*, Appl. No. 21987/93, 18 December 1996, para. 87; *Demir and others v. Turkey*, Appl. No. 21380/93; 21381/93; 21383/93, 23 September 1998, paras. 52 et seq.; *Sakik and others v. Turkey*, Appl. No. 87/1996/706/898-903, 26 November 1997, paras. 46, 54, 61.

⁶³ *Inter alia*, *Brannigan and McBride v. United Kingdom* (*supra* note 60) paras. 41 et seq. and *Aksoy v. Turkey* (*supra* note 62), para. 68.

⁶⁴ *Al Skeini v. UK* (*supra* note 3), para. 168.

⁶⁵ H. Krieger (*supra* note 34), at 273.

Eventually, these means to guarantee human rights protection in the context of military crisis missions do not come free of costs for human rights concerns, either. The Court's jurisprudence might result in an increase in derogations—a phenomenon which in itself is heavily criticised by human rights institutions.⁶⁶ Moreover, courts might have to lower some human rights standards in order to define what is strictly required by severe security conditions, such as in Afghanistan and Iraq. Given the length of some of the contemporary military missions, emergency situations with reduced human rights standards might exist for an extended period of time thus raising the danger of a permanent emergency.⁶⁷ What has become clear from the recent case law of the European Court of Human Rights is that EU Member States are bound by the Convention during many of their military missions abroad and that there is a heavy argumentative burden on the governments if they want to dispense with these obligations. The decision in the *Al Jeddah* case achieves to place this argumentative burden on the Member States by requiring precision in Security Council authorisations or transparency in derogations. Both prerequisites contribute to public political as well as judicial review and scrutiny of security measures taken abroad in the name of the Member States or the EU.

⁶⁶ See, *inter alia*, Council of Europe, Parliamentary Assembly, *The Protection of Human Rights in Emergency Situations*, Doc. 11858, 9 April 2009 and Resolution 1659 (2009), 27 April 2009.

⁶⁷ See for arguments on the danger of permanent emergencies in the context of Northern Ireland and the European Courts of Human Rights response to it: S. Marks, 'Civil Liberties at the Margin', 15 *Oxford Journal of Legal Studies* (1995), 69-96.

THE DUTY TO RESPECT INTERNATIONAL HUMANITARIAN LAW DURING EUROPEAN UNION-LED OPERATIONS

Marten Zwanenburg¹

1. INTRODUCTION

The European Union (EU) attaches great importance to promoting compliance with International Humanitarian Law (IHL). It frequently calls upon other actors in the international community to respect that body of law.² It has even adopted guidelines to ensure that the promotion of IHL is systematically addressed in its external relations.³

The development of the Common Security and Defence Policy (CSDP) of the EU, however, begs the question whether the EU itself must respect IHL. This question has become increasingly relevant as the EU has begun fielding military operations. The first such operation was Operation Concordia, which was deployed in the former Yugoslav Republic of Macedonia in 2003.⁴ Since then, the EU has launched a number of other military operations. Some of these have been small-scale and with a limited mandate, but others have been more robust and had a mandate that included elements of peace enforcement. The use of such enforcement powers could lead to an operation becoming involved in an armed conflict.

In a situation of armed conflict between states or between a state and an armed group, the parties to the conflict have the duty to respect IHL. This contribution aims at investigating whether there is a duty to respect IHL during EU-led operations, and if so who is the addressee of this obligation. This same question has received some attention in the context of military operations led by the United Nations (UN) and the North Atlantic Treaty Organization (NATO).⁵

¹ This article was written in a personal capacity. The opinions expressed do not necessarily reflect the views of the ministry of Defence or any other part of the Government of the Netherlands. The author is grateful to Frederik Naert for comments on a previous draft of this article.

² See e.g. Council of Ministers of the European Union, Council Conclusions on Somalia of 14 May 2012. See for an overview T. Ferraro, 'International Humanitarian Law in the EU's Foreign and Common Security Policy', 84 *International Review of the Red Cross* (2002), 435-461, at 435.

³ Guidelines on Promoting Compliance with International Humanitarian Law, OJ 2005/C 327/4. The Guidelines were updated in 2009, OJ 2009/C 303/06. See P. Wrangé, 'The EU Guidelines on Promoting Compliance with International Humanitarian Law', 78 *Nordic Journal of International Law* (2009), 541-552, at 541.

⁴ See C. Mace, 'Operation Concordia: A "European" Approach to Crisis Management?', 11 *International Peacekeeping* (2004), 474-490, at 474.

⁵ See e.g. D. Shraga, 'The United Nations as an Actor Bound by International Humanitarian Law', 5 *International Peacekeeping* (1998), 64-81, at 64; M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden/Boston: Martinus Nijhoff Publishers 2005).

It has however been relatively neglected in the context of EU-led operations.⁶ This situation is increasingly unsatisfactory, and calls for closer scrutiny of whether in such situations IHL is the applicable legal regime and must be respected by the operation.

To this end, this contribution will first examine the nature of EU-led operations and the circumstances in which they are deployed. In particular, an attempt will be made to answer the question whether they may become a 'party to the conflict' in the sense in which that expression is used in IHL. This is followed by an analysis of substantive IHL obligations binding the EU and troop contributing states, respectively. The next section discusses whether, when an EU-led operation becomes involved in an armed conflict, the EU or rather troop contributing states become parties to that conflict. The contribution will conclude by arguing that the EU may itself become a party to an armed conflict when an EU-led operation becomes involved in hostilities, but that this does not preclude troop contributing states from also becoming such parties.

2. EU-LED OPERATIONS INVOLVED IN ARMED CONFLICT

The principal instruments of treaty IHL, i.e. the Geneva Conventions and their Additional Protocols, provide that they apply during 'armed conflicts.'⁷ They contain a few provisions that must be implemented by the states parties to these instruments in peacetime, but the bulk of the obligations become applicable when there exists an armed conflict only. In that case it is principally the 'parties to' that conflict that are the bearers of such obligations. IHL principally regulates the conduct of warfare between the opponents in a conflict: they are the 'parties' in question. For this reason discussion of a duty to respect IHL for EU-led operations is only relevant in case there is an armed conflict in which such an operation is involved.⁸

Although there is no definition of 'armed conflict' in conventional IHL, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has authoritatively found in the *Tadic* case that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.'⁹ The defining characteristics of an armed conflict are the existence of hostilities with a minimum level of intensity between

⁶ With a few notable exceptions: F. Naert, *International Law Aspects of the EU's Security and Defence Policy with a Particular Focus on the Law of Armed Conflict* (Antwerp: Intersentia 2010); V. Falco, 'The Internal Legal Order of the European Union as a Complementary Framework for its Obligations under IHL', 42 *Israel Law Review* (2009), 168-305, at 168; Y. Arai, 'The Application of International Humanitarian Law to the So-called European Union Forces', in T. Tanaka and K. Shoji (eds.), *The Governance of the European Union and its Decision-making Process* (Tokyo: Keio University Press 2008).

⁷ Common Article 2 to the Geneva Conventions, Art. 1 of Additional Protocol I and Art. 1 of Additional Protocol II.

⁸ The question which entity is a party to the conflict in that case is discussed in section 5 *infra*.

⁹ ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

two or more groups with a minimum level of organisation.¹⁰ With regard to the requirement that hostilities have a minimum level of intensity, there is no consensus on the level of intensity that is required. On the one hand, it is argued by some that the intensity criterion is very low, and that an armed conflict starts with the first shot fired by a member of the armed forces of one party at the other party. The ICRC for example considers that the intensity of the force used is irrelevant, at least in determining whether there is an international armed conflict.¹¹ On the other hand, there are commentators who argue that the level of intensity required is higher, and that sporadic incidents do not suffice to bring an armed conflict into existence.¹² The latter position appears to be supported by a large body of state practice, and is therefore used here.¹³

The question is whether EU-led operations satisfy these criteria or are likely to satisfy them. Many would argue that they do not at this point in time. The majority of EU-led operations established hitherto have had limited recourse to the use of force, although they sometimes had robust Rules of Engagement. The use of force by EU-led operations has so far been sporadic and small-scale. On this basis, it has been argued that EU-led forces have not become engaged in combat as a party to an armed conflict in any of the EU's military operations.¹⁴ This is not to say, however, that this will remain the case. Indeed, the EU constituent documents explicitly envisage operations at the higher end of the spectrum of violence. Article 43 Treaty on European Union (TEU) provides that the tasks undertaken by the EU missions in the context of the CSDP shall include 'tasks of combat forces in crisis management, including peace-making and post-conflict stabilization.' In particular the reference to 'peacemaking' suggests a kind of operation that could very well become involved in armed conflict as a party. Although this term is not defined in the TEU or in any other public EU document, there are good reasons to conclude that 'peacemaking' was used to refer to what many other organisations such as NATO refer to as 'peace enforcement', i.e. operations without the consent of the host state and potentially at the high end of the spectrum of violence.¹⁵ At least a number of EU Member States appear to hold this view, including the Netherlands, the UK and Belgium.¹⁶

¹⁰ See e.g. Final Report on the Meaning of Armed Conflict in International Law, *International Law Association* (2010), available at <<http://www.ila-hq.org>>.

