

The Applicability of Human Rights Instruments to European Union's CSDP Operations: Framing the Challenges*, **

*La aplicabilidad de los instrumentos de Derechos Humanos
a las operaciones de gestión de crisis de la PESC:
delimitando los retos*

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Abstract: With the adoption of the Treaty of Lisbon, the mainstreaming of human rights reached a new dimension in EU external action. The promotion and protection of human rights through the European Union Crisis Management Operations present important operational difficulties that could undermine EU credibility and its mission's effectiveness. This article seeks to frame the challenges that arise in legal and practical terms from the applicable human rights and humanitarian law to EU crisis management missions.

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Resumen: *Con la aprobación del Tratado de Lisboa, la integración de los derechos humanos ha alcanzado una nueva dimensión en la acción exterior de la UE. La promoción y protección de los derechos humanos a través de las Operaciones de Gestión de Crisis presenta importantes dificultades operacionales que podrían debilitar la credibilidad de la UE y la efectividad de las misiones. Este artículo pretende enmarcar los retos que surgen en términos legales y prácticos respecto de la aplicación del Derecho Internacional de los Derechos Humanos y el Derechos Internacional Humanitario a las Operaciones de Gestión de Crisis de la UE.*

Palabras clave: *UE, PCSD, Operaciones de Gestión de Crisis, aplicación de los derechos humanos. Derecho internacional humanitario.*

I. Introduction

The mainstreaming of human rights in the European Union (EU) external policies has added a new dimension to the promotion and protection of human rights by the EU, which has been evidenced by an expansion of EU instruments and tools where human rights have become a major cross-cutting factor. Nonetheless, the evolution of EU human rights internal and external action has not reached the level of an EU autonomous and separately institutionalized human rights policy. The most recent “mainstreaming” general documents, the EU *Strategic Framework and Action Plan on Human Rights and Democracy*,¹ do themselves draw on pre-existing policies, seeking to coherently organize their human rights components².

¹ The *Strategic Framework on Human Rights and Democracy* establishes the principles, objectives and priorities that must guide EU's action. Among its general objectives, two of them could be highlighted: the EU's and its Member States' commitment to promote the universality of human rights and the EU's determination to promote human rights and democracy in its external action. In addition, the *Strategic Framework* highlights some areas of action related to CSDP. See Council of the European Union, *Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12 (2012), at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/131181.pdf (accessed on 10 November 2014), p. 2, 7, 12, 16.

² In any event it is remarkable that the EU has developed a diversity of instruments (the so-called toolkit) in order to contribute to the specific objective of the promotion of human right and democracy worldwide, such as in particular, the EIDHR, the human rights clauses, the human rights focal points in EU Delegations, the EUSR for Human Rights, and the human rights dialogues and consultations. Moreover, the EU uses other traditional instruments of its CFSP to promote human rights and democracy in its relations with third countries. These instruments respond to the EU's objective of mainstreaming human rights and democracy in all its policies and actions toward third countries. Among them, it can be highlighted the EU's

Much of the referred expansion has had to do with security policy, which grew as the EU assumed ever increasing responsibilities throughout the world³. In the context of the international security agenda, formulated at the end of the Cold War, where the security-human rights-nexus featured prominently (later theorised by the doctrine of human security), it was aimed at giving response to the challenges of the “new wars” that characterised the post-Cold War period. Mr. Javier Solana, the first High Representative for Common Foreign and Security Policy, was instrumental in the adoption of the European Security Strategy (2003) by the European Council⁴ which prominently featured human rights — though not explicitly using this term — in the framework of its aims, linking them with international stability.

Since then, the EU security policy has experienced considerable expansion, marked by the development of an operational capability that has enabled it to deploy military and civilian crisis management missions in third countries, in pursuit of EU foreign and security policy. As a result of this development, the EU has launched 34 operations and missions since 2003 that are characterised by their diversity in nature and scope: from large-scale military and civilian deployments to more modest security sector and monitoring missions, where human rights and fundamental freedoms play a prominent role⁵.

action in multilateral fora, bilateral political dialogues, demarches and declarations, election support, CFSP decisions, restrictive measures and, finally, thematic and geographic financial programmes. For an extensive analysis of priorities identified by the Strategic Framework/Action Plan, see: CHURRUCA MUGURUZA, C., GÓMEZ ISA, F., GARCÍA SAN JOSÉ, D., FERNÁNDEZ SÁNCHEZ, P.A., MÁRQUEZ CARRASCO, C., MUÑOZ NOGAL, E., NAGORE CASAS, M. and TIMMER, A., “Report mapping legal and policy instruments of the EU for human rights and democracy support”, FRAME Deliverable 12.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> (accessed on 5 May 2015).

³ For instance, deploying the EU first operations in Western Balkans and Congo.

⁴ The European Security Strategy, “A Secure Europe in a Better World”, 2003. It is Available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

In 2008, the Council adopted the Report on the implementation of the European Security Strategy: Providing Security in a Changing World <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf> (accessed on 5 May 2015).

⁵ To date, the EU and CSDP has successfully launched 34 operations and missions: seven military operations (*Concordia*, *Althea*, *Artemis*, *EUFOR DR Congo*, *EUFOR Tchad/RCA*, *Atalanta*, *EUFOR RCA*), twelve assistance/supporting missions (*EUSEC DR Congo*, *EU support to AMIS Darfur*, *EUSR BST Georgia*, *EUPAT JYROM*, *EUPT Kosovo*, *EUSSR Guinea-Bissau*, *EUNAVCO*, *EUCAP Sahel Niger*, *EUCAP NESTOR Horn of Africa*, *EUAVSEC South Sudan*) including the two most recent (*EUCAP Sahel Mali* and *EUAM Ukraine*), six police operations (*EUPM*, *Proxima*, *EUPOL Kinshasa*, *EUPOL COPPS*, *EUPOL DRC*, *EUPOL Afghanistan*), three rule of law missions (*EUJUST THEMIS*, *EUJUST LEX*, *EULEX Kosovo*), three border missions (*EUBAM Rafah*, *EUBAM Ukraine/Moldova*, *EUBAM Libya*), and two monitoring missions (*AMM* and *EUMM Georgia*). See at <http://www.csdpmap.eu/mission-chart>.

