



Armed Conflicts, Peacekeeping, Transitional Justice:  
Law As Solution

## Code of Conduct for CSDP Operations Personnel



## **DRAFT CODE OF CONDUCT FOR CSDP PERSONNEL**

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## **ANNEX: EU CSDP PERSONNEL CODE OF CONDUCT**

## 1. INTRODUCTION

### 1.1. The ATLAS Project

### 1.2. The Need and Benefits of a Code of Conduct

“As a Union based on the rule of law, we the EU carry a particular responsibility to ensure a rule-based international order, the cornerstone of which is the UN Charter”.<sup>1</sup>

The CoC’s objective is both the strengthening and furthering of the integration of human rights and IHL in CSDP missions and operations and the assessment of the appropriate and realistic level of engagement of the EU in the respect and promotion of these rules and principles.

- ✓ The CoC could be shared with other international organizations including the African Union.
- ✓ EU ESDP personnel is expected to maintain the highest standards of behaviour.

We are at a crucial moment: CSDP is developing (see number of missions), the Lisbon Treaty has just been adopted, officialising the legal personality of the EU; the EU is in the process of adhering to the European Convention on Human Rights (although it is not yet certain that CSDP will be a field of jurisdiction of the European Court and what the interplay of the EUCourts and the ECHR will be).

Dissemination strategy: our aim is to expose this Code of Conduct to:

- The Council of the European Union, therefore raising the EU awareness regarding the need of having a general document on the respect of human rights and humanitarian law by EU ESDP personnel. The final aim is the official adoption of this document by the EU institutions;
- The EU Member States, through their Ministries of Defence and Foreign Affairs. The document will therefore be disseminated in the framework of training specifically targeting future EU ESDP personnel.

### 1.3. Field of Application of the Code of Conduct

The present CoC would cover all missions provided for in Articles 42 and 43 of the Lisbon Treaty, i.e. “missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter” pursuing the following tasks: joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. Article 43 moreover provides that “[a]ll these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories”.

The field of application of the CoC *ratione personae* includes the following categories of EU personnel: all military, international civilian – seconded and contracted – and local EU ESDP

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<sup>1</sup> Gert-Jan Van Hegelsom, “International humanitarian law and operations conducted by the European Union”, in International humanitarian law, Human Rights and peace operations – 31st Round Table on Current Problems of International Humanitarian Law, Gian Luca Beruto ed., International Institute of Humanitarian Law (in collaboration with the International Committee of the Red Cross) (San Remo: 4-6 September 2008), p. 107; <http://www.icrc.org/eng/resources/documents/report/san-remo-round-table-report-060908.htm>.

personnel. Civilian contracted personnel associated with the operation will also be required to conform to this CoC.

According to the EU SOFA,<sup>2</sup>

« 1. 'military staff' shall mean:

(a) military personnel seconded by the Member States to the General Secretariat of the Council in order to form the European Union Military Staff (EUMS);

(b) military personnel, other than personnel from the EU institutions, who may be drawn upon by the EUMS from the Member States in order to provide temporary augmentation if requested by the European Union Military Committee (EUMC), for activities in the context of the preparation and execution of the tasks referred to in Article 17(2) of the TEU, including exercises;

(c) military personnel from the Member States who are seconded to the headquarters and forces which may be made available to the EU, or personnel thereof, in the context of the preparation and execution of the tasks referred to in Article 17(2) of the TEU, including exercises;

2. 'civilian staff' shall mean civilian personnel seconded by the Member States to EU institutions for activities in the context of the preparation and execution of the tasks referred to in Article 17(2) of the TEU, including exercises, or civilian personnel, with the exception of locally hired personnel, working with headquarters or forces or otherwise made available to the EU by the Member States for the same activities ».

For the purpose of this Code of conduct, the civilian staff will also include locally hired personnel.

Special attention is drawn to the conduct of commanders and senior management at all levels of the command chain: they are to guarantee that their own professional and personal behaviour is of the highest standard in order to inspire the same in their subordinates. Moreover, they are to ensure that the required standards are known and adhered to by their personnel.

## **2. LEGAL FRAMEWORK APPLICABLE TO EU MISSIONS**

The legal framework for EU missions is composed by the following:

### **2.1. Internal legal framework**

- **The Lisbon Treaty**

According to Article 2 TEU: "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". Concerning its external relations, Article 3(5) TEU states that: "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 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".<sup>3</sup>

<sup>2</sup> Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), 2003/C 321/02, 17 November 2003.

<sup>3</sup> Also, article 21.1 in the Chapter on the general provisions on the Union's external action states that "the Union's action on the international scene shall be guided by the principles which have inspired its own creation,

From this, we can assume that all the EU external activities, thus including PKO, should respect the principles proclaimed formally by the European Union, in particular for what concern IHRL. While article 6(1) establishes that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 2000.

In addition, even if the EU is not yet a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, it is clear that human rights established in it are part of the *acquis communautaire*.<sup>4</sup>

- **Communication from the Commission: “Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union” (2010)<sup>5</sup>**

The Commission affirms that “(t)he Union must be exemplary”; the Union’s action must be above reproach when it comes to fundamental rights. The Charter is not a text setting out abstract values; it is an instrument to enable people to enjoy the rights enshrined within it when they are in a situation governed by Union law.

In the Commission’s view:

“that the Union is exemplary is vital not only for people living in the Union but also for the development of the Union itself [...]. **Effective protection is also necessary to strengthen the credibility of the Union's efforts to promote human rights around the world.**

**The Union's work in the area of fundamental rights extends beyond its internal policies. The Charter also applies to its external action.** In accordance with Article 21 TEU, the Union's action on the international scene is designed 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 the respect for the principles of the United Nations Charter and international law. Certain human rights standards of the United Nations have an internal and external dimension for the Union”.

As pointed out before, the concrete obligations, in this field as well, derive both from:

- General International Human Rights Law, known as *the minimum standard*
- Multilateral Treaties on Human Rights both at universal and regional level.

Moreover, “we should conclude that both form global and regional International Law, the legal framework applicable to EU and its missions abroad derived from Human Rights Law reaches the highest levels in the world. Accordingly, the highest levels of compliance should be required to EU missions on this ground”.<sup>6</sup>

- **“Mainstreaming human rights across CFSP and other EU policies” (PSC, 2006)**

This document states that:

“The protection of human rights should be systematically addressed in all phases of CSDP operations, both during the planning and implementation phase, including by measures ensuring that the necessary human rights expertise is available to operations at headquarter

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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”.

<sup>4</sup> “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”. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Article 6.1

<sup>5</sup> Doc. 15319/10, 21 October 2010

<sup>6</sup> F. Vacas, *International Human Rights Law as a Legal Framework Applicable to EU Missions*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 33.

level and in theatre; training of staff; and by including human rights reporting in the operational duties of CSDP missions”.

The document refers to a series of concrete actions to be implemented by the Council Secretariat and the Presidency to:

- Integrate human rights provisions in guiding documents and reviews of CSDP missions and operations where relevant, inter alia by making use of the human rights fact sheet and seeking advice of relevant UN agencies and NGOs;
- Implement human rights policy in the context of CSDP missions and operations where relevant, in particular as regards women and children, including by monitoring and reporting on human rights related issues;
- Include human rights experts in CSDP missions and operations where appropriate.

Member States, the Commission and the Council Secretariat also have to:

- Provide human rights training to personnel serving in CSDP missions and operations;
- Integrate human rights aspects as part of flanking measures or technical assistance provided in the context of CSDP missions and operations where appropriate.
- Including relevant human rights aspects in the mandates of EUSR; considering the possibility of appointing human rights focal points/human rights advisors in the staff of EUSR.”

- ***Generic Standards of Behaviour for CSDP Operations (2005)***<sup>7</sup>

In 2005, the Political and Security Committee adopted the “Generic Standards of Behaviour for CSDP Operations”. The generic standards of behaviour ensure commonality of approach.

It is underlined that: “the standards of behaviour are complementary to the legal obligations of personnel. *EU personnel must apply the provisions of international law, including, when applicable, the law of armed conflict, and the laws of the contributing state. EU personnel will also respect local law unless the execution of the mission requires otherwise*”.

The aim of this document is to ensure that all categories of personnel involved in CSDP operations maintain the highest personal standards of behaviour. The Generic Standards are a “living” document and guiding document as: “the planning documents for every future CSDP mission should contain provisions for the implementation of standards of behaviour. These provisions should be based on this document”. However, it is to be noted that the PSC recommends that further work should be undertaken in areas related to standards of behaviour in acknowledging that this document “provides principles for the implementation and further development of the generic standards of behaviour”. In particular, it is stated that this document must be seen as complementary to the “EU Guidelines on Protection of Civilians in EU-led Crisis Management”.

The adoption of this document was a very positive step because:

- It demonstrates the need of adopting standards at EU level and represents the first step in this sense. The CoC can be easily built on the basis of these EU agreed standards on behaviour for CSDP missions (including civilian missions);
- It constitutes a valuable moral guide for EU personnel. The aim of the standards is “to guarantee appropriate relations with the local population” and “to contribute to the moral cohesion of the force”. This is proved by the fact that in order to ensure the

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<sup>7</sup> Doc. 8373/3/05m, 18 May 2005.

achievement of these standards of behaviour, the EU personnel should adhere to principles such as impartiality, personal integrity, courage, discipline, loyalty and respect for others is essential;

- It relates to alleged violations by EU personnel of human rights and international humanitarian law or international criminal law violations and the “obligation” (which is not clearly established as the document says “personnel should”);
- It recognizes the obligation of all personnel to report cases of serious misconduct and criminal activity. It further sets out the basis for the establishment of fair and unbiased complaints procedures in each CSDP operation, utilising existing procedures where available and appropriate. In accordance to the document: “Clear reporting mechanisms should be established for each CSDP operation and for each category of personnel. National reporting systems should be established, but serious incidents require to be reported up the EU chain of Command in accordance with normal reporting procedures”;
- It endorses to commanders and senior management the responsibility of ensuring that their personnel are aware of complaint procedures;
- It recognizes the importance of pre-deployment training of personnel, which should include training and education on prescribed standards of behaviour. Particular attention should be given to human rights issues in particular trafficking in human beings, gender and child protection. Specific training requirement should be developed within the framework of the EU Training Concept in CSDP, drawing on existing manuals developed for instance by the UNICEF and DPKO.