¹¹ ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', *Opinion Paper* (March 2008), available at <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>.

¹² C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 2nd ed. 2008), 45-78, at 48.

¹³ International Law Association, *supra* note 10.

¹⁴ F. Naert, 'Challenges in Applying International Humanitarian Law in Crisis Management Operations Conducted by the EU', in A. Millet-Devalle (ed.), *L'Union Européenne et le Droit International Humanitaire* (Paris: Pedone 2010), at 139.

¹⁵ F. Naert, *supra* note 6, at 204-205.

¹⁶ *Id.* The Netherlands Government for example wrote in a letter to Parliament that its contribution to the Helsinki Headline Goal should be able to participate in a 'peace enforcement operation' ['vredesafdwingende operatie'] for a limited period. Kamerstukken II 2000-2001, 26900, nr. 33, at 2.

3. EU OBLIGATIONS

3.1. International legal personality

If EU-led operations can become involved in an armed conflict making IHL applicable, this raises the question whether the EU has any obligations under that branch of international law. For this to be the case, it is necessary that the EU have international legal personality. This is because, as the International Court of Justice (ICJ) pointed out in its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, international legal personality is the capacity to bear rights and obligations under international law.¹⁷ The ICJ made this observation in respect of the United Nations (UN), but it is now accepted that this applies not only to the UN but also to other international organisations.¹⁸ In the sphere of European integration, it was recognised at an early stage that the European Communities had international legal personality. This was not the case for the European Union, however. None of the relevant treaties expressed itself on the matter. Whether the EU nevertheless had a separate international legal personality was hotly debated in the literature. A number of commentators maintained that it did, *inter alia* based on the treaty-making power and practice of the Union. Others on the other hand considered that it did not.¹⁹ The issue has now largely become moot, since the inclusion in the Treaty of Lisbon of an article referring explicitly to legal personality of the EU.²⁰ This is commonly understood to refer to international legal personality.²¹ Although the Treaty cannot of course bind third parties, the latter do not appear to dispute that the EU is an international legal person. As a consequence, there appears no more room for doubt that the EU is capable of bearing rights and obligations under international law.

3.2. Treaties

That the EU is capable of bearing obligations under international law is reflected in the fact that it is party to a number of treaties. None of these, however, are treaties in the field of IHL. This is not surprising, because the treaties concerned seem to bar international organisations from becoming parties. The

¹⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, 1949 ICJ Rep. 174, at 179.

¹⁸ See e.g. H. Schermers and N. Blokker, *International Institutional Law* (Leiden: Martinus Nijhoff Publishers 2003), at 34.

¹⁹ See e.g. R. Wessel, 'Revisiting the International Legal Status of the European Union', 5 *European Foreign Affairs Review* (2000), 507-537, at 507; C. Tomuschat, 'The International Responsibility of the European Union', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International 2002), at 177; D. McGoldrick, *International Relations Law of the European Union* (London: Longman 1997), at 38.

²⁰ Article 47 TEU.

²¹ M. Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process', in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press 2008), 34-69, at 38.

Geneva Conventions refer to the possibility for any 'Power' to accede to them. The Additional Protocols provide that they are open to accession by any Party to the Geneva Conventions. Although the term 'Power' does not textually exclude international organisations, it has been interpreted as only referring to states. Such an interpretation is supported by the *travaux préparatoires* of Additional Protocol I. During the negotiations, it was proposed by Egypt to include a provision making it possible for 'The United Nations Organization, the international specialised agencies and regional intergovernmental organisations' to accede to the Conventions and Additional Protocol I.²² The category 'regional intergovernmental organizations' would have included the European Union. The Egyptian proposal was rejected by a majority of delegates, however. They stressed that the capacity for international organisations to become a party to such treaties raised difficult legal problems. Thus, the drafters of the Protocol appear to have consciously rejected the possibility for international organisations to accede.

Becoming a party to the Geneva Conventions or the Additional Protocols is not the only way in which the EU could be bound by IHL obligations as a matter of treaty law. Such obligations could also be included in treaties between the EU and other parties. An important precedent in this regard is the UN. Since the early 1990s, Status of Forces Agreements (SOFAs) that the UN has concluded with host states for its peace operations have included the obligation to respect IHL.²³ SOFAs concluded by the EU, however, have hitherto not included a similar reference.²⁴

3.3. Customary International Law

Many IHL rules constitute rules of customary international law. Indeed, the EU has stated that most provisions of the Geneva Conventions and the 1977 Additional Protocols are generally recognised as customary law.²⁵ It is widely accepted that international organisations are subject to the rules of customary international law in the field in which they undertake activities. The International Court of Justice has held that '[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law'.²⁶ There is no reason not to apply this finding to the EU, given that it has international legal personality.²⁷

²² ICRC, Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, Geneva (1972), at 193-194, paras. 4.165—4.166.

²³ See M. Zwanenburg, *supra* note 5, at 165-166.

²⁴ One exception was EUFOR RDC, to which the SOFA concluded between the UN and the DRC for MONUC applied provisionally by virtue of UN Security Council Resolution 1671. UN Doc. S/RES/1671 of 25 April 2006, o.p. 12.

²⁵ Statement by A. Sotaniemi, Legal Adviser, Permanent Mission of Finland to the United Nations, on behalf of the European Union, GAOR (61st Session), 6th Committee, Agenda item 75.

²⁶ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, I.C.J. 73, at 89-90, para. 37.

²⁷ See also Y. Arai, *supra* note 6, at 197-198.

Consistent with this finding by the ICJ, the European Court of Justice has held that the European Communities are bound by general international law. In the *Racke* case the Court held that 'the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law.'²⁸ Subsequent case-law of the Court has reaffirmed this finding.²⁹ This was however limited to the European Community. As the Court did not have jurisdiction over the European Union's Common Foreign and Security Policy, it was not in a position to examine whether the same held for that international actor in this field. This changed with the Lisbon Treaty, however.

In the recent *Air Transport Association of America* case, the Grand Chamber of the Court expressly held that the European Union is bound to observe international law in its entirety, including customary international law.³⁰ The Court related this conclusion to Article 3 (5) TEU, according to which the Union is to contribute to the strict observance and the development of international law. Interestingly, this Article does not state that the EU must observe international law. Rather, it enjoins the Union to 'contribute to' the observance of international law. This may appear to be no more than a nuance, but it could be argued that Article 3 (5) aims at the EU ensuring that other actors observe international law rather than that it must itself observe that law. A parallel can be drawn with Article 55 of the UN Charter, which provides that the United Nations shall promote, *inter alia*, universal respect for, and observance of, human rights and fundamental freedoms for all. Although this is not undisputed, this article is accepted by some commentators as imposing an obligation upon the UN itself to observe human rights.³¹ It seems that the ECJ interprets Article 3 (5) TEU, in the same vein as Article 55 UN Charter. However this may be, the Court has accepted that customary international law applies to the EU.

3.4. EU constitutional instruments

A third potential source of IHL obligations for the EU is the constitutional instruments of the EU itself.³² It is true that these instruments do not refer to IHL explicitly. As Falco points out the ICRC, during the negotiations of the Amsterdam Treaty, reportedly attempted to persuade the EU Member States to include references to IHL in the sections of the Treaty dealing with foreign and secu-

²⁸ ECJ, Case C-162/96, *Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655, para. 45.

²⁹ See *inter alia* ECJ, Case C-286/90, *Anklagemyndigheden v. Peter Poulsen and Diva Navigation Corp.* [1992] ECR I-6019, para. 9; Case C-308/06, *The Queen v. Sec'y of State for Transp. (Intertanko)* [2008] ECR, para. 51.

³⁰ Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011, para. 101.

³¹ See e.g. E. Riedel, Article 55 (c), in B. Simma (ed.), *The Charter of the United Nations: A Commentary* 917 (Oxford: Oxford University Press 2002), at 920.