Under EU law, the founding Treaties lead the Union to respect human rights whenever it acts on the international scene, including in the field of crisis management. At the international level, the promotion of human rights is one of the main foreign policy objectives of the EU's external action. As it has been noted, the EU has thus a dual commitment to respect and to promote human rights⁶. In practice, the implementation of this dual commitment to ensure respect for and to promote human rights, encounters certain difficulties which have been the subject of recent studies⁷. One of those problems, which is the focus of this article, refers to the uncertainty surrounding the legal effect and applicability of the relevant human rights and humanitarian law instruments. The fact that is that the applicability of international human rights and humanitarian law instruments to the EU CSDP operations is problematic because the EU, unlike Member States, is not a party to those instruments.

Thus, the present article seeks to frame the challenges that arise in legal and practical terms, from the applicable human rights and humanitarian law in EU crisis management missions. Among the many problems raised by the implementation of mainstreaming human rights into CSDP operations, this paper will examine the applicability of human rights instruments to CSDP missions, and will identify the human rights obligations of the EU. The possible accountability of the EU for human rights violations conducted by personnel in an EU-led crisis management mission will be assessed, by analysing judicial decisions of the European Court of Human Rights. The paper will also provide an overview of the progress that has already been made in the mainstreaming of human rights as one of the best means to avoid the accountability of the EU for human rights violations.

If the EU does not live up to its own proclaimed standards of human rights protection, it would not only jeopardise the success of its missions. but it would also weaken its credibility as an international security actor, resulting in the potential of losing its international legitimacy in the long-run.

⁶ This statement is supported by SARI, A. and WESSEL, R.A, *Human Rights in EU Crisis Management Operations: A duty to respect and protect?*, Cleer Working Papers 2012/6. p. 8. See at <http://www.asser.nl/media/1635/cleer-working-paper.pdf> (accessed on 5 April 2015). Notwithstanding, other authors such as Lorand Bartels consider that according to the TEU, the EU has the obligation to respect human rights in its external action, but not the obligation to protect and fulfill. See BARTELS, L., *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, *The European Journal of International Law*, Vol. 25, No. 4, 2014., p.1075, at <http://ejil.oxfordjournals.org/content/25/4/1071.full.pdf+html> (accessed on 10 April 2015).

⁷ *Ibid.* p. 9.

II. The EU legal and policy framework on the promotion and respect for human rights in EU missions

This section aims to set out the overall EU legal and policy framework on human rights and their main features.

1. *Human rights as a foreign policy goal of the European Union*

Although it was conceived as an international organization whose primary goal was to create a common market, the EU has been gradually expanding its competences to more fields, such as external action and external policies. Thus, the original aim of the founding treaties did not link the need to respect human rights to the foreign policy goal to promote them until 1992, when Article J.1 (2) of the then new EU Treaty of Maastricht included as a Common Foreign and Security Policy (CFSP) goal, *inter alia*, ‘to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms’.

The Treaty of Maastricht formalized for the first time the jurisprudential recognition of human rights and fundamental freedoms. The jurisprudence of the European Court of Justice (ECJ) has stated that human rights laws are binding for the former European Community, affirming that “fundamental Human Rights are part of the Community Law”⁸. This statement was made in light of the lack of reference to human rights in the treaties, and identifies one of the EU’s sources of obligation: the general principles of EU Law.

In the subsequent evolution, “the protection of human rights by EU institutions has grown to become a concern alongside each further transfer of powers to the EU, since the organization lacked any clear legal framework”⁹. Although the protection of human rights in Europe reached the highest degree of development with the European Convention on Human Rights (ECHR) and the regional system of protection established by the Council of Europe, the EU seemed unable to reduce the gap that kept it apart from this first European system. The fact that this gap featured for a long time undermined EU credibility in fostering a human rights external

⁸ Issue 29/69 *Erich Stauder v. Stadt Ulm – Sozialamt* [1969] ECR 419, at p. 425.

⁹ ECJ Decision, 28th March, 1996 at [http://curia.europa.eu/juris/liste.jsf?pro=AVIS%252C&lgrec=es&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=c-2%252F94&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=425321](http://curia.europa.eu/juris/liste.jsf?pro=AVIS%252C&lgrec=es&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=c-2%252F94&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=425321) (accessed on 5 April 2015).

policy. With the adoption of the Treaty of Lisbon, the EU has filled this gap to some extent, since references to respect for human rights have been included in different articles, constituting a source of obligation for the EU. These new provisions have also opened the path towards better judicial protection of individuals against breaches committed within the EU framework, as Article 6 establishes the duty of the EU to accede to the ECHR¹⁰.

In accordance with the current EU legal framework, both human rights and foreign policy have solid basis in the primary legal sources, most importantly in the TEU.

References to human rights in the TEU start in the Preamble, supporting the adherence of the EU to human rights, and continue in Article 2, where human rights are considered one of the values on which the EU is founded. Article 3(5) of the EU Treaty now states that in its relations with the wider world, the Union shall contribute to “the protection of human rights... as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”. Hence, “the references to human rights in the TEU constitute a source of obligation for the EU grounded in its own rules”¹¹. Additionally, Article 6 TEU confirms the sources for human rights protection identified by the ECJ and brings new obligations to the EU

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

The general human rights clauses (Articles 2, 3 and 6 of the TEU) have been conceived to increase the effectiveness of the EU human rights foreign policy. The Treaties confirm specifically that human rights are part of the Common Foreign and Security Policy (CFSP) framework, as set out in Article 21 (1) subparagraph 1 of the TEU:

¹⁰ Accession of the EU to the ECHR seems to be further that anticipated in light of the CJEU's Opinion 2/13 issued on 18 December 2014. The CJEU held that the Draft Agreement on the Accession of the EU to the ECHR has so many shortcomings that cannot be considered compatible with EU law. See at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=480235>. See also the commentary by BUYSE, A., “CJEU Rules: Draft Agreement on EU Accession to ECHR Incompatible with EU Law” at <http://www.fp7-frame.eu/cjeu-rules-draft-agreement-on-eu-accession-to-echr-incompatible-with-eu-law/> (accessed on 10 April 2015).

¹¹ FERNÁNDEZ ARRIBAS, G., “International Responsibility of the European Union for the Activities of its Military Operations. The issue of effective control”, *Spanish Yearbook International Law*, n.º 33, 2013-2014, p. 34.

“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”.

Under this provision, the universality and indivisibility of human rights are upgraded to guiding principles of the EU’s external action. From the mentioned legal bases (Art. 2, 3, 6, 21 (1)) it is possible to infer that human rights shall be respected in EU operations abroad¹².

The Treaty also encourages the EU to “build partnerships with third countries, regions or global organizations which share” those principles, thus tacitly denying full legitimacy to enter into negotiations of any kind —this provision applies to all wings of its external policy— with countries openly acting against such principles. The Lisbon reform has provided the European Court of Justice (ECJ) with jurisdiction over the general provisions on external action, but not specifically over the CFSP (Article 24(1) subparagraph 2).