However, this document has a very general nature. It is not a Code of Conduct for EU personnel because:

- ***It is rather a moral than a legal instrument.*** “The standards of behaviour are complementary to the legal obligations of personnel in accordance with international law and the law of the contributing state”.
- ***It draws only in a very limited way on these standards*** as they are set out in the planning documents for such operations, either in structure or in substance. Actually, the text states that even if they cover all relevant standards to ensure the appropriate behaviour of personnel both with regard to each other and to the local population, “the standards of behaviour will have to be tailored to the specific mission”. Therefore, each CSDP operation will have its own specifics and the standards of behaviour will require adaptation to each mission. Coherence between missions, both civilian and military, should be maintained.
- ***The generic approach to the issue*** makes the wording not to be adequate as it sends the message that any kind of misconduct may result in disciplinary measures when the Generic Standards of Behaviour make reference to acts that might be the basis for criminal prosecution. This wrong idea could be inferred from the following paragraph: “Sexual exploitation and sexual abuse violate universally recognised international legal norms and standards. They constitute acts of serious misconduct and are therefore grounds for disciplinary measures. Exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited”.
- ***The list of “criminal activities” it includes is only illustrative and, therefore, incomplete.*** A particular reference is made to: 1) organized crime; 2) corruption; c) human trafficking; d) child abuse, but the document recognizes that “other types of

criminal activities will be included, as appropriate, in the relevant planning documents for each operation". This creates an uncertainty on what kind of activities are generally forbidden, sending the wrong message that other conducts not included in the Generic Standards are not forbidden or, at least, less relevant.

- ***The issue of criminal prosecution for the commission of criminal acts is not adequately addressed.*** In accordance with this document: "not adhering to the required standards of behaviour is misconduct and may result in disciplinary and/or administrative measures. However, it does not imply that the act as such is illegal".
- ***It does not address the issue of the reporting modalities neither the question of differentiation of disciplinary measures according to the status of personnel in question*** (military, civilians seconded from EU member states, international civilians, local civilians) where the responsibility lies for initiating disciplinary action is a key point needing clarification.<sup>8</sup>
- ***It lacks adequate reference to the legal international instruments supporting the prohibition of these acts.*** For example, the reference to the 2004 EU Guidelines on Children and armed conflict and the Plan of Action adopted for the implementation of the guidelines is not the adequate reference to this end. More particularly, a reference to the 2000 *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* is clearly missing.

- **Draft Revised Guidelines on the Protection of Civilians in CSDP Missions and Operations (2010)<sup>9</sup>**

Although provisions relevant to the protection of civilians have been included in several mandates, the concept of PoC as such has not been explicitly mentioned in the mandates of CSDP missions or operations. The EU base their understanding of the PoC on IHL and human rights law, in line with the definition which defines PoC as "encompassing all activities aimed at obtaining full respect for the rights of the individual in accordance with international humanitarian, human rights and refugee law".

## 2.2. External legal framework

While the legal framework for EU operations appears to be quite well established and exhaustive,<sup>10</sup> the main challenge in the definition of the applicable rules may be due to the fact that peacekeeping practice has consistently evolved along the years and that the EU is at the present given the mandate for enhancing a wide range of missions abroad.

- **Possible scenarios for intervention**

- Civilian missions
- Military missions

EU military missions are framed within UNSC Resolutions. In particular, the military EU PKO must be inserted within the general framework of international law guiding the legality of

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<sup>8</sup> See on this point: CIVCOM advice on Generic Standards of Behaviour for CSDP Operations, Bruselas, 12 May 2005. Doc 8895/05.

<sup>9</sup> Doc. 15091/10, 15 October 2010.

<sup>10</sup> F. Naert, 'Legal Aspects of EU Operations', in Vol. 15 *Journal of International Peacekeeping* 2011, p. 241.



deploying military troops in foreign countries (the UN Charter, the Helsinki Final Act, the Paris Charter). However, according to the UN Charter Chapter VII, Article 39, the UN Security Council (UNSC) may disregard the principle of sovereignty and non-intervention if the situation is defined as a threat to international peace and security. Under such circumstances the UNSC may authorise the use of force to restore peace.<sup>11</sup> The EU members have interpreted the UN Charter to allow for the deployment of peacekeeping operations without an explicit mandate from the UNSC, if they rest instead on the acceptance and invitation from the government(s) in the area of operation. If, however, the operation would be foreseen to carry out peace enforcement tasks, this would require a UNSC mandate (based on Chapter VII in the UN Charter).<sup>12</sup>

In some military operations, such as EUFOR Artemis in the DRC, the protection of the civilian population has been the main focus of the operation: addressing the large scale attacks being committed against civilians in the district of Ituri. Also the EU civilian-military supporting action to the African Union mission in Darfur (AMIS) contributed to the protection of the civilian population and efforts aimed at improving the security and humanitarian situation. Similarly, providing a safe and secure environment for refugees and internally displaced persons was a key objective of EUFOR Tchad/RCA. In a similar vein, EUFOR ALTHEA's (BiH) role is to provide a military presence in order to contribute to a safe and secure environment and deny conditions for a resumption of violence.

Actually, according to article 43 of the Treaty on European Union, the actions for which the EU may use civilian and military means "shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation".<sup>13</sup> As a consequence, EU operations can be tailored to the specific situation and range from "consensual rule of law, police, security sector reform, border assistance or monitoring missions, to peacekeeping and potentially even peace enforcement".<sup>14</sup>

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From this, we can assume that the definition of the legal framework depends on the types of intervention carried out by the EU.

- **International Human Rights Law**

In general, it is commonly accepted that HR law is always applicable and that IHL applies only in case that EU is part to an armed conflict or in a situation of occupation.

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<sup>11</sup> A. Björkdahl and M. Strömviik, *EU Crisis Management Operations - CSDP Bodies And Decision-Making Procedures*, Danish Institute for International Studies Report, 2008:8, p. 21.

<sup>12</sup> A. Björkdahl and M. Strömviik, *EU Crisis Management Operations - CSDP Bodies And Decision-Making Procedures*, Danish Institute for International Studies Report, 2008:8, p. 22.

<sup>13</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Section 2 - Provisions On The Common Security And Defence Policy, Article 43, 2010/C 83/01.

<sup>14</sup> F. Naert, 'Legal Aspects of EU Operations', in Vol. 15 *Journal of International Peacekeeping* 2011, p. 222.

However, while the centrality of human rights has been strongly emphasised by the EU, their practical implementation in crisis management has been hindered by significant legal, conceptual and practical obstacles.<sup>15</sup>

In order to define the IHL and the IHRL legal framework applicable, it is fundamental to consider the internal normative body of the EU, in particular the Treaty of the Union, and general and customary international law. In fact, even if the EU is not (yet) party to any IHL or IHRL treaty, it stands clear that the EU is bound by IHRL and IHL. However, IHRL and IHL are concerned by different aspects and issues.

In relation to the application of HR to the EU PKO missions, the problem is to establish whether, when and how those Human Rights also bind upon the EU when it acts outside the territory of its members States.

On the contrary, for IHL even if all 27 Member States are parties to the main Conventions on IHL, the difficulty lays in defining the situation as an armed conflict or not, given the complexity of the missions in cases in which the intensity of violence is high.

- **Main lessons learned from the UN practice**

In the determination of the EU PKO legal framework, the United Nations collective security system provisions have to be taken into account; they are considered to be a part of the legal basis of the EU missions.<sup>16</sup> Bearing in mind the fact UN is the largest multilateral contributor to post-conflict stabilization worldwide and that, since 1948, it deployed 64 field missions, its practice must be considered a point of reference for the EU policy.

Actually, even if the EU is not a party to the UN Charter, it is considered to be bound by its principles as they are part of general international law. The international legal framework that binds UN PKO, especially concerning the use of force, is also binding the EU in the implementation of its missions abroad. In fact, even if the EU is not directly bound by the UN Charter provisions, EU Member States are all UN members, so they have to respect the UN Charter provisions. According to Article 103, in the case of a conflict between the obligations of the Members of the United Nations under the Charter and Member States' obligations under any other international agreement, their obligations under the Charter should prevail.<sup>17</sup>

The EU human rights approach to crisis management operations has been strongly influenced by the lessons learned from previous UN missions in the field. Practical methodology of human rights promotion in the context of CSDP operations is based on the UN peacekeeping human rights mainstreaming practice.<sup>18</sup>

<sup>15</sup> Wanda Troszczyńska-van Genderen, *Human rights challenges in EU civilian crisis management: the cases of EUPOL and EUJUST LEX*, European Union Institute for Security Studies, Occasional Paper, August 2010 84, p. 7.

<sup>16</sup> "In crisis management, international legitimacy is guaranteed in particular by respecting the UN collective security system provisions, and the presence of this requirement is in regard to all the interventions, independently of the performers: one or more States, the UN itself (blue helmets) or international organizations", L. Paladini, "The European Union's Peace Missions in the United Nations Collective Security System", *RSCAS 2009/71 - EUI Working Papers*, Robert Schuman Centre For Advanced Studies, 2009, p.1.

<sup>17</sup> According to L. Paladini ("The European Union's Peace Missions in the United Nations Collective Security System", *RSCAS 2009/71 - EUI Working Papers*, Robert Schuman Centre For Advanced Studies, 2009, p. 12) "this provision is considered the basis to enact the priority of UN Charter on TEU. While Article 103 binds EU Member States directly, it binds the EU transitively. [...] the EU is bound to the respect UN Charter provisions as a result and to the extent that its Member States are bound, as effect of the principle *nemo plus iuris ad alium transferre potest quam ipse habet*". Also, customary law binds all the members of the international community, including international organizations with legal personality. The issue of EU legal subjectivity is no longer an object of debate: EU personality is supported by a declaratory norm, confirmed by the Constitutional Treaty codified and the Lisbon Treaty. Therefore, customary provisions bind the EU independently on the conclusion of any treaty.