³² See generally V. Falco, *supra* note 6.

rity policy. In particular, in 1996 it proposed to the Council Presidency that the Treaty provision on the common defence policy should read as follows:

[a]ll decisions relating to a common defence policy and actions of the Union which have defence implications shall be in conformity with international humanitarian law and help ensure its respect.³³

These proposals however did not lead to the insertion of an explicit reference to IHL in the TEU. This does not necessarily mean that IHL cannot be implicitly read into the Treaty, however. Article 6 (3) TEU provides that:

‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’

At first sight, this article appears to refer only to human rights, in particular those laid down in the European Convention on Human Rights (ECHR) as well as those resulting from the constitutional traditions of EU Member States. Thus, it appears to exclude IHL, which is often considered as a distinct branch of international law from human rights. It could also be argued, however, that, for the purposes of EU law, IHL is to be regarded as a specific subset of human rights, thus bringing it within the ambit of Article 6 (3) TEU. This is the way in which the UN has traditionally seen IHL.³⁴ It is interesting to note that at least in one context, the EU has also adopted this approach. This has been in the field of development cooperation. In this field, Regulation 975/1999 is concerned with laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms. This regulation states that:

‘human rights within the meaning of this Regulation should be considered to encompass respect for international humanitarian law, also taking into account the 1949 Geneva Conventions and the 1977 Additional Protocol thereto, the 1951 Geneva Convention relating to the Status of Refugees, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and other acts of international treaty or customary law;’

Even if the view that IHL is a subset of human rights is rejected, it must be noted that Article 6 (3) refers to ‘fundamental rights’. ‘Fundamental rights’ is not necessarily the same as ‘human rights’. In this sense, IHL norms may also qualify as ‘fundamental rights’ in the sense of the article. Naert suggests that a body of IHL rules forms part of the ‘constitutional traditions common to the Member States’, given the widespread ratification of IHL treaty obligations by

³³ cited in V. Falco, *id.*, at 190.

³⁴ See in particular General Assembly Resolution 1444 of 19 December 1968, UN Doc. A/RES/23/2444.

EU Member States, leaving no doubt that many of these obligations are shared by the Member States and can be found in their domestic legislation as well as their treaty obligations. He also points to the criminalisation of a number of war crimes in the ICC Statute to which many EU Member States are a party, and the constitutional anchoring of this Statute in some EU states.³⁵

The ECJ has in its case-law identified 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' as one source of inspiration and guidance for identifying general principles of EU law. As Falco states, it could be argued by analogy that, since *all* EU Member States are parties to the Geneva Conventions and their Additional Protocols, these treaties may well serve as particularly authoritative sources of inspiration in the formation of general principles of Community, and now Union, law.³⁶ This requires quite some creative interpretation, but if it is accepted that relevant treaty provisions of IHL have achieved the status of 'general principles of Community/Union law,' they would impose legal obligations upon the EU institutions not only by way of general international law, but also as a matter of Community/Union law.

It has also been argued that the EU is bound to respect international law on the basis of Article 21 (1) TEU. This article reads:³⁷

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

Like Article 3 (5) TEU, this article sets out objectives of the EU, in the case of Article 21 (1) specifically relating to external action of the EU. Also like Article 3 (5) TEU, this article at first sight appears to be of a programmatic character rather than to impose obligations directly on the EU. However, Article 21 (3) adds that 'The Union shall *respect* the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action ...' (emphasis added). This is much stronger language than used in Article 3 (5) and does imply a legal obligation to respect international law, including IHL. Even leaving Article 21 (3) aside, it may be recalled that as noted above, the ECJ appears to have considered Article 3 (5) as imposing substantive obligations on the EU. Commentators have argued that the same applies to Article 21 (1) TEU. According to Van Vooren and Wessel, it would be incorrect to consider the article as nothing more than empathic claims or ambitions with no legal substantive consequence for EU institutions and Member States.³⁸ They state that Article 21 (1) and

³⁵ F. Naert, *supra* note 6, at 531.

³⁶ V. Falco, *supra* note 6, at 195.

³⁷ Article 21(1) TEU (emphasis by the author).

³⁸ B. Van Vooren and R. Wessel, 'External Representation and the European External Action Service: Selected Legal Challenges', in S. Blockmans and R.A. Wessel (eds.), *Principles and*

certain other articles are legally binding in their nature as constitutional objectives of EU law, and that Article 4 (3) TEU requires of the EU institutions and Member States 'sincere cooperation in carrying out tasks which flow from the Treaties'.

In conclusion, it can be argued that certain provisions in the TEU impose an obligation on the EU to respect IHL, although such a conclusion does require some interpretation. This does not take away from the fact that the EU is bound by customary IHL as an international organisation undertaking activities in the field in which IHL is relevant, as discussed in section 3.3

4. OBLIGATIONS OF TROOP CONTRIBUTING STATES TO EU-LED OPERATIONS

EU-led operations are, as the expression indicates, led by the EU. They are however carried out by troops voluntarily placed at the disposal of the EU by Member States, and in certain cases also non-member States. This is a result of the fact that the EU has no military forces of its own, as would have been the case if proposals for a European Defence Community in the 1950s would have been adopted.³⁹ These troop contributing states have their own obligations under IHL. As the Geneva Conventions have been universally ratified, all troop contributing states are necessarily states parties to those conventions. All EU Member States are also parties to the two 1977 Additional Protocols. Although many of them are also parties to other IHL instruments, not all of them have ratified all IHL treaties. The United Kingdom and Ireland have not ratified the 1954 Convention on the Protection of Cultural Property in Time of War, for example. To the extent that the norms to which the states concerned have not submitted themselves as a matter of treaty law also constitute customary international law, those states are nevertheless bound by those norms.⁴⁰

5. PARTY TO THE CONFLICT

In section 3 and 4 above the IHL obligations of the EU and troop contributing states were discussed. This discussion begs the question which of these obligations are relevant in case an EU-led operation becomes involved in an armed conflict making IHL applicable. This question is linked to the question which entity is a 'party to' that conflict. It is this party that must respect its obligations under IHL.⁴¹ It was traditionally considered that only states could be parties to an armed conflict. This changed with the adoption of the four Geneva Conven-

practices of EU external representation: selected legal aspects (The Hague: CLEER Working Papers 2012/5), pp. 59-82.

³⁹ See E. Fursdon, *The European Defence Community: A History* (London: Palgrave Macmillan 1980).

⁴⁰ Unless the state concerned is a persistent objector to the norm.

⁴¹ This does not preclude other entities having an obligation to 'ensure respect' by the entity that is a party to the conflict.

tions, in particular common Article 3. This article refers to 'each party to the conflict' in a non-international armed conflict, thus implying that one of the parties is a non-state actor. Since then it has become generally accepted that a non-state armed group can be a party to a (non-international) armed conflict. From accepting that such groups, often referred to as 'insurgents' or 'rebels', can be a party to armed conflict it is a small step to accept that international organisations can equally be a party to an armed conflict. If this category is no longer the exclusive domain of states but also open to another actor, there is no reason in principle to deny this possibility to international organisations. In certain respects international organisations could even be said to have a stronger claim to this states, being international legal persons unlike most non-state armed groups.

It is therefore not surprising that, at least in principle, it has been accepted that the United Nations can become a party to an armed conflict.⁴² Although more controversial, there is reason to believe that the same may be true for the North Atlantic Treaty Organization (NATO). It appears that the ICRC determined that during the NATO-led operation in Libya in 2011, both NATO and states contributing troops to the operation were parties to the conflict.⁴³ There seems to be no reason in principle why, if the UN and NATO can be parties to a conflict, the EU could not.

If it is accepted that the EU can in principle be a party to an armed conflict, the question remains whether in case an EU-led operation becomes involved in armed conflict that organisation, the troop contributing states or both become parties to that conflict. In the absence of clear answers in IHL instruments to this question, it seems logical to look for inspiration to other fields of international law, and how they deal with troops placed at the disposal of an international organisation by a state. A relevant parallel in that regard is to be found in the law of responsibility of international organisations. In 2011, the International Law Commission (ILC) adopted a set of draft articles on this topic after studying the topic for almost ten years. A number of these articles deal with the attribution of conduct. Article 7 in particular deals with attribution of conduct in the situation in which a state has placed an organ at the disposal of an international organisation. The article provides that:

'The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.'

The commentary to this article makes clear that the ILC considered the situation of states contributing troops to a peace operation led by an international organisation as a situation in which that article applies.⁴⁴ This is because peace-

⁴² See e.g. D. Shraga, *supra* note 5.