Additionally, Article 21(2)(b) locates the consolidation and support of human rights and the principles of international law among the goals which the common policies and actions must pursue ‘in all fields of international relations’. The Treaty also stresses that human rights promotion should happen through a high level of international cooperation (TEU Art. 21(2)). This obligation applies to areas specifically mentioned in the Treaty on the Functioning of the European Union, like foreign commercial policy, development, financial and technical cooperation and humanitarian aid.

As noted, “the inclusion of human rights concerns has a double effect: all EU policies, including foreign policy, is subject to human rights standards, thus enshrining respect for human rights as a limit; and human rights promotion, on the international level, is an important goal of foreign policy”¹³.

The referred provisions have been reinforced by the policy commitments expressed in the Strategic Framework on Human Rights and Democ-

¹² Ibid. p.34. In this respect, Bartels insists that the Treaty does not include, strictly speaking, the principle of respect for human rights itself. See BARTELS, L., *op. cit.* p.1074.

¹³ See FRACZEK, S., HUSZKA, B., HÜTTNER, C., KÖRTVÉLYESI, Z., MAJTÉNYI, B., ROMSICS, G., “Report on mapping, analysing, and implementing instruments”, January 2015, FRAME Deliverable 6.1 at <http://www.fp7-frame.eu/reports/> (accessed on 10 April 2015).

racy and the Action Plan for its Implementation, adopted on 25 June 2012¹⁴. It is interesting to note that the Strategic Framework formulates a commitment about pursuing coherent objectives related to the promotion and protection of human rights internally and in the EU's external action.

Therefore, the key provisions of the constituent EU instruments indicate that the "EU is subject to its own legal obligations to respect human rights and fundamental freedoms in addition to the obligations binding its Member States"¹⁵. The founding Treaties also express a broader political commitment on the part of the Union to conduct its external activities in a manner that upholds the highest human rights standards. In this respect, it should be noted that the promotion of human rights at the international level is one of the principal foreign policy objectives of the EU's external action as a whole¹⁶. EU crisis management missions can make a significant contribution to this objective, for instance, deploying military forces in order to contribute to the establishment of a secure environment in which the humanitarian needs of local populations can be addressed¹⁷.

Among the main aspects of the EU legal framework, it may be stressed that Union law establishes that human rights to be respected during CSDP operations. The catalogue of fundamental rights is included in the EU Charter of Fundamental Rights, which has to be observed by the EU institutions in their actions, and by Member States when implementing EU law. It is accepted that such is the case when Member States act on a mandate under a Council Decision establishing a CSDP mission. Furthermore, according to Article 6 (3) TEU, the European Convention on Human Rights (ECHR) is

¹⁴ The first paragraph states: "The European Union is founded on a shared determination to promote peace and stability and to build a world founded on respect for human rights, democracy and the rule of law. These principles underpin all aspects of the internal and external policies of the European Union". The EU commit to promote human rights into all areas of external action without exception, mentioning in particular the integration of the promotion of human rights into CSDP and the promotion of the observance of international humanitarian law. The EU commits itself to pursue coherent objectives, stressing that "the EU seeks to prevent violations of human rights throughout the world and, where violations occur, to ensure that victims have access to justice and redress and that those responsible are held to account. To this end, the EU will step up its efforts to promote human rights, democracy and the rule of law across all aspects of external action. It will strengthen its capability and mechanisms for early warning and prevention of crises liable to entail human rights violations". See at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed on 10 April 2015).

¹⁵ SARI, A. and WESSEL, R.A, *op. cit.*, p.7.

¹⁶ *Ibid.* p.7

¹⁷ E.g. Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic, OJ [2007] L 279/2.

also a source of EU fundamental rights to be observed by the EU and Member States¹⁸.

2. *Promotion of human rights under the progressive framing of the Common Security and Defence Policy*

The progressive framing of a Common Security and Defence Policy, in which the human security doctrine for Europe has been embedded, has established a complementary means to external promotion of human rights. However, the original ESDP was much more concerned about the development of capabilities and the progressive building up of a new relationship with NATO that would allow for an autonomous European defence identity, which is still one of the important dimensions that explains EU's squizofrenia¹⁹ in dealing with its security and defence identity.

Yet the nature of the EU as an international security actor has pushed forward, and since the adoption of the European Security Strategy in late 2003, mentions to the EU's actorness in conflict prevention and effective multilateralism, and to the rule of law, justify the interpretation that neither of them can actually be fostered without prioritizing human rights promotion. The affirmation of the global actor by the EU committed to the rule of law, entails a global responsibility to protect and promote human rights²⁰.

The scope of CSDP operations has experienced considerable evolution over time. The Maastricht Treaty cleared the path to a European defence strategy, and the Amsterdam revision built goals of common operations on the Western European Union's 'Petersberg Tasks'. Nonetheless, implementation had to wait until European inaction during the outrageous violations of human rights committed in Kosovo, urged the United Kingdom and France to agree in Saint Malo in 1998, that the Union should have 'the capacity for autonomous action, backed up by credible military forces, the means to use them and a readiness to do so, in order to respond to inter-

¹⁸ POPTCHEVA, E.M., *Breach of EU values by a Member State*, Library of the European Parliament, 15/10/2013. Available at: http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130633/LDM_BRI%282013%29130633_REV2_EN.pdf

¹⁹ BARRUECO, M.L., "The promotion and protection of Human Rights during European Security and Defence Policy operations: in-between a spreading state of mind and an unsolved concern", en WETZEL, J. (coord.), *The European Union as a global player in the field of Human Rights*, Routledge Research in Human Rights Law, London, July 2011, p.160.

²⁰ For instance, see HACHEZ, N. and WOUTERS, J., *Promoting the rule of law: a benchmarks approach*, KU Leuven Working paper No. 105, April 2013 at <http://www.fp7-frame.eu/wp-content/materiale/w-papers/WP105-Hachez-Wouters.pdf>, accessed on 15 April 2015.

national crises”²¹. As the Treaty of Amsterdam left the boundaries of common tasks open to discussion, practical implementation was facilitated by European Council conclusions or Joint Actions governing the launching of ESDP missions. Thus, concrete provisions on crisis management capabilities of the EU are not be found until the Saint-Malo Declaration of 1998. Stating that ‘the European Union needs to be in a position to play its full role on the international stage’, it addressed the importance of the implementation of Amsterdam provisions on CFSP, including through the ‘progressive framing of a common defence policy in the framework of CFSP’²². It further stated that the EU should have the ability to respond to international crises, by credible military forces.