<sup>18</sup> In particular since the UN Secretary-General Kofi Annan requested that human rights dimensions be enhanced and integrated into a range of the organisation's activities. "Report of the Secretary General on renewing the United

The two principal UN instruments relevant to the integration of human rights in crisis management operations are the UN Charter and the Office of the High Commissioner for Human Rights (OHCHR)<sup>19</sup>.

Furthermore, with the progressive development of the concept of 'integrated missions' the status of human rights was further strengthened, with UN missions being mandated both to protect and actively promote human rights in all their operations.<sup>20</sup>

Within the EU, human rights were first acknowledged and then practically integrated within CSDP through political declarations, which later had to be translated into concrete actions.<sup>21</sup> In this context, the development of the EU guidelines on HR, have decisively contributed to the further development of the EU human rights policy. The aim of delineating the EU human rights standards, which often reach a higher threshold than international standards and mandate EU actors to actively promote them in the context of their external action<sup>22</sup>.

### • The quest for the extraterritorial applicability of IHRL

It is generally accepted that Human Rights Law applies in all circumstances. However, the extraterritorial application of human rights still is not a settled issue. Article 1 of the European Convention on Human Rights (EConvHR) states that the States parties must secure the rights listed to everyone within its jurisdiction, in relation to PKO abroad, the problem is to determine when a person can be considered to be under the jurisdiction of EU.<sup>23</sup> This is due to the fact that when the EU undertakes a PKO its forces do not act on EU territory (or on the territory of its member States).

Even if the applicability of human rights *as a matter of law* is still controversial in relation to the aforementioned aspects, at least it can be observed that as a matter of *policy and practice* human rights do provide significant guidance in EU operations and in practice, EU operational planning and rules of engagement take into account internationally recognised standards of human rights law.<sup>24</sup>

Concerning the interaction between IHRL and IHL, it is now commonly accepted among scholars (and practice? See the ICJ Wall a.o.) that International Human Rights Law, as general law on terms of protection of human beings in all time and place, is always in force.<sup>25</sup> Its application to a concrete case depends on whether special law – in this case, IHL – 'should be generally applied because we face an armed conflict; and even in this case, we should see

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Nations: A programme for reform", Un doc. A/51/950.

<sup>19</sup> For example, the UN Human Rights Committee in 2004 confirmed the applicability of human rights treaties in the context of peacekeeping UN Human Rights Committee, General Comment no. 31, CCPR/C/2/1/Rev.1/Add.13, 2004.

<sup>20</sup> Wanda Troszczyńska-van Genderen, *Human rights challenges in EU civilian crisis management: the cases of EUPOL and EUJUST LEX*, European Union Institute for Security Studies, Occasional Paper, August 2010 84, p. 12.

<sup>21</sup> In particular, the Council pointed to the need to ensure human rights policy coherence in this field in its 2005 Annual Report on Human Rights, EU Annual Report on Human Rights – 2005, Council of the European Union, 3 October 2005.

<sup>22</sup> Wanda Troszczyńska-van Genderen, *Human rights challenges in EU civilian crisis management: the cases of EUPOL and EUJUST LEX*, European Union Institute for Security Studies, Occasional Paper, August 2010 84, p. 13.

<sup>23</sup> According to Sassóli, the ECHR jurisprudence has evolved from the *Bankovic* case, in which it was required an effective control over the territory by being physically present to the *Pad* case, Marco Sassóli, *EU missions, international humanitarian law (IHL) and international human rights law (IHRL)*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 44.

<sup>24</sup> F. Naert, *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p.58.

<sup>25</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1.C.J. Reports 1996, p. 226, par. 25.

whether particular International Humanitarian norms can be applied at the concrete case, and if not, International Human Rights Law, as general law, will always be applied'.<sup>26</sup>

- **International Humanitarian Law**

Although IHL has been usually taken into consideration by the EU jointly within the Human Rights wider category, it has progressively included a specific “international humanitarian law” dimension in the policies it intends to pursue in its external relations. In fact, international humanitarian law is no longer considered as an alternative, but as a useful complement to be applied within its foreign and common security policy.<sup>27</sup>

This shift can be found both in declaratory acts<sup>28</sup> and legal compulsory instruments.<sup>29</sup>

In particular, in order to promote compliance with IHL, the EU has approved the European Union Guidelines on promoting compliance with international humanitarian law (2005). However, these guidelines aim to address *compliance with IHL by third States (and, as appropriate, non-State actors operating in third States)*<sup>30</sup>. Furthermore, it adds: “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**”.<sup>31</sup> There is therefore no reference to obligations towards Member States in the development of the EU Foreign and Security Policy.

However, a footnote to this article clearly states that “(a)ll EU Member States are Parties to the Geneva Conventions and their Additional Protocols and thus under the obligation to abide by their rules.” And article I.5. “(s)tates are obliged to comply with the rules of IHL to which they are bound by treaty or which form part of customary international law.” And that “(w)henever relevant, EU Heads of Mission, and appropriate EU representatives, including Heads of EU Civilian Operations, Commanders of EU Military Operations and EU Special Representatives, should include an assessment of the IHL situation in their reports about a given State or conflict. Special attention should be given to information that indicates that serious violations of IHL may have been committed. Where feasible, such reports should also include an analysis and suggestions of possible measures to be taken by the EU” (art. 3.15(b)).

However, it must be considered that, although Article 21.1 of the EU Consolidated version Treaty does not specifically mention IHL, this branch of international law is obviously covered by the more general term ‘international law’ that the Treaty requires that the EU respects in the conduct of its external relations and, also, for the purposes of EU law, at least some rules of international humanitarian law would appear to be covered by EU human rights provisions.<sup>32</sup>

This is a relevant aspect, considering that although until now EU missions were never involved in hostilities reaching the threshold of an armed conflict, it is not excluded that this could

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<sup>26</sup> F. Vacas, *International Human Rights Law as a Legal Framework Applicable to EU Missions*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 32.

<sup>27</sup> T. Ferraro, “Le droit international humanitaire dans la politique étrangère et de sécurité commune de l'Union européenne”, *Revue internationale de la Croix-Rouge No. 846*, p. 435-461, 2002

<sup>28</sup> Promotion of ratification of ICC, dissemination and promotion of the Geneva Conventions and Protocols..., F. Medjoub, “La prise en considération du droit international humanitaire par l'Union Européenne - une introduction”, *La protection des personnes vulnérables en temps de conflit armé*, sous la direction de J-M. Sorel et L. Popescu, Bruxelles, Bruylant, 2009, p. 16.

<sup>29</sup> Negative measures (sanctions), actions and common positions, *Ibid.*

<sup>30</sup> Official Journal C 327 of 23.12.2005, art.I.2.

<sup>31</sup> Official Journal C 327 of 23.12.2005, art.I.2. Also, EU Guidelines on Human Rights are relevant to International Humanitarian Law, considering that Chapter 4 constitutes a guidance on children and armed conflict.

<sup>32</sup> F. Naert, ‘Legal Aspects of EU Operations’, in Vol. 15 *Journal of International Peacekeeping* 2011.

happen in the future. As the UN Peacekeeping operations experience shows, they have evolved from non-coercive operations to operations classified as of peace enforcement.<sup>33</sup>

All Member States of the European Union are parties to the Geneva Conventions of 12th August 1949 and their two Additional Protocols of 1977. They have also ratified the Convention on the Rights of the Child, New York November 20th, 1989 and the vast majority (except Cyprus and Estonia), its Optional Protocol on the Involvement of Children in Armed Conflict, of 2000.<sup>34</sup> Furthermore, The Hague Conventions of 1907 is considered today as part of customary international law.

International humanitarian law only applies to situations of armed conflict and occupation. The EU and its Member States accept that if EU-led forces become a party to an armed conflict, international humanitarian law will fully apply to them. This is in line with the Salamanca Presidency Declaration, which provided that '*Respect for International Humanitarian Law is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict to which the forces are party*'.<sup>35</sup>

This position corresponds to that reflected in Article 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel and, to some extent, in the UN Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law.<sup>36</sup> However, given that only some EU missions might involve the use of armed force *as a party to an armed conflict*, international humanitarian law is likely to be applicable only to a few of them.<sup>37</sup>

However, the matter is more complex if we consider that the EU approaches crisis management (which may include imposing peace) in a multidimensional way, acting not only in the military field but also in reconstruction, police and judicial cooperation, administration and civilian protection.<sup>38</sup>

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<sup>33</sup> "From the point of view of the applicability of IHL, observation missions are not the same as the ones aimed at peacekeeping with authorization to use weapons solely in case of self-defence or those in which this authorization extends to meet the purpose of protecting civilians or achieving the goal set out to the mission", J.L. Rodriguez Villasante, "The Humanitarian Legal Framework as Applicable to the European Union Peace Missions", *Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union*, CEDRI-UJI, 25-26 November 2010, p.23.

<sup>34</sup> Also most are obliged by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and Protocol I (except Ireland, Malta and the UK) and 1999 Protocol II (except Belgium, Denmark, France, Ireland, Latvia, Malta, Poland, Portugal, Sweden and the UK); the 1976 ENMOD Convention on the prohibition to use environmental modification techniques for military or other hostile purposes (except Estonia, France, Latvia, Liechtenstein, Luxembourg, Malta and Portugal); the 1997 Ottawa Treaty on the banning of landmines (except Finland and Poland).

<sup>35</sup> J.L. Rodriguez Villasante, *The Humanitarian Legal Framework as Applicable to the European Union Peace Missions*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 26

<sup>36</sup> F. Naert, *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 57.