⁴³ Presentation by T. Ferraro on 'IHL applicability to International Organizations involved in peace operations', Bruges colloquium, October 2011.

⁴⁴ Draft Articles on the Responsibility of International Organizations with Commentaries, in Report of the International Law Commission, Sixty-third Session, UN Doc. A/66/10 (2011), at 52.

keeping operations exemplify the situation in which a state places an organ at the disposal of an international organisation, while the seconded organ or agent still acts to a certain extent as organ of the seconding State. The commentary states in this respect that '[p]ractice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary and criminal matters.'⁴⁵

It could be argued that there are strong similarities between determining which entity is a 'Party to the conflict' and determining to which entity conduct must be attributed for purposes of responsibility. In both cases, what is at issue is linking the conduct of physical persons to a holder of international obligations. In the case of determining who is a 'Party to the conflict', the purpose of the exercise is to clarify whose obligations come into play. If the conduct of physical persons leads to the conclusion that they become combatants, which entity has the primary responsibility to ensure that that conduct respects IHL? In contrast to the law of responsibility, in the framework of determining who is a Party to the conflict the answer to this question is also relevant before any obligation has been breached. This is because a Party to an armed conflict has an obligation to prevent its IHL obligations being breached. It must also be pointed out that Article 7 of the articles on the responsibility of international organisations must be applied to specific conduct. In other words, the outcome of the test set out in that article may vary from one act to another, depending on the particular facts of the case. Such a conduct-by-conduct approach does not seem feasible in the case of determining which entity is a Party to an armed conflict. In that context, the relevant factor would be which entity had effective control over the conduct that led to involvement in an armed conflict, such as ordering troops to fire.

These differences do not necessarily mean that the substantive standard used in the two fields of law must be different. If we consider international law as one system, it is logical to answer similar questions in a similar way.⁴⁶ Why use different tests for what is essentially the same operation of linking conduct to a legal person, albeit in different fields of law?

If the test of 'effective control' is used to determine which entity is a Party to an armed conflict in case an EU-led operation becomes involved in armed conflict, such a determination will have to be made on the basis of the specific facts of the case at hand. There is however a presumption that the EU would be in effective control. This is because in the practice of EU-led military operations, the starting point is that the EU exercises authority and control over EU-led operations. It is standard practice for the Decision (formerly Joint Action)

⁴⁵ Id., at 88, para. 7.

⁴⁶ In this context reference may be made to the issue of fragmentation of international law, which was the subject of study by the ILC from 2002—2006. In its final report, the study group established by the ILC for this purpose concluded *inter alia* that 'International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.' See Report of the International Law Commission on the Work of its Fifty-Eight Session (2006) UN Doc. A/61/10, 400, at 407.

of the Council of Ministers establishing an operation to provide that 'under the responsibility of the Council, the PSC shall exercise the political control and strategic direction of the EU military operation.'⁴⁷ The Council also appoints an 'Operation Commander' to lead the operation, under the strategic guidance and direction of the Political and Security Committee (PSC). The Operation Commander will normally receive operational control over forces put at his disposal by the participating States via a so-called 'transfer of authority'.⁴⁸ Although there is no transfer of authority document in the public domain, this is illustrated by agreements between the EU and non-EU Member States contributing troops to EU-led operations. These commonly provide that 'National authorities shall transfer the operational and tactical command and/or control of their personnel to the EU Operation Commander.'⁴⁹ If national authorities do transfer such control, they are in principle no longer allowed to give the personnel operation directions.⁵⁰

There are indications, however, that EU Member States may not accept that if an EU-led operation became involved in an armed conflict it would be the EU and not them that would be party to that armed conflict. This at least is implied by the Salamanca Presidency Declaration of 24 April 2002. This declaration was the final document of a seminar organised by the Spanish presidency of the EU in April 2002 on enforcement and application of international law, including IHL, in EU-led operations. The wording of the Declaration suggests that the obligations of troop contributing states remain relevant when an EU-led operation becomes involved in armed conflict. In particular, paragraph 2 states that 'the responsibility for complying with IHL, in cases where it applies, rests primarily with the State to which the troops belong.' The wording of this paragraph makes clear that the drafters of the document considered that troop contributing states' IHL obligations remain relevant.⁵¹

The use of the word 'primarily' however suggests that there may also be a 'secondary' role for obligations of the EU. Naert argues that the EU, troop

⁴⁷ See e.g. Council Joint Action of 27 April 2006 on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process (2006/319/CFSP), OJ L 116, 29 April 2006, at p. 98, Art. 6.

⁴⁸ F. Naert, 'Legal Aspects of EU Military Operations', 15 *Journal of International Peacekeeping* (2011), 218-242, at 225.

⁴⁹ See e.g. Agreement in the form of an Exchange of Letters between the European Union and the Government of the Swiss Confederation on the participation of the Swiss Confederation in the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process (Operation EUFOR RD Congo), OJ L 276, 7 October 2006, pp. 111-115, at 113, Art. 13.

⁵⁰ To the author's knowledge, most troop contributing states transfer 'operational control' to the EU. The EU defines this as 'The authority delegated to a commander to direct forces assigned, so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location: to deploy units concerned, and to retain or assign tactical control of those units. It does not include authority to assign separate deployment of components of the units concerned. Neither does, of itself, include administrative or logistic responsibility.' See EU Military C2 Concept, 26 July 2006, (partially declassified) available at <<http://register.consilium.europa.eu/pdf/en/03/st11/st11096-ex01.en03.pdf>>.

⁵¹ See also A. Breslin, 'Ensuring Respect: The European Union's Guidelines on Promoting Compliance with International Humanitarian Law', 43 *Israel Law Review* (2010), 381-413, at 384.

contributing states and even EU Member States that do not contribute troops may become parties to the conflict.⁵² For participating states, this would be the result of 'concurrent and continuing' obligations. This refers, *inter alia*, to an obligation on states to assure that the organisation to which they have contributed troops respects IHL. He also submits that one could argue that Member States who have voted in favor of establishing an EU military operation would become parties to the conflict. Certainly the latter appears too far-reaching. This is because a vote in favor of the establishment of an operation does not equal a vote for that operation to become a party to an armed conflict. On the contrary, it is fully possible that the state concerned does not desire for the operation to become such a party.⁵³ Secondly, the possibility that legal consequences flow from the vote that a state casts as a member of an international organisation is highly controversial, as may be deduced from the literature on the responsibility of states for their vote in an international organisation.⁵⁴

However this may be, as mentioned above there are indications that EU Member States contributing troops to an EU-led operation consider that their IHL obligations remain relevant if the operation would become involved in an armed conflict. This in turn suggests that in such a case they would consider themselves as a party to that conflict.

This begs the question whether, if it were accepted that if either the EU became a party to the conflict (on the basis of the 'effective control' test) or the troop contributing states became parties (as the EU Member States appear to maintain), this would preclude the other from also becoming a party to the same conflict. The case of Operation Unified Protector indicates that the ICRC does not exclude the possibility that both an international organisation and troop contributing states can be parties.⁵⁵ At least if the test of 'effective control' is used to determine which actor is a party to the conflict, this is difficult to accept. In the context of international responsibility, the 'effective control' test is used to determine whether conduct must be attributed to a state or to an international organisation.⁵⁶ Similarly, in the context of determining the entity that is a party to the conflict, it appears difficult to imagine cases in which the outcome of the test would be both that a state and an international organisation would be a party. If one of these exercises 'effective' control, how could any remaining control exercised by the other also be 'effective'?⁵⁷ Effective control is a zero-sum game: the more effective the control by one entity, the less effective any residual control by another entity.

⁵² F. Naert, *supra* note 6, at 525-526.

⁵³ Although it is fair to state that in certain cases the Operation Plan and Rules of Engagement, which are adopted by unanimity, may point in that direction.

⁵⁴ See e.g. O. Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization', 8 *International Organizations Law Review* (2011), 291-347.

⁵⁵ See T. Ferraro, *supra* note 43

⁵⁶ ILC Commentary to art 7, para. 5.

⁵⁷ It must be noted that Special Rapporteur Gaja of the ILC has suggested that in case of violations of IHL by a UN peacekeeping operation, there might be joint attribution of the same conduct. It remains unclear what he considered the basis for such double attribution. G. Gaja, Second Report on responsibility of International Organizations, 2 April 2004, UN Doc. A/CN.4.541, at 20.

This does not preclude troop contributing states from becoming 'co-belligerents' of the EU if the EU is considered to be a party to the conflict, however.