This declaration was followed by several important Council meetings, including the Cologne and Helsinki Council meetings in 1999, which laid the foundations for ESDP and defined the capabilities needed in order to implement the Petersberg tasks, explicitly included in the Treaty on European Union (Article 17). A key development was the “Berlin Plus agreement” giving the EU, under certain conditions, access to NATO assets and capabilities²³.

In 2000, after the Santa Maria Da Fera meeting, the Council stated that “the European Council reaffirms its commitment to building a Common European Security and Defence Policy capable of reinforcing the Union’s external action through the development of a military crisis management capability as well as a civilian one, *in full respect of the principles of the United Nations Charter*”²⁴. The third appendix of the first Annex to the Conclusions of the presidency gives a first structure to EU Civilian Crisis Management Intervention, pointing out in a very pragmatic way the duties of such interventions: “[...] prevent[ing] the eruption or escalation of conflicts [...] consolidating peace and internal stability in periods of transition [...] ensuring complementarity between the military and civilian aspects of crisis management”²⁵.

²¹ Joint Declaration issued at the British-French summit, Saint-Malo, France, 3-4 December 1998, at http://www.fco.gov.uk/en/news/latest_news/?view=News&id=2244063, accessed on 15 April 2015.

²² *Ibid.*

²³ REHRL, J. R. and WEISSERTH, H. B, *Handbook on CSDP: The Common Security and Defence Policy of the European Union (2nd ed.)*, Vienna: Federal Ministry of Defence and Sports of the Republic of Austria, pp.14-15.

²⁴ Council conclusions on the Santa Maria da Feira European Council, 19-20 June 2000, at: http://www.consilium.europa.eu/en/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en0.htm (accessed on 10 April 2015).

²⁵ Fera Annexes to Presidency Conclusion, Annex I, Appendix III, Introduction.

Based on the first meeting of the committee for civilian aspects of crisis management, it identified four civilian priority areas²⁶:

- Police: the aim to provide 5,000 police officers to international mission in order to prevent or mitigate international crises and conflicts.
- Strengthening of the rule of law, to re-establish the judicial and penal system, by finding judges, prosecutors and penal experts to be deployed in a short term to help peace process;
- Strengthening civilian administration, by sending experts to help restore the destroyed administration or to train locals;
- Civil protection, to resort to EU Member States tools and capacities in the field, and to promote a better cooperation and organisation in crisis interventions.

In 2003, the first ESDP mission was launched in Bosnia and Herzegovina, making the referred provisions operational²⁷. In addition in December 2003 the European Security Strategy (ESS) was formulated. Justifying the role of the EU as a global security actor, the ESS identified key security threats: terrorism, proliferation of weapons of mass destruction, regional conflicts and State failure. It highlights the potential of the EU to respond to these threats, however without giving clear concrete indication on how to respond to them.

The Treaty endorsed the extension of the scope of CSDP operations which currently covers “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 peacemaking and post-conflict stabilisation” (Art. 28B/ Article 43 (1) TEU).

To date, the nature of most operations conducted within ESDP/CSDP have been primarily civilian²⁸. As noted, the denomination of “civilian” or “military” reflects the nature of participating forces (police officers, judges or civilian experts, as opposed to military troops) without necessarily implying that they are unarmed²⁹. Thus it can be inferred that there is no a direct link to be drawn between human rights promotion and the scope or nature of the operations.

As indicated previously, the June 2000 Feira European Council listed several priority areas in civilian missions, which usually merge within a

²⁶ Annex I: Presidency report on strengthening the common European security and defence policy.

²⁷ REHRL, J. R. and WEISSERTH, H.B., *op. cit.* p 15.

²⁸ BARRUECO, M., *op. cit.*, p. 166.

²⁹ *Ibid.*

mission's mandate in practice³⁰. Such tasks are mostly linked to post-conflict state-building, but not primarily directly aimed at fostering human rights. Considering these examples, human rights do not appear to be at the top of the priorities of CSDP operations, but they undoubtedly serve as a necessary/indispensable complement to security concerns. When police missions help improve local performance as regards security or conflict prevention, they apply EU human rights standards to a great extent. As a rule of law, missions resort to core international legal documents to give advice on local legislation reform on, e.g., criminal codes or procedural rules, thus increasing protection of individuals.

In recent years an increase in CSDP missions conducted by the EU abroad has been witnessed. There are currently eleven on-going civilian missions³¹ and five military operations³².

With the construction of the postmodern identity of the EU, it was conceived that it had to include a place and a role for armed forces, where the areas of human rights, peacekeeping and state-building become the obvious arenas for their actions, however limited. The Barcelona Report commissioned by Javier Solana and presented at the end of 2004, was a clear attempt to reconcile armed forces and Europe's ethical and humanitarian beliefs and values. The report made reference to seven principles of actions for the use of armed forces the primacy of human rights: clear political authority, multilateralism, a bottom-up approach, regional focus, the use of legal instruments and the appropriate use of force³³.

The concept of human security in the context of the ESS was developed with the Barcelona report and subsequent doctrinal theorising, which contributed to the adoption of the emergent human security discourse at the level of the EU. The human security doctrine was seen as summing up the above priorities and normatively marking out a zone of action for EU security and defence policy.

Nevertheless, in most cases, as evidenced by the important 10-year review of ESDP published by the Institute for Security Studies, human rights have remained under-conceptualised in the theorising of the emergent security culture, often relegated to merely being listed as constitutive elements

³⁰ Ibid, p.167.

³¹ EULEX Kosovo, EUBAM Libya, EUCAP SAHEL Mali, EUCAP SAHEL Niger, EUSEC RD Congo, EUCAP NESTOR, EUPOL Afghanistan, EUMM Georgia, EUAM Ukraine, EUPOL COPPS and EUBAM RAFAH in Palestian Territories.

³² EUFOR ALTHEA Bosnia Herzegovina, EUTM Mali, EUMAM RCA, EUTM Somalia, EUNAVFOR Atalanta.

³³ Vid. FRACZEK, S., HUSZKA, B., HÜTTNER, C., KÖRTVÉLYESI, Z., MAJTÉNYI, B., ROMSICS, G., *op. cit.* p. 134.

of what CSDP is³⁴. However, it is undeniable that furthering human rights lies at the very heart of conflict —prevention and— resolution. Therefore, the ability of CSDP operations to spread such principles in the field gives a good hint of their real performance and becomes key to lasting peace and security.