<sup>37</sup> "The EU legal instruments relating to EU missions have not referred to international humanitarian law so far, except in two case where status agreements for non-EU missions which did refer to international humanitarian law were made applicable to an EU mission, namely for the AMIS Supporting Mission via the African Union SOMA and for EUFOR DR Congo via the MONUC SOFA", F. Naert, *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 57.

<sup>38</sup> J.L. Rodriguez Villasante, *The Humanitarian Legal Framework as Applicable to the European Union Peace Missions*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 25

The primacy of the United Nations leads to requiring the Security Council authorization for the deployment of a peacekeeping operation of the European Union, an indispensable requirement if you want to undertake missions involving the use of force<sup>39</sup>.

As was already established, the members of these operations and missions of the European Union are obliged to respect and ensure this respect for IHL and Human Rights, which form part of customary international law. A good point of reference is the 1999 UN Secretary General Bulletin on the observance of IHL by UN forces that specifies that IHL will be 'applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence' (section 1.1 of the Bulletin).

Military operations conducted by the European Union do not normally include the accomplishment of missions that could be classified as peace enforcement or law. Nevertheless this does not imply that military forces can not use their weapons in self-defence.<sup>40</sup>

As for UN PKO, the requirements of EU peace operations consist in relying on the consent of the parties in conflict, refraining from the use of force except in legitimate self-defence and act impartially.<sup>41</sup>

The commonly accepted position among scholars is that the norms that will have to be integrated in the rules of engagement are to be determined on the basis of a factual assessment of the situation.<sup>42</sup> For example, in the words of Ferraro, the tendency today "is that the EU proceeds on a case by case basis, that is each mission seek and determine the exact norms of IHL on the basis of which the EU and Member States contribute with their troops, that is depending on the nature of the mission", this not excluding that the EU should in any case respect the minimum standard of protection norms concerning an armed conflict pertaining to the customary IHL and *jus cogens*.

### 2.3. Specific issues regarding the use of force

The EU policy is accordingly that IHL does not necessarily apply in all EU operations. In fact, so far, EU-led forces have not become engaged in combat as a party to an armed conflict in any of

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<sup>39</sup> J.L. Rodriguez Villasante, *The Humanitarian Legal Framework as Applicable to the European Union Peace Missions*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 25. Not necessary UNSC resolutions authorization, civilian interventions only require the consent of the host State, normally agreed via the conclusion of a status-of-forces-agreements (the mandate, normally agreed with the host State in the status-of-forces-agreements and simultaneously indicated in the Joint Action instituting the mission). "In relation to EU peacekeeping operations UNSC always adopted resolutions under Chapter VII, but the authorizations have been expressed in different formulas, going from the express authorization to the EU Member States to use force to the authorization directly to the military operation", L. Paladini, "The European Union's Peace Missions in the United Nations Collective Security System", *RSCAS 2009/71 - EUI Working Papers*, Robert Schuman Centre For Advanced Studies, 2009, p. 22.

<sup>40</sup> J.L. Rodriguez Villasante, *The Humanitarian Legal Framework as Applicable to the European Union Peace Missions*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 26

<sup>41</sup> J.L. Rodriguez Villasante, "The Humanitarian Legal Framework as Applicable to the European Union Peace Missions", *Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union*, CEDRI-UJI, 25-26 November 2010, p. 24.

<sup>42</sup> S. Kolanowski, *Drafting EU Missions' mandates and Rules of Engagement: application and assessment of Human Rights component and International Humanitarian Law*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 47.

the EU's military operations.<sup>43</sup> In the words of Sassòli 'if there are hostilities [...] the legal basis of the use of force and the mandate of the EU mission are irrelevant. Even if they have the mandate not to use force or to use force only in individual self-defence, if they are attacked by the enemy they have to decide whether to run away or to use force and then the law of international armed conflicts applies'.<sup>44</sup>

### 3. RESPONSIBILITY FOR VIOLATIONS

#### 3.1. Specific issues of concerns regarding the EU personnel action in military or civil operations

- **Gender violence and human trafficking**

In its 2005 'Generic Standards of Behaviour for CSDP Operations', the Council of the EU considered the following:

'Personnel should be aware that both prostitution and the pornographic industry have established links with organised crime and human trafficking. Not only will the patronage of either serve to undermine the moral standing of the CSDP operation, but it will ultimately make the mission more difficult to achieve.

Sexual exploitation and sexual abuse violate universally recognised international legal norms and standards. They constitute acts of serious misconduct and are therefore grounds for disciplinary measures. Exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited'.

In the part concerning criminal activities, the General Standards of Behaviour focus on the personnel participation in organized crime, corruption, human trafficking and child abuse. The aide memoire of each operation, as well as the training given to the members of the EU missions either before their deployment or at their arrival, should include a summary of the charges that could be brought towards them in case they either help, or directly participate in these criminal activities. These trainings are the responsibility of the leadership command – commanders, senior managers and legal advisers. It is very surprising that the immediate reaction of leadership concerning prostitution, for instance, still resembles the attitude adopted by some UN forces commanders in the 1990s. When asked about the cases of sexual exploitation by members of UN forces deployed in Cambodia, the UN Secretary General's Special Representative in Cambodia declared: 'Boys will be boys' and no disciplinary measures were taken.<sup>45</sup> This is all the more inadmissible that some of the girls who were the victims of sexual violence by UN peacekeepers were 11-14 years-old.

Sexual exploitation and sexual abuse are indeed violations of fundamental international norms and standards.<sup>46</sup> Commenting on Article 6 of the Convention on the Elimination of all Forms of Discrimination against Women, according to which 'States Parties shall take all

<sup>43</sup> F. Naert, *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 57.

<sup>44</sup> M. Sassòli, *EU missions, international humanitarian law (IHL) and international human rights law (IHRL)*, Contribution to the Colloquium The Integration of Human Rights Component and International Humanitarian Law in Peace Missions led by the European Union, CEDRI-UJI, 25-26 November 2010, p. 42.

<sup>45</sup> See S. Martin, *Must Boys be Boys? Ending Sexual Abuse and Exploitation in UN Peacekeeping Mission*, Refugees International, 2005.

appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women', the Committee on the Elimination of Discrimination against Women said the following:

'13. States parties are required by article 6 to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women.

14. Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

15. Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.

16. Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures'.

The EU has taken the measure of these obligations and has proclaimed 'the three indissociable aims of combating violence against women : prevention of violence, protection and support for victims and prosecution of the perpetrators of such violence'.<sup>47</sup> This should be read together with the Update on the EU Guidelines on Children and Armed Conflicts, according to which '(i)n countries where the EU is engaged with crisis management operations, and bearing in mind the mandate of the operation and the means and capabilities at the disposal of the EU, the operational planning should take into account, as appropriate, the specific needs of children, bearing in mind the particular vulnerability of the girl child. In pursuit of the relevant UNSC resolutions, the EU will give special attention to the protection, welfare and rights of children in armed conflict when taking action aimed at maintaining peace and security'.<sup>48</sup>

Moreover, sexual exploitation and abuse in the framework of peacekeeping would not only contribute to the development of organised crime and human trafficking, but can also have ravaging consequences on the psychologic development of girls and women, some of whom were victims of rape during armed conflict.<sup>49</sup> The consequences of sexual violence or exploitation of the local population can be all the more dangerous that the territories where peacekeeping operations are deployed are combining economic difficulty, dismantlement of the familiar structures and deterioration of the educative system. It is also clear that a

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<sup>46</sup> At a universal level, see the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979 ; the Declaration for Elimination of Violence against Women, 23 February 1994. ; the Additional Protocol on the Convention for Transnational Criminality ; Convention for the Repression of Human Trafficking and exploitation of prostitution. Violence against women is also concerned in IHL regulations. See Article 27 of the Geneva Convention (IV), Article 76 of Additional Protocol I and Article 4 of Additional Protocol II. See also the landmarking 1325 (2000) UN General Assembly resolution as well as GA resolution 1820 (2008), that include guiding principles for CSDP missions. See also the following EU instruments : Council Conclusions on Promoting Gender Equality and Gender Mainstreaming in Crisis Management (2006) ; Check List to Ensure Gender Mainstreaming and Implementation of UNSC Resolution 1325 in the Planning and Conduct of CSDP Operations (2006) ; EU guidelines on violence against women and girls and combating all forms of discrimination against them (2008).

<sup>47</sup> EU guidelines on violence against women and girls and combating all forms of discrimination against them (2008).

<sup>48</sup> See also the EU Guidelines on the Promotion and Protection of the Rights of the Child (2007), the Guidelines on Children in Armed Conflict (2003, updated in 2008), and the Checklist for the Integration of the Protection of Children Affected by Armed Conflict into CSDP Operations (2006, updated in 2008).

<sup>49</sup> This has been clearly affirmed in the enquiries made after the denunciation of the sexual abuses committed by member of the UN Mission in the Congo.



peacekeeping operation cannot advise a government on the respect of international human rights obligations and the reform of its legal system and the judiciary if its own personnel is responsible for acts of sexual abuse and exploitation.

At the national level, they are not only acts of misconduct leading to disciplinary measures, but they may also be the ground for criminal proceedings. While the *Status of Forces Agreements* (SOFAs) provide for the sending State's jurisdiction, all the EU Member States criminal codes include the crimes of sexual exploitation and sexual abuse. Most of the EU Member States' national courts have also jurisdiction to prosecute crimes of sexual exploitation and sexual abuse committed extraterritorially.

A global strategy for protection of sexual exploitation and sexual abuse has been elaborated in the UN Framework,<sup>50</sup> which was not entirely put in practice for lack of political will. Among other, it includes elements concerning the investigative process, organizational, managerial and command responsibility, and individual disciplinary, financial and criminal accountability. It provides for a trust fund, which was never created, and for the imposition of fines to members of the mission whose paternity has been proved, who have never been imposed. The EU could anticipate eventual problems in this field and elaborate a similar strategy, knowing that the more recommendations are put in practice at an EU level, the better the EU institutions will respect the rights of the civilian populations and create conditions for the proper execution of the mandate.