In the first place, if the parallel with the law of responsibility is carried through consistently, then there may be other grounds for attributing the conduct leading to an armed conflict existing to a state as well as to the EU. For example, a state could adopt the conduct as its own. Secondly, if troop contributing states are not parties to the conflict from the outset, they may be considered as neutrals. If a neutral state significantly and systematically violates its duties under the law of neutrality, notably the obligation not to support one party to the conflict, the other party may consider it as a co-belligerent of its opponent.⁵⁸ Troop contributing states do in fact support EU-led operations. The very fact of contributing troops could be considered such support. But even if that were not the case, they support the operation by the logistic and other support they provide to the troops they have contributed. EU military doctrine provides that 'The responsibility for the provision of resources and for planning the support of national forces remains ultimately with the TCNs.'⁵⁹ In many cases, troop contributing states deploy National Support Elements (NSE) for this purpose that remain fully or to a large extent under the command and control of national authorities. As a consequence of this support, it could be said that troop contributing states have lost their neutral status and may be regarded as parties to the conflict. The same reasoning can be applied if it is the troop contributing states rather than the EU that are a priori considered as parties to the conflict. The latter make use of the EU political and military infrastructure to establish and carry out an EU-led operation. This is subject to any consequences that in particular a UN Security Council resolution may have for (the loss of) neutrality in a particular case, however.

6. CONCLUSION

This contribution has investigated whether there is a duty to respect IHL during EU-led operations, and if so who is the addressee of this obligation. The analysis has included little practice, for the simple reason that very little practice is available. This is because most practitioners and commentators consider that the situation in which the answer to these questions would have practical consequences has not arisen yet: EU-led operations have so far not become involved in armed conflict themselves.⁶⁰ So far, because it seems only a matter of time before this situation will become a practical reality. It is important in this regard to note that it does not matter whether the EU desires such a situation or not. Because the question whether there is an armed conflict or not must be

⁵⁸ H. Lauterpacht, *Oppenheim's International Law, Vol. II Disputes, War and Neutrality* (London: Longmans 1952), at 253.

⁵⁹ EU Concept for Logistic Support for EU-led Military Operations, 4 April 2011, available at <<http://register.consilium.europa.eu/pdf/en/11/st08/st08641.en11.pdf>>.

⁶⁰ This is to be distinguished from the question whether they have been deployed in situations where there was an armed conflict between other actors but in which the operation was not involved.

determined on the basis of the factual situation, another actor can bring about the existence of an armed conflict by attacking EU-led forces if this involves hostilities with a minimum of intensity.

This contribution has argued that if such a situation occurs, there is no clear rule in IHL to determine whether the EU or the troop contributing states become a party to the armed conflict. IHL instruments do not contain criteria for making such a determination, if only because the role of international organisations as potentially involved in armed conflicts was not taken into account in those instruments. In the absence of clear answers in IHL instruments, it seems logical to look for inspiration to other fields of international law, and how they deal with troops placed at the disposal of an international organisation by a state. A relevant parallel in that regard is to be found in the law of responsibility of international organisations. The draft articles on this topic adopted by the ILC contain an article that was drawn up with military operations led by international organisations in mind. This article uses the criterion of 'effective control' to determine to which entity the conduct of a member of such an operation must be attributed. If international law is seen as a more or less coherent system, then it makes sense to apply the same criterion to determine which entity is a 'party to the conflict'. It is true that the unity of international law that this transposition is based on has been subject of much debate in recent years. Certain legal theorists in particular have claimed that such unity does not in reality exist. From the standpoint of a practitioner, however, the view is different.⁶¹

If the test of 'effective control' is used to determine which entity is a Party to an armed conflict in case an EU-led operation becomes involved in armed conflict, such a determination will have to be made on the basis of the specific facts of the case at hand. There is however a presumption that the EU would be in effective control. This is because in the practice of EU-led military operations, the starting point is that the EU exercises authority and control over EU-led operations. It must be noted that the wording of the Salamanca Declaration adopted in 2005 could be read as suggesting a different conclusion, namely that EU Member States consider that their IHL obligations remain relevant. This declaration was adopted at a time when the question whether the EU had international legal personality was still debated, however. The possibility cannot be excluded that drafters of the declaration did not accept that the EU had such personality. If that was indeed the case, the reference to troop contributing states in the declaration might be discounted now that the EU's international legal personality is no longer disputed.

In view of the close relationship between the EU and troop contributing states in the context of an EU-led operation, it may be concluded that ultimately, the question which entity is a priori a party to the conflict does not matter greatly. This is because normally the other entity, be it the EU or the troop contributing states, will be a 'co-belligerent'. This is a result of the support provided by the troop contributing states to the EU and vice-versa.

⁶¹ See also B. Simma, 'Universality of International Law from the Perspective of a Practitioner', 20 *European Journal of International Law* (2009), 265-297.

This conclusion means that it is all the more important that both the EU and troop contributing states take IHL into account in the planning phase of an EU-led operation. Both are potentially responsible if a violation of IHL is committed during such an operation, and it is therefore in the interest of both to prevent that such a violation takes place. This is all the more important because any such violation could have serious consequences for the EU's credibility in calling upon other actors to respect IHL.

HUMAN RIGHTS IN CSDP: A VIEW FROM THE EUROPEAN PARLIAMENT

Wanda Troszczyńska-Van Genderen¹

1. PARLIAMENT'S INVOLVEMENT AND POLITICAL PRIORITIES IN CSDP

Since the Lisbon Treaty entered into force, the European Parliament (EP) has been taking an increasing interest in matters related to the Common Security and Defence Policy (CSDP). The Treaty has enhanced the stature of the European Parliament in this field through mandating the High Representative of the Union for Foreign Affairs and Security Policy to 'regularly consult the European Parliament on the main aspects and basic choices of common foreign and security policy and the common security and defence policy and inform it of how those policies evolve.'² The European Parliament's views, in the words of the Treaty, should be 'duly taken into consideration.'³ On a first reading, these provisions might not sound like much, but ever since the EP has been working busily to ensure a robust interpretation and practical application of these with the aim of stretching to the maximum the notion of what it means to be properly consulted and having its views duly taken into consideration.

The obligations of the High Representative and the European External Action Service (EEAS) were further confirmed and specified in the 2010 'Declaration on Political Accountability' issued by High Representative Ashton. This declaration provided for various channels and instruments aimed at securing adequate parliamentary access to information, enabling it to scrutinise actions falling under the CSDP. Among the key mechanisms, the declaration provided for *inter alia*:

- Enhancing the status of the so-called Joint Consultation Meetings (JCMs), allowing for a defined group of Members of the European Parliament (MEPs) to meet their counterparts from the Political and Security Committee (PSC), the Committee for Civilian Aspects of Crisis Management-CIVCOM, EEAS (Civilian Planning and Conduct Capabilities-CPCC, Crisis Management Planning Directorate-CMPD), and the Commission (Foreign Policy Instru-

¹ The views expressed in this article are of the author and do not necessarily reflect an official position of the European Parliament.

² Consolidated Version of the Treaty on the Functioning of the European Union, Article 36, *Official Journal* C 115/47, 9 May 2008, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>>.

³ *Ibid.*

- ments-FPI Unit) and discuss the on-going and planned civilian CSDP missions;
- Affirming the right of the parliamentary so-called 'special committee' to have access to confidential information related to CSDP on basis of the 2002 inter-institutional agreement;⁴
 - Providing for the possibility to exchange views with the Heads of Missions, Heads of Delegations and other high EU officials on the occasion of the parliamentary committee meetings and hearings (usually held *in camera*);
 - Mandating the High Representative to appear before the European Parliament at least twice-yearly to report on the current state of affairs in CFSP/ CSDP and answer questions.⁵

Other than the above-mentioned ways of involvement in the inter-institutional context, the European Parliament has provided a platform for discussions on CSDP involving various stakeholders, including governmental and institutional bodies, civil society as well as epistemic communities such as think tanks and academics. These exchanges, usually on the occasion of committee meetings, hearings, exchanges of views, conferences and workshops, serve to discuss various parliamentary recommendations, own initiative reports, opinions as well as to consider the findings/recommendations of commissioned external studies. Such exchanges are usually taking place either at the Sub-Committees on Security and Defence (SEDE) and Human Rights (DROI) or the Committee on Foreign Affairs (AFET). The MEPs have also been trying to directly monitor the CSDP missions by occasionally dispatching delegations to travel to the operational theatres and see for themselves the progress being made.

One of the key ways in which the European Parliament has exercised its 'hard' control over CSDP operations is through its budgetary control over the CSDP civilian expenditure. The Budget Committee (BUDG) has been the lead committee responsible for scrutinising CSDP expenditure as part of its regular committee work as well as on the occasion of the Joint Consultation Meetings (JCMs) mentioned before.