III. Applicability of human rights and humanitarian law instruments to CSDP missions and operations

One of the challenges that concern the protection of human rights in EU crisis management missions is that this subject is not governed by a single legal regime but “it rather involves action by a multitude of entities—including the EU, its Member States and any contributing third States and international organisations—subject to a diverse set of instruments and obligations (international, regional and domestic)”³⁵. The legal effect and applicability of the relevant human rights instruments is uncertain in important respects, which raises questions about the consistency of human rights protection in EU missions, and also about a clear determination of responsibility for violations of human rights in specific cases.

The specific tasks of CSDP operations vary depending on the specific situation, covering a wide range of missions: rule of law, police, security sector reform, border assistance or monitoring missions, peacekeeping and potentially even peace enforcement. The nature and scope of the operation has consequences in terms of the applicable law, as it will be seen below.

1. *Applicability of International Human Rights Law*

The applicability of international human rights law, which would also bind the EU vis-à-vis third countries and international organisations, is surrounded by uncertainties.

These difficulties stem from the fact that the EU as such is not a party to the most relevant human rights treaties. Therefore it is questionable whether certain international human rights instruments apply to EU missions abroad, although the EU has not signed them, and so what is their scope of application in this situation. An additional challenge comes from the fact that CSDP operations often involve a mix of EU institutions, Mem-

³⁴ Ibid, p. 140.

³⁵ SARI, A. and WESSEL, R. A., *op. cit.*, p. 8.

ber States forces and possibly also third countries and other international organisations.

The EU is, since the entry into force of the Lisbon Treaty, an international organisation with legal personality (Article 47 TEU) and is thus an international law subject with the capacity to bear rights and obligations under international law³⁶. In this capacity, the EU recently signed the United Nations Convention on the Rights of Persons with Disabilities. Moreover, as it has been earlier underlined, Title V TEU (provisions on the Common Foreign and Security Policy-CFSP) contains references to the principles of international law and in particular to the respect of human rights to guide the EU external action (Articles 21 and 22 TEU).

Along this line, the ECJ has ruled that the EU must respect international customary law³⁷, and some rules of international humanitarian law would appear to be covered by EU human rights provisions. Moreover, almost all the Member States are party to the most relevant human rights treaties, which might lead to the conclusion that these represent “regional customary international law”³⁸. This works not only for the EU, but with other international organisation such as the UN³⁹. Consequently, in addition to any obligations of its Member States, the EU becomes an addressee of the rights and obligations deriving from international human rights norms⁴⁰. This obligation on the EU to respect human rights as part of customary international law also applies abroad.

In this regard, there are a number of general principles of international human rights law which are applicable to EU peace missions. Some of them are codified in relevant treaties to which EU Member States are party, and others are a matter of being part of customary international law⁴¹.

³⁶ The EU has signed the UN Convention on the rights of persons with disabilities.

³⁷ See Cases C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, 24 November 1992, § 9 and C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others*, 3 June 2008, § 51.

³⁸ DE WET, E., “The emergence of international and regional value systems as a manifestation of the merging international constitutional order”, *Journal of International Law*, 2006, Vol. 19, pp. 631-632, at http://law.huji.ac.il/upload/de_wet_reading.pdf (accessed on 10 April 2015).

³⁹ See PAUST, J., “The UN is bound by human rights: understanding the full reach of human rights, remedies and non immunity”, *Harvard ILJ Online*, Vol. 51, April 12, 2010.

⁴⁰ See for instance, NAERT, F., *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Antwerp: Intersentia, 2010.

⁴¹ NAERT, F., ‘Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations’, in WOUTERS, J., ET AL. (eds.), *Accountability for Human Rights Violations by International Organizations*. Antwerp, Intersentia, 2010, p. 129-168.

The most important human rights principles applicable to EU crisis management operations are the principle of security and liberty of persons, including the principle of due process, holding that no one shall be subjected to unlimited arrest or detention and providing the accused the right to be heard before any condemnation⁴². But there are more important principles in the field of EU missions, such as the prohibition of torture and inhuman treatment; the prevention and repression of (sexual) violence, exploitation, and abuse in the context of peace operations and the principle of non-discrimination.

The applicability of some of these principles, especially those related to the administration of justice⁴³, is reflected in that part of the EU civilian missions' work in supporting and strengthening law enforcement structures in the host countries⁴⁴.

Notwithstanding, the applicability of human rights *as a matter of law* remains controversial in some respects, including the extraterritorial application of the European Convention on Human Rights⁴⁵, the question of derogation in times of emergencies and its applicability to peace operations, the relationship between human rights and international humanitarian law and the impact of UN Security Council mandates on human Rights⁴⁶. However, at least as a matter of *policy and practice*, human rights law provides guidance in EU operations and in practice. It is indeed quite important for the success of those missions that human rights be used as a benchmark for EU missions, since violations or abuses inevitably have devastating effects on the victims of course, but also on perpetrators, such as the loss of credibility, trust, respect and confidence amongst the local population. Consequently, disregarding human rights would negatively affect the legitimacy of these missions and the credibility of the EU.

A recent expression of policy commitments in that respect are those formulated in the *Strategic Framework on Human Rights and Democracy*

⁴² These principles have been identified by HAZELET, H., "Common security and defence policy: What nexus between human rights and security?", in SARI, A. and WESSEL, R.A., *op. cit.*, p. 32.

⁴³ See JACQUÉ, J.-P., *Review of the EULEX Kosovo mission's implementation of the mandate with a particular focus on handling of the recent allegations*, 31 of March 2015, at http://eeas.europa.eu/statements-eeas/docs/150331_jacque-report_en.pdf (accessed on 1 May 2015).

⁴⁴ *Ibid.* p. 32.

⁴⁵ The extraterritorial application of human rights instruments and customary international law is largely uncontroversial in the case of international organisations as they by definition have no state territory as indicated by NAERT, F., *International law aspects of the EU's Security and Defence Policy with a particular focus on the law of armed conflicts*, 2010, pp. 564-566.

⁴⁶ NAERT, F., "The applicability..." *op. cit.* p. 13.

and the *Action Plan* for its Implementation, adopted on 25 June 2012. Additionally, the EU has adopted a number of human rights Guidelines which indicate human rights priorities for the Union. The most relevant guidelines related to CSDP missions are on Children and armed conflict (2008), Violence against women and girls and combating all forms of discrimination against them (2008) and International Humanitarian Law (2009).