Guided by the UN experience, the EU should also adopt an internal document specifically focused on eventual acts of sexual exploitation and abuse perpetrated by EU personnel. The UN Secretary General's Bulletin on special measures for protection of sexual exploitation and sexual abuse<sup>51</sup> specifically prohibits acts of sexual exploitation and sexual abuse. Among other, it provides for the existence of a focal point (usually an official at a sufficient high level) for receiving reports on cases of sexual exploitation and sexual abuse.

This should be clear in a revised version of the *Generic Standards of Behaviour for CSDP Operations* as well as in the various aide memoire for commanders on standards of behaviour for different EU operations.

- **The Capture, Apprehension, Detention and Transfer of Criminal Suspects**

In cases of capture, apprehension and transfer of criminal suspects, peacekeeping personnel will apply guarantees provided for by IHL as well as human rights guarantees. According to Additional Protocol II to the Geneva Conventions (Art. 4-6) provide for fundamental guarantees in time of armed conflict. The ECHR, including the case-law of the European Court, provide for fundamental procedural standards, including the presumption of innocence, the requirement of reasonable suspicion, the right to be brought before a judge or another legal authority within 4 days, the right to contest one's detention and a fair and public trial.<sup>52</sup> The Guidelines to EU Policy Towards Third Countries on Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (2001, updated in 2008) reaffirm these obligations and include the right to be brought before a judicial authority, the right to have access to lawyers and medical care, as well as the right to inform one's relative about its detention. Among these obligations, the prohibition of torture, cruel, inhuman and degrading

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<sup>50</sup> United Nations, A/59/701, 24 March 2005.

<sup>51</sup> United Nations, ST/SGB/2003/13, *Secretary General's Bulletin. Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, 9 October 2003.

<sup>52</sup> Include ECHR cases.

treatment is a core obligation in international human rights law.<sup>53</sup> It does not allow restrictions or derogations.

While cases of criminal or criminal suspects abuse seemed to be multiplying in the last ten years, they actually were very much present in the previous period, though they received less publicity. In a case tried before a Belgian Military Court,<sup>54</sup> members of the UNOSOM II operation in Somalia in 1993. The soldiers had been accused of causing bodily harm with intent and of threatening a Somali child. The soldiers declared they had 'played' i-wth Somali children a number of times, the situation presented before the Court being one where the soldiers had held the child above a fire in order to scare or threaten him. The complaint was based on the 1993 Law on the repression of grave breaches of humanitarian law. The Military Court acquitted the soldiers for the reason that, according to the Court, the 1993 Law was not applicable.<sup>55</sup>

The spectre of violence in the framework of detention by peacekeeping forces reappeared with the Abu Ghraib prisoner abuses cases. In April 2004, a series of photographs of US military personnel abusing detainees in this prison facility shocked the international community.<sup>56</sup> Additional documents showed similar prisoner abuse at US and British facilities in Afghanistan and Iraq.<sup>57</sup> Commenting on the abuses that occurred in Iraq, Afghanistan and Guantánamo, the US Independent Panel to Review Department of Defense Detention Operations argued in its report (the Schlesinger Report) the detention abuses were 'widespread and, though inflicted on only a Small percentage of those detained, they were serious both in number and in effect. No approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a Policy of abuse promulgated by senior officials or military authorities. Still, the abuses were not just of some individuals to follow some standards, and they are more than the failure of a few leaders to enforce proper discipline'.<sup>58</sup> Lately, the lawyers of 142 Iraqi civilians asked for a public judicial enquiry concerning allegations of torture, sensory deprivation, forced nakedness and stress positions. Such investigations have been launched concerning two similar cases. The reports on the new cases show that the abuses are systemic, which would justify a public enquiry. For its part, the British government launched an enquiry (the Chilcot enquiry) conducted to identify lessons that can be learned from the Iraq conflict.

The Schlesinger Report pointed out the problems of leadership structure, the lack of training as well as the weak discipline. It is all the more important to ascertain the discipline authority

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<sup>53</sup> See the UN Body of Principles on the Protection of All Persons Under Any Form of Detention or Imprisonment ; the UN Human Rights Committee General Comment 20 ; the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment Standards ; the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment ; the UN Human Rights Committee General Comment (n° 20).

<sup>54</sup> Military Court, 17 December 1997 (*Ministère public and Centre pour l'égalité des chances et la lutte contre le racisme v. C... et B...*), *Journal des Tribunaux*, 4 April 1998, pp. 286-289.

<sup>55</sup> According to the Court, there was no international conflict at that time in Somalia, as the UN troops were "peace troops" which were neither party to the conflict nor an occupying power. The Court also stated that there was no non-international conflict in the sense of common Article 3 as the fighting involved irregular, anarchic armed groups with no responsible command.

<sup>56</sup> The photographs showed prisoners connected to electric wires, left naked on the floor or engaged in simulated sex acts. See Independent Panel to Review Department of Defense Detention Operations, August 2004 (<http://www.defense.gov/releases/release.aspx?releaseid=7663>).

<sup>57</sup> See P. Bartine, 'Lessons of Abu Ghraib : Understanding and Preventing Prisoner Abuse in Military Operations', *Defense Horizons*, n° 64, November 2008.

<sup>58</sup> Seven Army reservists in a Military Police unit were convicted for their misconduct in the Abu Ghraib prison : Charles Graner, sentenced to ten years; Sabrina Harman, sentenced to six months ; Ivan Frederick, sentenced to eight and a half years; Javal Davis, sentenced to six months; Jeremy Sivits, sentenced to one year; and Lynndie England, sentenced to three years. One person, Megan Ambuhl, was discharged from the Army without serving prison time. They were charged, variously, with conspiracy, maltreatment of detainees, dereliction of duty, assault, indecent acts, lying to Army investigators, and taking pictures of detainees.

of EU Force Commanders or EU Heads of Mission on internationally contracted or locally contracted personnel, or the disciplinary jurisdiction of 'national authorities or relevant authorities within the EU institutions'<sup>59</sup> underlying the specific problems that can arise in a peacekeeping context.

### **3.2. The EU and Member States' Responsibility for the Action of Peacekeeping Personnel**

The question of engagement of the responsibility of the EU and Member States for the activities of the European peacekeeping missions is a matter of debate. It is a matter of concern to note that, according to the general understanding among political decision makers and military commanders, the engagement of responsibility – either that of the Member States or of the EU, by the ECtHR or the European Court of Justice – for ESDP actions would be impossible in the near future. However, the progressive evolution on rules and applicable principles on international responsibility mark a diverging tendency. In particular, the International Law Commission's Draft Articles on the Responsibility of International Organizations, the evolution of the ECtHR case law and, finally, the future adhesion by the European Union to the EConvHR have to be taken into account.

- **The state of ECtHR case law: *Behrami and Behrami v. France and Saramati v. France, Germany and Norway***

In the joined cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,<sup>60</sup> the ECtHR had the opportunity of addressing for the first time the engagement of the responsibility of States in relation to the conduct and behaviour of peacekeeping agents.

The *Behrami and Saramati* case arose out of events relating to the international territorial administration of Kosovo by peacekeeping Forces. On 10 June 1999, after the withdrawal of the FRY forces from Kosovo, the United Nations Security Council adopted Resolution 1244 authorising the Secretary General to establish an interim administration for Kosovo (UNMIK). UNSC Resolution 1244 also provided for the establishment of a security presence (KFOR) by UN Member States and relevant international institutions (including substantial NATO participation) "under UN auspices" and "unified command and control".<sup>61</sup> As for the facts out of which the claims arose, we will briefly recall that in the case *Behrami* a child was killed and his brother injured because of a bomb explosion in the area of Mitrovica, which was under the responsibility of the Multinational Brigade (MNB) led by France; whereas the *Saramati* case concerned the detention of Mr Saramati by KFOR.<sup>62</sup>

The question responded to by the Court was whether it was competent to decide upon the responsibility of States who exercise relevant control of Kosovo, particularly the ones in charge of demining (in the case of *Behrami*) and detention (in the case of *Saramati*). After establishing the binding character of Security Council resolutions establishing the international presence in Kosovo, the Court considered it was not entitled to control the acts of States Parties taking place in the context of UN peacekeeping missions. "To do so would be to interfere with the fulfillment of the UN's key mission in this field including [...] with the effective conduct of its operations". This included UNMIK as much as KFOR: while NATO (through the KFOR

<sup>59</sup> General Standards of Behaviour for CSDP Operations, p. 11.

<sup>60</sup> Agim Behrami and Bekir Behrami v. France (Application n° 71412/01) and Ruzhdi Saramati v. France, Germany and Norway (Application n° 78166/01), Grand Chamber decision as to the admissibility of the case, 2 May 2007

<sup>61</sup> Op. Cit., ECHR, *Behrami v. France and Saramati v. France, Germany and Norway*, § 3-4

<sup>62</sup> *Ibid* §5-17

Commander down to the multinational brigades and to the troop contributing nations) exercised operational command, and as such KFOR's actions were directly attributable to the UNSC, which exercises authority and control. This conclusion led the ECtHR to declare itself incompetent *ratione personae* since the UN is not a Contracting Party to the Convention.