The question of the EP's institutional priorities in CSDP deserves to be devoted a separate volume. It is worth noting that, due to a wide range of views on CSDP held by the political groups represented in the EP (from strictly pacifist, through the advocates of developing a strong military dimension to CSDP operations), the thematic debates have not always been easy and reaching consensus always requires a fair amount of compromises and discussion. Nevertheless, in general terms, there has been a shared interest in and support for CSDP within the EP, and a wide consensus on a number of issues has been

⁴ Interinstitutional Agreement between the European Parliament and the Council Concerning Access by the European Parliament to Sensitive Information of the Council in the Field of Security and Defence Policy, 2002/2130(ACI), 23 October 2002, available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2002-0500+0+DOC+XML+V0//EN>>.

⁵ Declaration by the High Representative on Political Accountability, *Official Journal C* 210/1, 3 August 2010, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:210:FULL:EN:PDF>>.

reached over the years, as evidenced by the key thematic resolutions and reports related to general orientations of CSDP as well as specific missions.⁶

The European Parliament has progressively developed its interest not only in broad political and strategic orientations of the missions but also some key operational aspects such as staffing and management of CSDP expenditures. In terms of staffing levels, traditionally the EP has been concerned by difficulties in hiring and retaining qualified staff. It has put on the table various proposals on how to reform the CSDP budget and the associated working methods in order to allow for more contracted staff to be paid from the EU budget, thus offloading the national budgets and avoiding to further strain national administrations, currently downsized in the time of a financial crisis and budgetary cuts.⁷ Also, evaluating impact of the CSDP missions and operations has been a reoccurring theme during parliamentary debates. Faced with a lack of full information about their activities and impact, the Parliament has often been critical of the risk of significant CSDP expenditure not resulting in visible and concrete impact and improvement of the situation on the ground.

The discussions related to the CSDP expenditure have traditionally been an entry point for a more in-depth dialogue about programmatic activities and the impact of the actions carried under the CSDP banner. In this respect, the EP has traditionally advocated enhancing practices of lessons-learned and for more transparency and openness when presenting data related to CSDP activities, in order to allow the EP to fully appreciate the real track record of the missions. The desired improvement of the CSDP information flow ties directly to the questions of accountability of CSDP missions, which has been among key concerns of the EP and will be discussed in more detail in a latter section of this paper.

Besides the questions of accountability and cost effectiveness of CSDP missions, the European Parliament has been politically prioritising the questions of international coordination and proper positioning of CSDP missions within a wider context of other EU instruments. Recognising that CSDP missions and operations are usually a modest exercise in terms of the number of staff deployed, and sometimes severely limited in what they can accomplish due to the constraints of either political or security nature, the EP has traditionally held that CSDP action must be firmly positioned within a wider landscape of other EU political and development instruments being deployed in a particular context. Most importantly though, the EP has advocated that in each instance, both CSDP and the other 'flanking measures' must be part of a coherent political vision and strategy and that the creative matching of various EU instruments for their own sake should be avoided.

⁶ European Parliament, 'Report on the Annual Report from the Council to the European Parliament on the Main Aspects and Basic Choices of the Common Foreign and Security Policy (CFSP)', A7-0168/2011, 19 April 2011, available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0168+0+DOC+PDF+V0//EN>>.

⁷ The full links to documents and video recordings of the related events held by the EP's subcommittee on security and defence (SEDE) available at <<http://www.europarl.europa.eu/committees/en/sede/home.html>>.

The experience of CSDP missions and operations to date shows that they have usually been deployed in theatres already populated quite densely by an international presence, both of a civilian (UN, regional organisations) and a military (NATO) nature. Therefore, ensuring appropriate coordination with the other actors present on the ground has been among the top priorities of the EP when scrutinising CSDP actions taken to date. Again, the question of how to best position limited resources, and whether it makes sense to deploy the CSDP presence from a political as well as operational context (with the political deployment logic not always corresponding with an operational/tactical one), has been a *leitmotif* of the parliamentary debates.

2. HUMAN RIGHTS FOCUS OF EUROPEAN PARLIAMENT IN CSDP

While so far the more in-depth technical aspects of human rights-related work (such as the intricacies of mainstreaming human rights into CSDP operations) in the CSDP context have not been widely discussed in the EP, human rights ‘angles’ have nevertheless prominently featured in CSDP debates. Among the key points of interest, compliance with human rights and humanitarian law obligations during operations, human rights impact/lessons learned, the level of a mission’s awareness and expertise of human rights as well as questions of institutional accountability of CSDP missions have been at the centre of attention. These debates took place at various committees, including the Committee on Foreign Affairs (AFET), Subcommittee on Security and Defence (SEDE) and Subcommittee on Human Rights (DROI). Moreover, the committees’ delegations to countries and regions hosting CSDP missions and operations have also been active in raising these topics in the context of their work and visits.

The summary of the key issues of concern below has been done on the basis of the analysis of the key related documents and debates which took place in AFET, SEDE and DROI since the entry into force of the Lisbon Treaty, the thematic committee topical reports adopted by the committee in charge as well as the plenary.⁸

2.1. Adherence to international legal principles

One of the key issues of concern in terms of the human rights aspects of the EP’s scrutiny of CSDP missions and operations is their adherence to international legal norms, both with respect to human rights and humanitarian law. The EP has been traditionally interested in the question of the legality of mis-

⁸ The European Parliament annual report on CFSP has traditionally been dealing with wider implications of CFSP and CSDP. Also, human rights and gender issues in the CSDP context have been dealt with on the occasions of specific reports, primarily by the SEDE and DROI subcommittees.

sions and operations, for example through ensuring legitimacy of the CSDP missions and operations by means ranging from the UN Security Council authorisation to the invitation from the hosting country.

As the CSDP missions have been progressively deployed in diverse geographic contexts, questions have been raised about the adherence to human rights law and international norms with respect to issues ranging from the implementation of the executive mandate (EULEX Kosovo) and the treatment of captured pirates (EU NAVFOR Atalanta) to the usage of the Private Military and Security Companies (PMSCs) across a wide range of missions in Africa and the Middle East. Also, the issue of applicability of international human rights law in CSDP has been raised in the past debates of the human rights subcommittee (DROI), including on occasions of discussing the implications of the EU's accession to the ECHR, as well as the applicability of the Charter on Fundamental Rights to CFSP/CSDP.

The EP's status as a political body enabled it to initiate discussions on compliance of CSDP missions and operations with human rights and humanitarian law, arguably raising the profile of these issues, and helping to formulate proposals for concrete solutions.

Most recently, the issue of legality of CSDP has come to the attention of the MEPs on the occasion of discussing the role of the private military and security companies (PMSCs) in the context of potential human rights violations stemming from their operations. The Human Rights Subcommittee (DROI) considered the ways in which the CSDP missions enforce compliance with the so-called Montreux document, the set of guiding operational principles, to which seventeen EU Member States and over four hundred companies have already subscribed to. The Committee felt that it does not have sufficient information regarding the operations of PMSCs hired to protect CSDP staff and infrastructure and it is currently exploring a possibility of an own initiative report in 2013 in order to shed more light on this issue.

2.2. Staffing, expertise and code of conduct

The second set of issues the European Parliament has been paying attention to with regard to the human rights aspects of CSDP operations is the level of preparedness of the missions and operations to effectively carry out their mandates, including their human rights protection and promotion aspects. One of the factors considered in this context is whether the mission staff is adequately trained and possesses sufficient expertise to carry its functions without jeopardising human rights of anybody involved in the operations, through either directly violating human rights principles or not properly promoting them due to factors ranging from ignorance to negligence.

Generally speaking, the EP has been concerned about the endemic staff shortages, stemming from the applicable rules guiding the hiring process in the CSDP context, which often resulted in certain missions being seriously under-

staffed.⁹ Human rights and gender aspects of the training received by staff both prior to deployment and in-mission have been characterised as beneficial to the overall effectiveness of the mission in so far as they enable the missions to achieve better operational results as well as to avoid problems stemming from the real and perceived shortcomings, possibly amounting to human rights violations.

Among such shortcomings one can mention the failure to follow proper police and judicial procedures, opening the mission up to accusation of violating due process of the suspects/accused, unlawful detention or excessive force. Another potential criticism CSDP missions sometimes face is of a lack of recourse in cases of real or perceived human rights violations experienced by a third party due to the actions of the mission. This shows an importance of having an adequate and accountable mission setup, allowing local population to seek redress in cases they feel their rights have been harmed. (The issue of accountability is further discussed in a latter section of this paper.)