2. *Applicability of International Humanitarian Law*

As noted elsewhere, the changing landscape of warfare and international relations explains that the EU is conducting its missions abroad in increasingly high-risk and violent conflict-settings⁴⁷. Since Operation Concordia, which was deployed in the former Yugoslav Republic of Macedonia in 2003, the EU has launched a number (albeit limited) of other military operations with a broad range of mandates: from small scale and limited mandate to include elements of peace enforcement.

Article 42(1) of the Treaty on European Union (TEU) sets out that the CSDP shall provide the Union with a military and civilian operational capacity for 'missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the [UN] Charter'. These missions shall comprise, inter alia, "peace-keeping tasks [and] tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation". This includes peace enforcement. In particular EU peace operations raise the question of the applicability and application of international humanitarian law to operations under EU command.⁴⁸ These are controversial matters, controversy which has already been present in discussions on the applicable law to multinational forces operations⁴⁹ such as the UN peace-keeping 14 and NATO operations.

⁴⁷ See MÁRQUEZ CARRASCO, C., (ed. and main autor), IÑIGO ALVAREZ, L., LOOZEN, N. and SALMÓN GÁRATE, E., *Report survey study on human rights violations in conflict-settings*, FRAME Project, at <http://www.fp7-frame.eu/wp-content/materiale/reports/08-Deliverable-10.1.pdf> (accessed 10 May 2015).

⁴⁸ ZWANENBURG, M., "The duty to respect International Humanitarian Law during European Union-led operations", *CLEER Working paper*, 2012/6. p. 63.

⁴⁹ Among the issues they raise are legal and humanitarian challenges related to multinational operations, including: the applicability of international humanitarian law and other legal regimes, the legal classification of situations involving multinational forces, the status of peacekeepers, interoperability difficulties, detention, attribution of responsibility, as well as humanitarian engagement with multinational forces. See *International Review of the Red Cross*, "Multinational Operations and the law" at <https://www.icrc.org/eng/resources/international-review/review-891-multinational-operations-and-the-law/review-891-892-all.pdf>

This sub-section will thus tackle the main issues relevant for the applicability and application of international humanitarian law (IHL) to EU military operations.

As regulated in the Geneva Conventions and Additional Protocol, international humanitarian law (IHL) is applicable in situations of armed conflict (and occupation). This legal framework is not directly applicable to a simple deployment of a military operation⁵⁰ because it requires the existence of an “armed conflict”, a term of art in IHL which is not conventionally defined. An additional difficulty lies in the characterisation of such an armed conflict and the concrete applicable rules since it is considered that multinational forces operations usually intervene in situations of non-international armed conflict⁵¹. Another important requirement concerning the applicability of IHL is that the organization’s troops must also be involved in the conflict as combatants or parties to the conflict⁵².

To date, the practice of military operations under EU command show that they have never been involved in an armed conflict as combatants⁵³, bar having a limited recourse to the use of force, although they have sometimes had robust Rules of Engagement⁵⁴. However, this does not mean that practice could not change or evolve.

In fact, the TEU explicitly envisages that in the context of CSDP, the tasks of EU missions could include “tasks of combat forces in crisis management, including peace-making and conflict-stabilization” (Article 43). As noted, the term peace-making would suggest a kind of operation that could well be engaged in an armed conflict as a party⁵⁵.

So far, some noteworthy examples taken from the five on-going military operations could be cited. Operations deployed in countries where there is no armed conflict; the operation EUTM Somalia⁵⁶, which could be considered as being deployed in a country in a situation of armed conflict, is actually deployed in Uganda, the host state⁵⁷; and the operation in Central African Republic⁵⁸ is deployed in an 18-month transition process set by the Libreville Agreements and the N’Djamena declaration of 18 April 2014.

⁵⁰ FERNÁNDEZ ARRIBAS, G., *op. cit.*, p. 38.

⁵¹ PEJIC, J., “The protective scope of Common Article 3: more than meets the eye”, *International Review of the Red Cross*, vol. 93 no. 881, 2011, pp. 5-7.

⁵² ZWANENBURG, M., *op. cit.* p. 64.

⁵³ For instance, ARTEMIS RD Congo and EUFOR TCHAD, are two examples of escalation of violence. See NAERT, F., “The applicability...” *op. cit.* p. 13.

⁵⁴ ZWANENBURG, M., *op. cit.* p. 65.

⁵⁵ *Ibid.* p. 65.

⁵⁶ Council Decision 2010/96/CFSP of 15 February 2010.

⁵⁷ FERNÁNDEZ ARRIBAS, G., *op. cit.*, p. 20.

⁵⁸ Council Decision 2014/73/CFSP of 10 February 2014.

Regarding the condition that EU military operations must not take part in a situation of armed conflict, the participation of Switzerland in operation ALTHEA⁵⁹ is particularly enlightening, since its status as a neutral country determines the non-combatant nature of operation personnel.

It is usually not the EU but the UN which is at the forefront of military operations. To date, the EU has mainly intervened in post-crisis situations and always under a UN mandate⁶⁰. So far, the EU documents relating to EU missions have not referred to international humanitarian law, except in two cases where status agreements for non-EU mission were made applicable to an EU mission, namely for the AMIS Supporting Mission via the African Union SOMA and for EUFOR DR Congo⁶¹ via the MONUC SOFA⁶².

One of the relevant dimensions of the applicability of IHL during EU military operations concerns the identification of legal sources of obligations of the EU and Member States as well as the ascertainment of applicable general principles of international humanitarian law. In the constituent treaties there is no explicit mention of international humanitarian law, although it is generally understood that this branch of international law is covered by the reference to the more general term international law⁶³.

First, it is widely accepted that IHL instruments are binding to Member States and applicable during EU military operations. All EU Member States are party to the Geneva Conventions and their Additional Protocols and therefore they are under an obligation to abide by them. Regarding the EU, the Geneva Conventions do not apply directly to it, as international organisations are barred from becoming parties⁶⁴ but it has nonetheless been generally recognised that the rules of the Geneva Conventions are part of customary international law and, therefore, the EU must comply with them. This applicability is supported by the TEU and by EU case law. The ECJ has held that the European Communities “must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law...”. Recently, the Grand Chamber of the Court has reaffirmed this position by holding that the EU is bound to observe international law in its entirety, including customary international law⁶⁵.

⁵⁹ Council Joint Action 2004/570/CFSP of 12 July 2004.

⁶⁰ See for instance, EUFOR Althea or Operations deployed in Sudan.

⁶¹ Council Decision 2006/412/CFSP of 12 June 2006.