The *Behrami and Saramati* decision is widely criticised in legal doctrine as making a wrong use of the International Law Commission's (ILC) Draft Articles effective control test, a criticism shared by the Special Rapporteur and the ILC itself.<sup>63</sup> Indeed, the decision is open to criticism for its highly unsatisfactory reasoning, though a distinction must be made between the conclusions reached for KFOR and UNMIK. The latter's activities were clearly attributable to the UN since there are no doubts whatsoever that it is a subsidiary organ of the Organisation. However, the ECtHR's reasoning regarding the attribution of KFOR's conduct to the UN suffers from serious shortcomings: the ECtHR failed to fully comprehend the legal relationship between KFOR and the UN; it misapplied the rules governing the responsibility of international organisations, even though ample references to the ILC's draft articles on the issue were made. For the ECtHR, the key issue in respect to the attribution linkage of the acts of KFOR was whether the Security Council retained "ultimate authority and control" so that operation command only was delegated. This is somehow surprising given that, as the ILC Special Rapporteur notes, "when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question".<sup>64</sup> Indeed, the essential question was not whether UN exercised exclusive command, but whether or not it was effective.<sup>65</sup> The answer to this matter required from the ECtHR a much thorough analysis of the level of control of the Troop Contributing Nations (TCN) over KFOR as well as of the realities and practicalities of the chain of command running from UNSC to TCNs.<sup>66</sup>

### **Moving forward onto other issues raised by the *Behrami and Saramati* judgment: (Bosphorus presumption)**

The Court rejected the applicant's argument that the substantive and procedural protection of fundamental rights provided by KFOR was not equivalent to that under the Convention and that therefore the *Bosphorus* case presumption.<sup>67</sup> of Convention compliance on the part of the

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<sup>63</sup> International Law Commission, Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009, (A/64/10), p. 67

<sup>64</sup> *Ibid.*, p. 67

<sup>65</sup> So is the belief of the ILC Special Rapporteur, Giorgio Gaja who argues that "when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question". *Ibid.*, p. 63

<sup>66</sup> On this point, see also: European Commission for Democracy through Law ("Venice Commission"), *Opinion on human rights in Kosovo: Possible establishment of review mechanisms*.

<sup>67</sup> In its *Bosphorus* judgment, the Court held that, while a State was not prohibited by the Convention from transferring sovereign power to an international organization in order to pursue cooperation in certain fields of activity, the State remained responsible under Article 1 of the Convention for all acts and omissions of its organs, regardless of whether they were consequence of the necessity to comply with international legal obligations, Article 1 making no distinction as to the rule or measure concerned and not excluding any part of a State's jurisdiction from scrutiny under the Convention. The Court went on however, to hold that where such State action was taken in compliance with international legal obligations flowing from its membership of an international organization and where the relevant organization protected fundamental rights in a manner which could be considered at least equivalent to that which the Convention provides, a presumption arose that the State had not departed from the requirements of the Convention. Such presumption could be rebutted if in the circumstances of a particular case, it was considered that the protection of Convention rights was manifestly deficient: in such a case the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.

respondent states was to be rebutted. The Court, however, refused to apply the principle of "equal protection of human rights" developed in the *Bosphorus* case on the basis that the circumstances of the present case were essentially different since the impugned acts and omissions of KFOR and UNMIK could not be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. That is, the present case was essentially distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States and of the Court's competence *ratione personae*<sup>68</sup>.

Case of *M.S.S v. Belgium and Greece* (Application no. 30696/09), ECHR Grand Chamber decision of 21 January 2011, § 338 et s.s.

In the *Bosphorus* case the "Court found that the protection of fundamental rights afforded by Community law was equivalent to that provided by the Convention system (*ibid.*, § 165). In reaching that conclusion it attached great importance to the role and powers of the ECJ – now the CJEU – in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance (*ibid.*, § 160). The Court also took care to limit the scope of the *Bosphorus* judgment to Community law in the strict sense – at the time the "first pillar" of European Union law (*ibid.*, § 72)".

### **3.3.2 THE ILC DRAFT ARTICLES ON RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS AND THEIR POSSIBLE INFLUENCE ON FURTHER CASE LAW ON THAT POINT**

The attributability of internationally wrongful conduct to an International Organisation is governed by the rules of international Law concerning the responsibility of International Organisations. Even though no definite statement of the rules exists, the ILC on-going work on the responsibility of International Organisations<sup>69</sup> serves as a valuable guide to the current position of customary international law on this area<sup>70</sup>. Never mind the authority with which such work is vested, the Court did not apply the law of international responsibility as endorsed by the International Law Commission. Indeed, according to the ILC Draft Articles, the necessary level of control required in this context is that of effective control, not overall control or ultimate authority. Surprisingly, though, the ECtHR has upheld the "ultimate authority and control" criterion in further Judgments. In *Kasumaj v. Greece*<sup>71</sup> and *Gajić v. Germany*<sup>72</sup> the Court reiterated its view concerning the attribution to the United Nations of conduct taken by national contingents allocated to KFOR. Likewise in *Berić and others v. Bosnia and Herzegovina*<sup>73</sup> it quoted verbatim and at length its previous decision in *Behrami and Saramati* when reaching the conclusion that also the conduct of the High Representative in Bosnia and Herzegovina had to be attributed to the United Nations.

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Case *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* (Application n° 45036/98), ECHR, Grand Chamber decision of 30 June 2005, § 152-156

<sup>68</sup> Op. Cot., ECHR, *Behrami and Saramati* § 151

<sup>69</sup> For further details on the ILC work on responsibility of International Organisations see <http://www.un.org/law/ilc/>

<sup>70</sup> Op. Cit. SAURI, p. 163

<sup>71</sup> Case *Ilaz Kasumaj v. Greece*, (Application n° 6974/05) ECHR Decision of 5 July 2007

<sup>72</sup> Case *Slavisa Gajic v. Germany*, (Application n° 31446/02), ECHR Decision of 28 August 2007

<sup>73</sup> Case *Dusan Beric and others v. Bosnia and Herzegovina*, (Applications ns° applications Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05) ECHR Decision of 16 October 2007

There is consequently a real danger that in future cases the ECtHR, with reference to *Behrami* and *Saramati*, will simply declare itself incompetent to review the activities of national contingents carried out in the course of peace support operations authorised by the SC under Chapter VII, and in this way remove a large sphere of State activity from its scrutiny. Not only will this be problematic in terms of undermining the possibilities of redress to those private parties who have suffered damage or injury caused by peace support operations<sup>74</sup> but it is also worrying that the ECtHR's line of reasoning for this absence of judicial review is based on a misinterpretation of existing international law. The ILC Draft Articles are clear on this point and the Commission sticks to the effective control test.

Indeed, the effective control test is a well established one in international law of responsibility, and the ECtHR did not apply it correctly. The criterion of effective control was upheld by the International Court of Justice in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*<sup>75</sup> and further endorsed in the *Genocide* case<sup>76</sup>. This criterion has been retained by the International Law Commission in Article 6 Draft Articles. Draft Article 6 provides that the conduct of an organ of a state which is placed at the disposal of an international organisation shall be considered under international law to be conduct of the international organisation if the latter exercises effective control over such conduct<sup>77</sup>. As the commentary thereto shows, the Article was mainly written to codify the rule relating to the international responsibility of the United Nations and/or regional organisations for a military operation using the forces of its Member States<sup>78</sup>.

Furthermore, the ILC recognises the possibility of concurrent responsibility. Therefore, provided that all the other conditions are met, a violation of a ECHR right by a national contingent may give rise to the sending State's responsibility under the ECHR irrespective of the fact that the same conduct may also be attributed to the UN and may give rise to its international responsibility<sup>79</sup>

"The attributability of the relevant acts and omissions to UN merely demonstrates that the UN could in principle incur responsibility for the internationally wrongful conduct of KFOR and UNMIK, but this neither excludes the possibility that the same conduct may also be attributable to the respondent States [or other international organisations] and may engage their responsibility"<sup>80</sup>

Particularly since national contingents ... a dual legal position insofar as they are subsidiary organs of the sending States and subsidiary organs of the commanding International Organisation.

Chapter IV does not question the attribution of the act to the state (triggering its responsibility under state responsibility rules), but creates an additional responsibility of the international organisation, which may have contributed to internationally wrongful act by any of the means

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<sup>74</sup> The possibilities of redress are already meager since the options available to private parties are limited due to the jurisdictional immunities enjoyed by peace support operations and their individual members. *Op. Cit.*, SAURI, p. 167

<sup>75</sup> *Militarv and Puramilitary Activities in und aguinat Nicaragua*, (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14

<sup>76</sup> *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (*Bosnia and Herzegovina v. Yugoslavia*), Order of 10 September 200, ICJ Reports 2001, p. 572

<sup>77</sup> International Law Commission, Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009, (A/64/10) , p. 62

<sup>78</sup> *Ibid.*, p. 62

<sup>79</sup> *Ibid.*, p. 167

<sup>80</sup> *Ibid.*, p.164

enumerated in Draft Articles 13-16. Chapter IV situations therefore would generally lead to responsibility of both the member state and the organization for the conduct in question

As the Special Rapporteur acknowledges “dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor vice versa does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ”<sup>81</sup>.

### 3.3.3 THE ENGAGEMENT OF EU RESPONSIBILITY FOR ACTIONS OF CSDP PERSONNEL

According to Article 340 TFEU “the Union shall [...] make good any damage caused by its institutions or by its servants in the performance of their duties”. This provision, in principle, applies to all the Union’s activities, whatever the nature of the policy being implemented; to be specific, it also applies to the Common Foreign Security Policy (CFSP) including crisis management operations. However, insofar as the actors implementing CFSP are not institutions<sup>82</sup> neither servants<sup>83</sup> of the European Union within the meaning of Article 340 TFEU, the application of this provision is, in principle, deterred. Hence, the non-contractual liability of the EU would not be engaged in the event of damage caused by CFSP actors in the performance of their duties.