Also, human rights questions have come to the attention of MEPs when discussing the issue of the standards of behaviour and personal code of conduct of the missions' staff members, their interaction with the local population, the treatment of female staff members and the overall image of the mission as seen through the prism of staff personal behaviour and conduct. The issues of the personal code of conduct in the parliamentary discussions context again ties to a wider issue of accountability of the missions, which has been debated with particular interest in the parliamentary context.

While to date CSDP missions and operations thankfully managed to avoid serious problems and scandals related to staff conduct, there have been a few media-reported allegations of improper staff conduct, mainly in the context of the most robust on-going EU CSDP mission in Kosovo (in 2011, the EULEX police chief has been suspended and three other officials have been reassigned for what has been described in the media as a 'racist behaviour' towards their Albanian colleagues.)¹⁰ These have been noted by the MEPs and raised during the related exchanges of views, provoking broader discussion on the need to clearly define and reinforce the personnel standards of behaviour for CSDP, as well as to set and reinforce disciplinary procedures for cases of code of conduct breaches.

2.3. How to measure human rights impact?

Considering the still limited channels for parliamentary scrutiny of CFSP and CSDP, the key issue of concern for MEPs has been how to obtain the relevant

⁹ The European Parliament has been concerned with hiring delays in the case of contracted mission staff, as well as the standard length of deployment, which was deemed counter productive to the overall missions' effectiveness.

¹⁰ A. McKinna, 'EULEX's Perceived Timidity, Lack of Results Damaging Image among Kosovars', *Balkananalysis.com* (Prishtina, 2 May 2011), available at <<http://www.balkananalysis.com/kosovo/2011/05/02/eulex%E2%80%99s-perceived-timidity-lack-of-results-damaging-image-among-kosovars/>>.

data for assessing CSDP missions and operations as well as how to ensure access to reliable and representative information about the activities carried under the CSDP banner more generally. On the one hand, with the Lisbon Treaty and the Declaration on Political Accountability, the European Parliament upgraded the EP's channels and enhanced its practices of accessing information related to CSDP, for example by the *in camera* exchanges of views with the Heads of Missions, and Operation Commanders, high level Joint Consultation Meetings, as well as the procedures to access confidential information from the Council on basis of the inter-institutional agreement mentioned earlier. On the other hand, the participation of the JCMs and confidential information procedure is quite restricted,¹¹ which is arguably not conducive to establishing a level playing field for all MEPs in terms of information sharing.

The nature of the existing information channels in itself continues to restrict the ability of the EP to scrutinise CSDP operations. Moreover, the very question of methodology of collecting best practices and lessons-learned in the CSDP context is still in the process of being developed,¹² and the culture of openly sharing non-classified information still needs to be enhanced. As is often the case, the publicly available information on CSDP missions and operations is either limited or sanitised, without offering the reader a possibility to grasp what kind of activities the mission in question really undertakes or what are the key challenges the missions are facing.

While some missions run their own websites, providing plenty of useful information about their activities, including key statistical data (EULEX Kosovo¹³ and EUPOL Afghanistan¹⁴ could be mentioned as examples of good practice), in the case of many other missions and operations there does not appear to be much information available in the public domain. The literature provided by external actors (think tanks, academic writers) only partially fill this gap as these players themselves do not usually possess adequate access to information, which sometimes results in their analyses offering an incomplete view, occasionally to the degree of missing the point and being of a limited practical utility.

What does this persistent lack of information mean for human rights in the broader CSDP context? Generally speaking, the lack of the adequate information on the missions' and operations' activities exposes them to criticism and not always a fair one. As one cannot fully appreciate the overall climate and

¹¹ The attendance of the JCMs is restricted to the Chairpersons of AFET, BUDG, SEDE, Vice Chairs as well as the relevant Rapporteurs. Also, only the members of the so-called 'special committee' (which is again restricted to a narrow group of MEPs holding specific Committee leadership functions) is allowed to access the Council confidential information on CSDP.

¹² The recent external study commissioned by the European Parliament's Policy Department and written by the team of researchers from the Clingendael Institute of International Relations helpfully provides a detailed overview of lessons learned processes and methodologies in the general CSDP context, as well as in case of the individual missions; E. Dari *et al*, 'CSDP Missions and Operations: Lessons Learned Processes', study for the European Parliament, Directorate-General for External Policies of the Union, (Brussels, April 2012) available at <<http://www.europarl.europa.eu/committees/en/sede/studiesdownload.html?languageDocument=EN&file=74231>>.

¹³ EULEX Kosovo official website, available at <<http://www.eulex-kosovo.eu/en/front/>>.

¹⁴ EUPOL Afghanistan official website, available at <<http://www.eupol-afg.eu/>>.

difficulties they experience, of both a political and a technical nature, their impact often remains insufficiently appreciated or its appreciation diminished due to the limited understanding of the objective difficulties. This has also been true in some of the CSDP thematic debates' context in the European Parliament.

By way of an example, in some instances, CSDP missions' staff experienced severe restrictions to the freedom of movement, due to the extremely volatile security situation (the case of the missions in Afghanistan and Iraq). Some other missions' operations have been severely restrained politically (the case of EUBAM Rafah), which adversely impacted on the overall effectiveness of the mission. Without proper explanation of the external constraints beyond the control of the mission (or even EU as such), many missions and operations have been subject to harsh criticism and open to various allegations, either real, or frivolous/vexatious.

Protecting and promoting human rights mandates have also been adversely affected by such harsh operational circumstances, together with the rest of activities carried by the missions and operations. This is, however, usually not fully understood, due to the widespread lack of information surrounding the CSDP missions and operations. By way of example: in the early stages of the EUJUST LEX Iraq mission, almost all staff members were based in Brussels, isolated from the reality on the ground, and having a minimal impact on what has been going on in the structures the mission has been tasked to monitor and train, principally in terms of international human rights standards.¹⁵ It is possible to argue that, while the circumstances influencing the establishment of the out-of-country mission model has been beyond the control of the mission itself, the training model adopted has not ideally fitted to the needs of the interlocutors on the ground, taken to an out-of-country training to follow some European best practices in contemporary policing, penitentiary and justice work. As the result, the mission has been subjected to much sweeping, yet not entirely deserved, criticism, also by the EP.

The EP, due to having an insufficient level of information related to CSDP, has not always been in a position to fully appreciate the real impact of some of the CSDP missions and operations. In general terms though, it is an institution which strongly supports further strengthening and development of CSDP, and having access to better information could arguably not only help the EP, but also CSDP as such.

2.4. Accountability of the missions and operations

When it comes to criticisms regarding the conduct of the CSDP missions and operations, the EP has actively been paying attention to the questions of their accountability, primarily in terms of their political accountability, but also as

¹⁵ W.Troszczyńska-van Genderen, 'Human Rights Challenges in EU Civilian Crisis Management: The Case of Afghanistan and Iraq', 84 *EUJSS Occasional Paper* (August 2010), available at <<http://www.iss.europa.eu/uploads/media/OccasionalPaper84.pdf>>.

regards their institutional accountability *vis-à-vis* local partners. In terms of the political accountability of the missions and operations, the EP has traditionally insisted on being duly and fully informed about both operational and financial aspects of CSDP missions. In terms of the programmatic aspects of the operations, MEPs have been actively questioning the Heads of Missions (HoMs) directly, as well as high Council and EEAS officials on the occasions of the parliamentary hearings and exchanges of views. For the financial figures scrutiny, the main channel has been the procedure regarding the access to confidential information, providing figures regarding the staffing, equipment and operational expenditures.

When it comes to the institutional accountability of CSDP missions, the context in which this issue has been discussed in the EP has been on the occasion of debates regarding the EULEX Kosovo mission's executive mandate, currently in the process of being phased out. While it can be argued that the robust EULEX presence in Kosovo, combined with the ambitious mandate of the mission, makes the likelihood of complaints against the mission as well as particular staff members more likely, the EULEX mission can be considered a source of good practices in terms of its existing accountability mechanisms, most notably the Human Rights Review Panel (HRRP). This body, while of a purely advisory character, has been active in collecting and looking into third party liability complaints, providing some recourse to the local population in terms of their grievances. The structure's website contains multi-lingual information on its competences, activities, as well as some detail on the cases filed thus far, provided a welcome example of transparency and good practice.¹⁶

The accountability discussions related to the EULEX Kosovo case raised a series of wider issues of interest to the EP, helping it to voice its concern about an inadequate institutional accountability setup in CSDP missions and operations, leading to raising this issue on the occasion of the discussions surrounding the adoption of the so-called 'human rights package' and creation of the post of the EU High Representative for Human Rights (more on this in the following section of the paper).