⁶² NAERT, F., “The applicability...”, *op. cit.* p 13.

⁶³ NAERT, F., “The Application of Human Rights and International Humanitarian Law in Drafting EU Missions’ Mandates and Rules of Engagement”, *Institute for International Law KUL*, Working paper 151, October 2011. p. 4.

⁶⁴ BARRUECO, M., *op. cit.*, p. 167.

⁶⁵ Case C-366/10, *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*.

The EU promotes compliance with international humanitarian law, as evidenced in the original and updated EU Guidelines on the matter⁶⁶, under which the EU as well as Member States commit to ensure compliance with IHL by third States or by non-state actors operating in third States. Nevertheless these Guidelines do not cover Member States own conduct or that of their forces.

One of the problems arising from the applicable humanitarian customary law is the question of which rules are applicable to a conflict in which the EU is involved. In terms of treaty law this question is governed by different legal regimes on international and non-international armed conflict, which would entail the applicability of different rules. In terms of customary international law, the preponderant view is that the whole customary body can be applicable to both internal and international armed conflict⁶⁷.

Yet, customary law is not the only legal source that could bind the EU in relation to international humanitarian law. The general principles of the EU have also been considered a source of obligation for the EU in humanitarian law. This assertion has been supported in the “widespread and largely convergent ratification of LOAC treaty obligations by the EU member states and the close link between a number of such obligations and human rights”.

Another source of obligation might include unilateral acts. Council decisions (formerly joint actions) might be considered sources of unilateral acts⁶⁸. In relation to EU military operations, in some of the Council joint actions pertaining to operation EUNAVFOR⁶⁹, the EU makes reference to different UN Security Council Resolutions as a basis for its operation. In these resolutions, the Security Council allows States to enter and use the territorial waters of Somalia to fight against piracy in a manner consistent with relevant international law, which in the case of an armed conflict would be international humanitarian law. This limitation has also been included in the ‘whereas’ sections of one of the Council joint actions⁷⁰.

⁶⁶ EU Guidelines on promoting compliance with international humanitarian law, OJ 2005 C 327/12, updated in 2009.

⁶⁷ See McCOUBREY, H, and WHITE, D, *The Blue Helmets. Legal regulation of United Nations military operations*, Dartmouth, Aldershot, 1996. pp. 158-160. The authors refer to those rules which may be accepted as customary law.

⁶⁸ WESSEL, A., *The European Union's Foreign and Security Policy. A Legal Institutional Perspective*, Kluwer Law International, The Hague, 1999, pp. 193-195.

⁶⁹ Council Joint Action 2008/749/CFSP of 19 September 2008.

⁷⁰ Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO), OJ 2008 L 252/93; Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301/33.

This indirect applicability of international humanitarian law is confirmed in a subsequent resolution of the UN Security Council, in which there are specific references to regional organizations to fight against piracy, which foresee that “any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law”⁷¹.

Finally the EU, just like all other international subjects, is also bound by the norms of *jus cogens*.⁷² Article 53 of the 1986 Vienna Convention establishes the nullity of a treaty which conflicts with a peremptory norm of general international law; hence, it can be assumed that international organizations are bound by the norms of *jus cogens*.

In relation to EU military operations and humanitarian law, there is no consensus about which norms can be categorised as *jus cogens*. Zwanenburg makes reference to the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, where the CIJ “suggest that at least certain norms of international humanitarian law may have a peremptory character”, but it does not establish which of them should be classed as such. The norms that can be considered to be peremptory are the fundamental norms of humanitarian law, derived from the Geneva Conventions, and can be identified by taking into account the prohibition of derogatory agreements, the structure of denunciation clauses, the criminalization of breaches and the limits on reciprocity. Hence, norms such as the prohibition of war crimes, crimes against humanity and genocide can be considered peremptory norms⁷³.

In policy terms, EU member states accept that if EU-led forces become engaged in an armed conflict, IHL will fully apply to them. While IHL could have become applicable if the situation had escalated in some of these operations, especially Artemis (DRC)⁷⁴ and EUFOR Tchad/RCA⁷⁵, this did not happen. Nevertheless, the EU and its member states remain fully aware of the potential obligations of EU-led forces under IHL, in particular when the situation escalates.

Some of the relevant general principles of international humanitarian law that would be applicable during EU peace missions involving the use of military force, include the principle of distinction between civilian

⁷¹ SC Res. 1851 (2008) 16 December 2008.

⁷² International Law Association, ‘Berlin Conference (2004). Accountability of International Organizations’; ZWANENBURG, *op. cit.*, p.145; NAERT, F., *op. cit.*, p. 536.

⁷³ ORAKHELASHVILI, A., *Peremptory Norms and International Law*, Oxford University Press, Oxford, 2007.

⁷⁴ Council Joint Action 2003/423/CFSP of 5 June 2003.

⁷⁵ Council Decision 2008/101/CFSP of 28 January 2008.

and combatants, the principle of precautions in attack, the principle of proportionality and the overarching principle of humanity. These principles are generally translated into the rules of engagement, which are an important element of the legal framework, guiding the activity of the EU military forces on the ground. It is the duties of each EU Member State to train its armed forces so that they are able to comply with IHL and to respond to complex situations.

As Naert has indicated, when IHL does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct of EU military operations⁷⁶. In addition, he considers that States' different treaty obligations in the field of IHL can create problems of 'legal interoperability' in multinational operations. However, the importance of such divergences is limited by the fact that a significant body of IHL rules have become part of customary international humanitarian law. In fact, all 28 EU member states are parties to the 1949 Geneva Conventions, the two 1977 Additional Protocols and the Statute of the International Criminal Court, as well as to the 1980 Convention on Certain Conventional Weapons and the 1993 Chemical Weapons Convention. Even within the EU member States, if one looks at all IHL treaties, there are still differences because of differentiated ratifications, reservations or divergent interpretations of common obligations by States.

So far, IHL obligations in EU military operations seem to be primarily conceived as resting on the participating states. However, the EU may also have its own IHL obligations, especially under customary IHL.

The EU Guidelines on the promotion of IHL⁷⁷ has as its main objective to set out operational tools for the EU and its institutions to promote compliance with IHL. According to Council Document 13310/01, "humanitarian law, which could be classified as universal *sui generis* law, serves in association with "human rights" as an essential, efficient and effective legal instrument for managing the legal aspects of crisis situations"⁷⁸.

IV. The integration of human rights components in CSDP missions and operations

While deploying a CDSP mission or operations generally involves a hard and long process, this paper will address in this section how the EU integrates human rights instruments in each phase of the process.