Be this as it may within EU Law, the fact is that under the Law of International Responsibility such formalities are not upheld and other criteria are used for attributing the conduct of an organ or agent to an international organisation. In this sense, article 5 of the Draft Articles of the International Law Commission on the Responsibility of International Organizations states that

*“The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization”<sup>84</sup>*

This provision is in tune with the conclusions upheld by the International Court of Justice in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*. The ICJ, while dealing with the status of persons acting for the United Nations, considered relevant

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<sup>81</sup> Op. Cit., (A/64/10), p. 65

<sup>82</sup> Although the European Court of Justice in its Case C-370/89 pronounced itself on the scope of the term “institution”, the conclusions thereby reached concern the European Central Bank and the European Ombudsman and therefore cannot extend to the European External Action Service or to the civilian/military crisis management operations. MARHIC, G., “Violations of human rights and international humanitarian law in the context of EU missions: assessment of EU liability”,...Castellón, p. 2

<sup>83</sup> Since the Court of Justice has not yet pronounce on any possible broadening of the term “servant” a strict interpretation must hence prevail. Therefore, and in virtue of the nature of their mission and the modalities of their recruitment, neither the High Representative of the Union for Foreign Affairs, nor the commanders of the Union’s military crisis management operations, nor the European Union Special Representatives, nor the heads of the EU’s civilian crisis management are “servants” within the meaning of Article 340 TFEU. Although the staff of the European External Action Service are indeed servants of the EU within the meaning of Article 340, the fact is that insofar as no real decision making power has been conferred to the EEAS as regards the CFSP, the possibility that its staff might cause damage in performing their duties, which are preparatory in nature, appears to be purely theoretical. *Ibid*, p. 2-3 (for further clarifications on this issue, see MARHIC’s discussion on this issue)

<sup>84</sup> International Law Commission, Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009, (A/64/10) , p. 58  
<http://untreaty.un.org/ilc/reports/2009/2009report.htm>

only the fact that a person had been conferred functions by an organ of the United Nations and not whether the person in question had or did not have an official status

*“The Court understands the word ‘agent’ in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions - in short, any person through whom it acts”*<sup>85</sup>

As the ILC Report on Responsibility of International Organizations asserts, what was said by the International Court of Justice with regard to the United Nations applies more generally to international organizations<sup>86</sup>, including the EU<sup>87</sup>.

Thus, the non-identification of CSFP actors as “institution” or “servant” is not determinant<sup>88</sup>, since what matters in terms of attribution of conduct (and ultimately of engagement of responsibility) is whether the agent (irrespective of whether officially recognized as “servant” or not) acts for the International Organization on the basis of functions conferred by an organ of the organization. If it is so the case, any damage caused by CSFP actors (regarded by EU Law as “non-servants”) is capable of engaging the non-contractual liability of the European Union (as long as all the other necessary conditions are met, particularly that the act in question is wrongful under international law)

Although not truly relevant in terms of attribution of conduct to the EU, the fact that the actors that implement the EU’s Foreign and Security Policy are not “servants” or “institutions” within the meaning of article 340 of the TFEU does have important consequences as regards the conditions under which the EU responsibility might be exercised. Indeed, if they are neither “institutions” nor “servants” within the meaning of Article 340 TFEU, article 268 TFEU<sup>89</sup> is not applicable and, thus, the European Court of Justice does not have jurisdiction in disputes relating to missions conducted by the EU pursuant to the CFSP or their personnel<sup>90</sup>.

Yet the ECJ’s lack of jurisdiction for entertaining the legality of the EU’s CFSP does not mean, however, that the Union’s action as regards Foreign Policy is exempt from any kind of jurisdictional control. In accordance with the particularities of EU’s Law the Courts of the Member States have the potential for playing a fundamental role. Article 19(1) TUE, second subparagraph, states that *“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”*. Furthermore, article 274 TFEU points out that *“save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the court or tribunals of the Member States”*. Hence, the courts of the Member

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<sup>85</sup> *I.C.J. Reports 1949*, p. 177.

<sup>86</sup> Op. Cit., International Law Commission (A/64/10), p.57

<sup>87</sup> It is worth remembering that the Court of Justice of the EU concluded in its case C-286/90 *Poulsen and Diva Navigation Corp.* that the EU, within the exercise of its competences has to respect International Law, including the case law of the International Court of justice. In addition, in the case C-192/99 *Kaur*, the Court held that customary rules of international law have a binding force and should therefore be applied in the context of EU Law

<sup>88</sup> The sole role played by the “rules of the organization” in the attribution of conduct is to determine which functions are entrusted to each organ or agent (Article 5 paragraph 2). However, Article 5 paragraph 2 does not make the application of the rules of the organization the only criterion, the way it is worded leaves the possibility open so that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization. Op. Cit., International Law Commission (A/64/10), p. 58

<sup>89</sup> Article 268 TFEU provides that “The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in...Article 340”

<sup>90</sup> Moreover, in *Segi and others v. Council* (C-355/04 P) the Court concluded that there is no presumption in favour of its jurisdiction since “Article 35 TEU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever” *Ibid.*, MARHIC, p. 4



States offer the possibility to potential victims of damaging acts caused by crisis management missions to exercise their right to effective remedy.

It is worth noting that national courts are not to limit themselves just to the examination of the question of making good damage caused by CFSP actors in the context of crisis management operations. If an act of the Council regulating the conduct of such operations was to breach the fundamental principles of the EU the national court in question could, in accordance with national procedural rules, find that such violation existed. The legal reasoning for it being the fact that the CSDP, like the CFSP as a whole, is conducted in accordance with the provisions of Article 21 and 23 TEU<sup>91</sup>, and is based in particular on respect for human rights<sup>92</sup>.

Therefore, and as MARHIC concludes, it would be wrong to consider that the legality of EU's action in CSDP matters is exempt from any possibility of being challenged. Certainly, any questioning of the legality of such acts would not be covered by the jurisdiction of the Court of Justice of the Union, but would fall within the indirect jurisdiction exercised by the courts of the Member States<sup>93</sup>.

Moreover, if finally the accession of the EU to the European Convention on Human Rights and Fundamental Freedoms (foreseen in Article 6.2 TEU) materializes, it will be an additional means for challenging the responsibility of the EU for internationally wrongful acts caused by crisis management operations. In this respect it must be made clear that nowhere in Article 6(2) TEU is implied that certain of the Union's policies should be excluded when the Union accedes to the ECHR so there is no legal difficulty in that accession also covering activities in the area of the CFSP<sup>94</sup>.

As for the duty established in Article 13 ECHR, according to which *"everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"*, does not seem to demand an amendment of the fact that the ECJ is not competent to entertain CFSP issues given that the requirement of the right to effective remedy is already satisfied by the provisions of EU law guaranteeing access to national courts. Therefore, and as regards CFSP and CSDP the existence of the possibility of recurring to courts of the Member States already grants an effective remedy, this meaning that it will not be necessary to amend the provision of the Treaties at the time the EU's accession to the ECHR, so as to introduce a provision on the jurisdiction of the Court of Justice of the EU on this subject<sup>95</sup>.

Article 268 TFEU provides that 'The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340'.

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<sup>91</sup> Article 21(1), first subparagraph provides 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". This Article is part of Chapter 1 of Title V of the TEU (general provisions of the EU's external action).

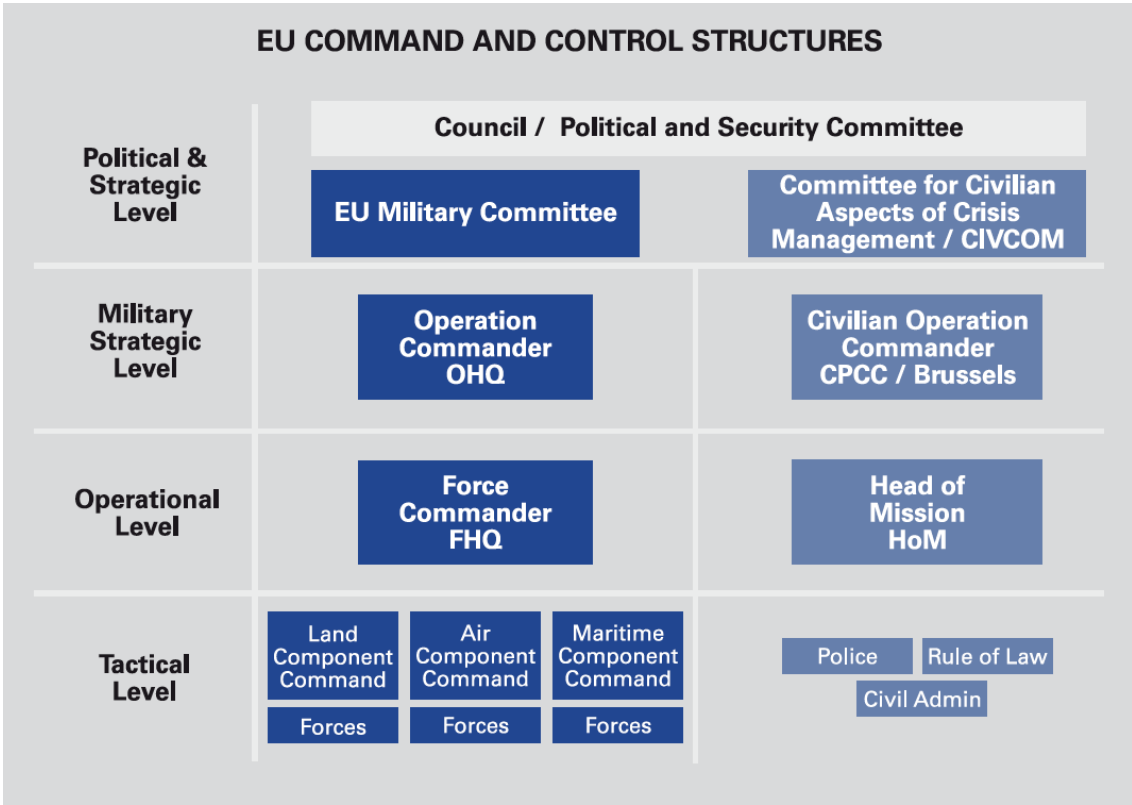
Article 23 of the TEU provides that "The Union's action on the international scene, pursuant to this Chapter, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with the general provisions laid down in Chapter 1" This Article is part of Chapter 2 of Title V of the TEU (specific provisions on the common foreign and security policy). The term "pursue the objectives" and "be conducted in accordance with" demonstrate that the EU is under a legal obligation to act accordingly in CFSP, including CSDP matters.