3. HUMAN RIGHTS IN CSDP: HOW HIGH DO THEY PLACE ON THE EUROPEAN PARLIAMENT'S AGENDA?

The EP's interest in the CSDP has increased throughout the years, as evidenced by its efforts to concretise and officialise the ways in which it could monitor and scrutinise the missions and operations. The Treaty of Lisbon boosted the status of the EP, which had some indirect trickle-down effect to its role in CFSP/ CSDP. Combined with its traditional interest in and activism on human rights topics, this has made the EP an important actor in process of raising CSDP broadly defined human rights agenda.

While the EP lacks detailed operational knowledge allowing it to scrutinise the technical angles of the human rights mainstreaming in the CSDP context

¹⁶ The Human Rights Review Panel's website, available at <<http://www.hrrp.eu/>>.

in-depth, it is aware of and attuned to the key problem areas, such as transparency/accountability, the level of staffing, expertise and impact assessment methods—with all these issues being seen as key ‘enablers’ of human rights compliance. The EP through its debates, reports and resolutions has consistently been raising the profile of these issues, often advocating for concrete solutions. It has also enabled a broader exchange of ideas on these issues to take place, bringing to its hearings and exchanges of views institutional and non-governmental representatives, providing a welcome platform and acting as an agenda facilitator.

In order to better understand the importance the EP places on human rights issues in CSDP, its human rights agenda should be contextualised within a broader political vision this institution has of EU crisis management capabilities and how they should be strategically deployed globally as a tool of stability, rule of law, and the promotion of good governance. One of the basic points the EP has consistently raising over the past years is the discrepancy between the level of ambition being publicly expressed with regard to CSDP and what it should be doing in the world, and the reality of shrinking CSDP capabilities, stemming from the budget cuts in the time of the financial crisis the EU is going through.

With the limited resources available for the CSDP missions and operations, the EP has been pointing out the need to be more strategic when deploying in the field. This has been evident in the recent exchanges of views in the AFET and SEDE regarding the EULEX Kosovo reconfiguration, phasing out the EUPOL Bosnia and Herzegovina, and the possibility for merging the two Palestine missions (EUPOL COPPS and EUBAM Rafah)—and conversely on the need to establish the regional maritime capacity building in the Horn of Africa (EUCAP Nestor), to support the rule of law in South Sudan through the EUAVSEC mission and to boost the local rule of law capacity in Sahel through the EUCAP Niger mission. Another case in point is the long-standing discussion on the need to support the rule of law by having a CSDP operation in Libya.¹⁷

Moreover, the EP has been quite critical about the before-mentioned level of the CSDP missions and operations’ ‘embeddedness’ into a wider landscape of the EU political and financial instruments in the regions of their deployment. This has been mainly due to the lack of the EU’s strategic vision in many of the countries and regions in question. In this context, the EP has been pleased to be consulted in the discussions concerning the development of the Horn of Africa and Sahel strategies, pointing out the importance of harmonisation of the missions and operations there with the Commission-managed financial assistance, as well as the political messaging of the HR/VP, EEAS, the EU Delegations as well as the diplomatic services of the EU Member States.

In the light of the EP’s general vision of the way the EU crisis management should be carried out, it should be noted that the EP has explicitly endorsed

¹⁷ At the end of 2011, a team of 10 civilian experts was dispatched to Libya in an EU-led Integrated Border Management (IBM) Needs Assessment mission. Their Assessment Report was due to be presented to the EU and Libyan authorities during the summer of 2012 (no information available at this writing whether it has taken place or not to date).

the use of the CSDP missions and operations as a tool to advance its human rights agenda. In its resolutions regarding recent emergencies, including South Sudan, Libya or the Sahel, human rights justification has been explicitly stated. Moreover, many of the related committee debates focused on the human rights situation on the ground, and how the CSDP-type assistance could be strategically deployed to tackle it. Once again, while there is a strictly pacifist minority in the EP, which does not necessarily share this vision¹⁸, the opinions presented above have clearly been shared by the majority of the political groups, as evidenced by the voting patterns on the relevant reports and resolutions.

In addition to the CSDP being an endorsed tool of human rights protection and promotion, human rights have featured prominently among other political priorities, such as ensuring measurable positive footprint of the missions and operations, empowering local actors and partners, making the mission and operation expenditure effective, through *inter alia* optimal coordination with other international and regional actors active in the theatres in question and in ensuring necessary synergies with other EU actions and mechanisms (often called ‘flanking measures’ in EU jargon). As human rights has indeed been a ‘silver thread’ frequently underpinning parliamentary discussions on CSDP, it is possible to argue that the EP has managed to politically mainstream human rights ‘angles’ to its thematic work on CSDP.

4. CONCLUSION: THE FUTURE OF PARLIAMENTARY ENGAGEMENT IN CSDP

What may the current trends and state of play mean for the possible further evolution for the EP’s role as a human rights advocate in CSDP? On an optimistic note, as the time goes by and the EP deepens its familiarity with and understanding of the CSDP structures and mechanisms, its involvement with and impact on the CSDP is likely to further increase over time. On the down side, the EP’s level of ambition might not always optimally correspond with its physical capabilities (for example in terms of the amount of time the MEPs and the relevant political structures and parliamentary administration/services could physically devote to working on the specific CSDP files). Being a political body backed by a small administrative/support service, and not a technical institution, the EP has to cover a much wider topical agenda, having at its disposal a fraction of the specialised staff that other European institutions, not to mention national administrations, have. Therefore, there is arguably a threat of the EP’s overstretch, which will make it ever more important for the institution to carefully choose its political priorities in CSDP so as to ensure the optimum allocation of time and resources to ensure a meaningful involvement, conducive to a tangible impact.

¹⁸ As expressed by for example the minority reports attached to the annual reports on CFSP/CSDP.

The EP's role in shaping the current state of CSDP has been analysed in some detail to date.¹⁹ It has been actively feeding its ideas on how to maximise the impact of the missions and operations through better civil-military coordination, creating synergies with other EU actions and instruments, as well as better cooperation with the other international actors and empowering local partners. Currently, with the institutional debates on the internal-external security nexus, there appears to be much room for discussion on how to ensure better complementarity between the internal and external EU instruments, including the CSDP actions, in order to advance the fundamental rights agenda.²⁰

All the above-mentioned actions have a significant human rights dimension, which needs to be taken into consideration and mainstreamed properly. The recently adopted EU Strategic Framework and Action Plan on Human Rights and Democracy,²¹ with an accompanying action plan, mandates the EU to 'reflect human rights in conflict prevention and crisis management activities,' through actions ranging from including human rights violations as early warning crisis indicators, systematically including human rights in the mandates of CSDP missions and operations, mainstreaming gender as foreseen by the UN Security Council resolutions 1325 and 1820 on Women, Peace and Security, as well as devising a proper mechanism for accountability for cases of staff breaches of the code of conduct.²² It remains to be seen how this strategic framework and the accompanying action plan will be implemented in the future. The European Parliament has been instrumental in the process of adopting the package, and is expected to play a strong role to scrutinise its implementation.

As part of the above-mentioned human rights package, the position of the EU Special Representative on Human Rights has been agreed on and recently filled by the former Greek Foreign Minister/former Vice President of the European Parliament, Stavros Lambrinidis. The EP has insisted on the creation of this position and has played a catalytical effect in its establishment. It is important that the EUSR's human rights mandate over the CSDP becomes strong and decisive, and that its impact on further enhancing the status of human rights within the CSDP is tangible. The EP is expected to exercise keen scrutiny of the work of the Special Representative, in order to ensure adequate impact and results, also in the field in the CSDP.

¹⁹ In addition to a wide range of external publications regarding the EP's involvement in CSDP, the EP itself has commissioned a wide range of thematic studies and analysis to better inform and advise its actions related to the CSDP, which can be retrieved on the SEDE subcommittee website, available at <<http://www.europarl.europa.eu/committees/en/sede/studies.html>>.

²⁰ Committee on Civil Liberties, Justice and Home Affairs (LIBE), 'Report on European Union's Internal Security Strategy', 2010/2308 INI, with an opinion of the Committee on Foreign Affairs (AFET), available at <[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2010/2308\(INI\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2010/2308(INI)&l=en)>.

²¹ Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 25 June 2012, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf>.

²² *Ibid.*