<sup>92</sup> Op. Cit., MARHIC, p. 5

<sup>93</sup> *Ibid*, p. 7

<sup>94</sup> *Ibid*, p. 7

<sup>95</sup> *Ibid*, p. 8



Source:

**Future accession of the European Union to the European Convention on Human Rights**

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# ANNEX

## Code of Conduct for EU CSDP Personnel

### Compliance by EU personnel involved in CSDP operations with human rights law and international humanitarian law

#### Chapter 1- Field of application

The Code of conduct for EU personnel participating in CSDP missions will be applicable to the following missions and the following personnel:

##### Section 1. Missions concerned

The concerned missions are the ones provided for in Articles 42 and 43 of the Lisbon Treaty. Article 43 provides that CSDP missions include 'joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories'.

##### Section 2. Applicability to EU personnel participating in CSDP missions

This Code of conduct is directed towards EU personnel participating in ESDP missions, including the following:

- Military personnel seconded by Member States, Third States and EU institutions;
- Civilian personnel seconded by Member States, Third States and EU institutions;
- Internationally contracted civilian personnel;
- Locally contracted civilian personnel.<sup>96</sup>

#### Chapter 2. Applicable Law

##### Section 3. Applicability of international humanitarian law and international human rights law

The relevant principles and rules of international human rights law, in particular the EU Fundamental Charter on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms,

The relevant principles and rules of international humanitarian law are applicable to EU forces actively engaged as combatants in situations of armed conflict, to the extent and for the duration of their engagement. They are accordingly applicable in all missions mentioned in section 1, including operations in which the use of force is only permitted in self-defence.

In the status-of-forces agreement concluded between the EU and a receiving State, the EU undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of international humanitarian law and international human rights law.

The EU also undertakes to ensure that members of the military and civilian personnel of the force are fully acquainted with these principles and rules. The obligation to respect the said

<sup>96</sup> See Council of the EU, 'Generic Standards of Behaviour for CSDP Operations', 18 May 2005.

principles and rules is applicable to EU forces even in the absence of a status-of-forces agreement.

#### **Section 4- Applicability of national law**

The provisions of the Code of conduct for EU CSDP personnel are complementary to other legal obligations of personnel in accordance with international law, the law of the contributing State and the law of the receiving State.

#### **Treatment of civilians and persons hors de combat**

EU personnel shall, in all circumstances, treat humanely and without any adverse distinction based on race, sex, religious convictions or any other ground persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed hors de combat by reason of sickness, wounds or detention. They shall be accorded full respect for their person, honour and religious and other convictions.

The following acts against any of these persons are prohibited at any time and in any place: violence to life or physical integrity, murder as well as cruel treatment such as torture and other cruel, inhuman or degrading treatment or punishment; collective punishment; reprisals; the taking of hostages; rape; enforced prostitution; any form of sexual assault and humiliation and degrading treatment; enslavement; and pillage.

Women and children shall be especially protected against any attack, in particular against rape, enforced prostitution or any other form of indecent assault.

#### **Protection of the wounded, the sick, and medical and relief personnel**

EU personnel shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel.

EU personnel shall not attack medical establishments or mobile medical units unless they are used, outside their humanitarian functions, to attack or otherwise commit harmful acts against the EU force. These shall at all times be respected and protected.

EU personnel shall facilitate the work of the ICRC Central Tracing Agency and respect in all circumstances the Red Cross and Red Crescent emblems.

Members of the armed forces and other persons in the power of the EU force who are wounded or sick shall be respected and protected in all circumstances. They shall be treated humanely and receive the medical care and attention required by their condition, without adverse distinction. Only urgent medical reasons will authorize priority in the order of treatment to be administered.

#### **Section 5- Responsibility for violations of international humanitarian law and international human rights law**

##### **General**

In case of violations of international humanitarian law and international human rights law, military and civilian personnel of an EU force are subject to prosecution in their national courts. The International Criminal Court (ICC) has complementary jurisdiction in case of violation of grave breaches of humanitarian law.

EU personnel involved in CSDP operations should report any alleged violations by personnel of human rights and international humanitarian or international criminal law. An investigation of each complaint and where relevant subsequent prosecution should be ensured by the competent authority, particularly in cases of prostitution, sexual exploitation and sexual abuse, human trafficking and child abuse. When possible, the EU should undertake an administrative investigation and follow the criminal investigation undertaken by the sending State.

Commanders, senior management and legal advisers are to ensure that the EU personnel is aware of complaint procedures against criminal activities committed by members of EU personnel.

### **Detention and Apprehension of Persons**

EU personnel – excluding internationally or locally contracted civilian personnel – will only apprehend, transport or detain members of armed forces if it is specifically included in the EU mission's mandate.

Internationally or locally contracted personnel will only have the power to apprehend persons or guard detainees.

Any detention or apprehension of persons must be consistent with applicable national and international law. EU personnel will treat all persons detained or apprehended humanely and consistent with their status and protections under applicable human rights law and international humanitarian law, including in particular prohibitions on torture or other cruel, inhuman or degrading treatment or punishment and rights of detainees under international human rights law and international humanitarian law.

Detained members of the armed forces and other persons who no longer take part in military operations by reason of detention will be treated humanely. They shall be treated in accordance with the relevant provisions of international human rights law and international humanitarian law, in particular the Third Geneva Convention of 1949,. In case of doubt relating to their legal status, the EU personnel will provide for the highest standard of protection.

The capture and detention of members of armed forces shall be notified without delay to the Central Tracing Agency of the International Committee of the Red Cross (ICRC). The ICRC's right to visit prisoners and detained persons shall be respected.

Special protection provided for in international humanitarian law will be given to women. Particular attention will be given to the implementation of measures permitting to avoid gender based violence and sexual harassment. They shall be held in quarters separated from men's quarters. They shall be under the supervision of women.

In cases where children are arrested, detained or interned by the EU force, they should continue to benefit from special protection provided for under international law.

### **Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment**

EU personnel will not engage in torture or other cruel, inhuman or degrading treatment or punishment.

The prohibition of torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is absolute in any circumstances. Superior orders or exceptional circumstances such as an armed conflict or an imminent armed conflict, a threat to national or international security, internal political instability, or any other public emergency, can never be a justification for engaging in torture or other cruel, inhuman or degrading treatment or punishment. In particular, this prohibition is extended to operations launched in the framework of the fight against terrorism, including by supporting third countries in combating terrorism on their territories.

Personnel should report any alleged act of torture and other cruel, inhuman or degrading treatment or punishment. Reports will automatically be made to the EU, in accordance with the reporting mechanism established in the framework of the ESDP operation, without prejudice to any parallel national reporting system.

### **Sexual Exploitation and Abuse or Gender-Based Violence**

EU personnel will not engage in sexual exploitation (including prostitution) and abuse or gender-based violence or crimes, including rape, sexual harassment, or any other form of sexual abuse or violence.

All forms of sexual conduct with children as well as child pornography are prohibited. EU personnel must not in any way involve themselves in sexual exploitation, abuse and trafficking of children.

EU personnel should report any alleged act of sexual exploitation (including prostitution) and abuse or gender-based violence or crimes. Reports will automatically be made to the EU, in accordance with the reporting mechanism established in the framework of the ESDP operation, without prejudice to any parallel national reporting system

### **Human Trafficking**

EU personnel must not in any way engage in or contribute to human trafficking.

EU personnel should report any alleged act of human trafficking. Reports will automatically be made to the EU, in accordance with the reporting mechanism established in the framework of the ESDP operation, without prejudice to any parallel national reporting system

For the purposes of this Code, human trafficking is the recruitment, harbouring, transportation, provision, or obtaining of a person for (1) a commercial sex act induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or (2) labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, debt bondage, or slavery.

## **Chapter 3. Protection of the civilian population**

In the planning, launching and conduct of military operations, the EU personnel will respect the rules of international humanitarian law and act in accordance with the principles of distinction, proportionality, and humanity.

Monitoring and reporting the respect of those rules and principles by EU personnel is the particular responsibility of the commander of the EU force.



All the members of EU personnel should report any alleged violation of the rules protecting the civilian population, in particular the rules protecting children and women. Reports will automatically be made to the EU, in accordance with the reporting mechanism established in the framework of the ESDP operation, without prejudice to any parallel national reporting system.

In addition, EU personnel should report to relevant authorities and, where applicable, to international courts and tribunals, all allegations of serious human rights and international humanitarian law violations. When possible, they will signal to potential aggressors or perpetrators of human rights violations that they will be held accountable.

The EU personnel shall make a clear distinction at all times between civilians and combatants and between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited.

Civilians shall enjoy the protection afforded by this Chapter, unless and for such time as they take a direct part in hostilities.

The EU personnel shall take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian peoples.

In its area of operation, the EU force commanders shall avoid, to the extent feasible, locating military objectives within or near densely populated areas, and take all necessary precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations.

The EU force commanders are prohibited from launching operations of a nature likely to strike military objectives and civilians in an indiscriminate manner, as well as operations that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.

The EU force shall not engage in reprisals against civilians or civilian objects.

## **Section 6- Means and methods of combat**

The right of the EU force to choose methods and means of combat is not unlimited.

The EU force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases and biological methods of warfare; bullets which explode, expand or flatten easily in the human body; and certain explosive projectiles. The use of certain conventional in section, such as non-detectable fragments, anti-personnel violence to life or physical integrity; murder as well as cruel mines, booby traps and incendiary weapons, is prohibited.

The EU personnel is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.

The EU personnel is prohibited from using weapons or methods of combat of a nature to cause unnecessary suffering.

The EU personnel will respect the special protection accorded to cultural and religious objects. In its area of operation, the EU force shall not use such cultural property or their immediate surroundings for purposes, which might expose them to destruction or damage.

Theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited. Reports will automatically be made to the EU, in accordance with the reporting mechanism established in the framework of the ESDP operation, without prejudice to any parallel national reporting system.