⁷⁶ NAERT, F., "The applicability..." *op. cit.*, p. 13.

⁷⁷ Council of the EU, 15246/05, Guidelines on the Promotion of International Humanitarian Law (IHL). Brussels, 5 December 2005. (CEU 15246/05).

⁷⁸ See CEU 13310/01.

1. *Decision-making and planning documents*

Every single mission or operation in the field of CSDP has to be based on a Council Decision —formerly Council Joint Action— adopted on the basis of Article 43 of TEU. In military operations, the Council usually adopts a further separate decision launching the operation.

Aside from the Council, which plays a key role in the process, the Political and Security Committee is also authorised, under Article 38 TEU and under the responsibility of the Council and the High Representative, to take *political control and strategic direction* of EU operations. This can even include taking decision to amend the planning documents, including the Operation Plan, the Chain of Command and the Rules of Engagement⁷⁹.

This whole process is known as the *crisis management procedures*⁸⁰, and it will culminate with the Operation Plan (OPLAN), and where applicable, the Rules of Engagement (ROE)⁸¹.

At the point of development, the OPLAN should clarify the applicable law to the operation, specifying whether international humanitarian law or human rights law is suitable for each context, but this is not always the case. The absence of this kind of exact provision may be reflected in references to *applicable* rules of IHL or HRL, which does not clarify in which circumstances those rules actually are applicable. Consequently, the Operation Commander would have to determine this to some extent⁸².

Notwithstanding, the full range of planning documents should reflect the awareness to enhance human rights through the operation⁸³. In fact, the *Mainstreaming Human rights across CFSP and other EU policies*⁸⁴ adopted in 2006 is an adequate framework towards fostering the integration of human rights issues in CSDP missions, as well as the recent *Action Plan on Human Rights and Democracy*⁸⁵. Accordingly, the protection of human

⁷⁹ Ibid.

⁸⁰ Crisis Management procedures, “Suggestions for procedures for coherent, comprehensive EU crisis management”, at http://www.ies.be/files/2012-04_AM_final.pdf<http://eiop.or.at/eiop/pdf/2010-009.pdf> (accessed on 1 May 2015).

⁸¹ ROE, requested by the Operation Commander and authorised by the Council, based on the EU’s policy on the use of force. See NAERT, F., *Observance of International humanitarian law...*, *op. cit.*, p. 5.

⁸² NAERT, F., “The applicability...”, *op. cit.* p. 17.

⁸³ Council, ‘EU Annual Report on Human Rights 2008’, Brussels, p. 11, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/st14146-re02.en08.pdf> (accessed on 1 May 2015).

⁸⁴ Doc. 10076/06, 7 June 2006.

⁸⁵ See sub-set of actions number 12, a), b) c) and d) and sub-set number 21. See at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/131181.pdf, (accessed 1 november 2014), p. 12 and p. 17.

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

However, only a few EU missions contain *explicit* references to human rights in its mandate, including the EUMM in Aceh, Indonesia (2005)⁸⁶, EUSEC-DR Congo (2005)⁸⁷, EULEX Kosovo (2006)⁸⁸, and EUPOL Afghanistan (2007)⁸⁹. If not directly in the mandate, CSDP planning documents for virtually all missions and operations refer to human rights and gender issues⁹⁰.

While the Council Decision setting up the EUTM Somalia, in order to contribute to the training of Somali security forces, does not explicitly mention human rights, they are included in the training, which refers to international humanitarian and human rights law⁹¹. Legal considerations may furthermore be reflected in implementing documents, once the operation is launched.

Considering the obligations of the EU and Member States in enhancing human rights issues in CSDP missions, the promotion and protection of human rights should be clearly reflected in the mandate before deploying the operation. The lack of accuracy defining the mandate may create serious difficulties when deciding the guiding strategy of the mission in the field and could give rise to different interpretations and coordination problems⁹².

⁸⁶ Council Joint Action 2005/643/CFSP of 9 September 2005.

⁸⁷ Council Joint Action 2005/355/CFSP of 2 May 2005.

⁸⁸ Council Joint Action 2008/124/CFSP of 4 February 2008.

⁸⁹ Council Joint Action 2007/369/CFSP of 30 May 2007.

⁹⁰ HAZELET, H., *op. cit.* p 12.

⁹¹ See the 6 December 2011 EUTM press release available at http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/Somali%20Recruits%20Cultural%20Training%20%20%20Press%20Release.pdf, accessed on 20 April 2015.

(“The intensive military training includes ...classes i.e. about historical convergence between International Humanitarian Law and the laws of the war, the right to education, humanitarian aid and refugee law.... It promotes and encourages respect for human rights, for fundamental freedoms and for all without distinction as to race, sex, language, or religion. In relation to human rights education focus will promote and encourage respect for life especially for women and children, as well as teaching the principles of equality, self determination and how is assimilate these principles into their societal and cultural norms with compromising their religious beliefs.”).

⁹² Best practices Atlas, 2011.

2. Deploying Missions

The extent to which CSDP missions pursue the promotion of human rights will depend very much on their mandate and means⁹³. It is important to take into account that usually these missions are deployed in an operationally challenging environment. Nonetheless, it is unquestionable that the EU has to respect human rights in its missions, not only during the first decision-making stage, but also during its deployment in the field.

Accordingly, there are the legal obligations of the personnel participating in a CSDP operation. The Generic Standards of Behaviour (2005) establish that the staff must treat the local population *with dignity and respect, regardless of sex, age, ethnic origin, religion, sexual orientation, disability, social or economic status or political views*⁹⁴.

This concern was present in the Council Handbook on Mainstreaming Human Rights and Gender, adopted in 2008. The document was the compilation of previous ones, including the Guidelines on Children in Armed Conflicts and the Guidelines on the implementation of UN Security Council resolutions on Women, Peace and Security. Interpretation of the legal effect of these instruments is disputed. Some scholars consider these documents as leading to self-commitment of the EU in setting human rights standards, others point out that there is a lack of binding character⁹⁵.

On the other hand, fostering human rights effectively during CSDP missions requires that the personnel receive effective training in human rights. Similarly, the staff must be familiar with IHL and human rights law, the European external policy on human rights and the standards of behaviour for CSDP missions⁹⁶.

In this respect, human rights advisors have been assisting CSDP missions since 2005, providing expertise to them in this field. The European Parliament, in its resolution on the implementation of the CSDP of November 2013, called for the inclusion of human rights and gender advisors in all CSDP missions and for the exchange of best practices amongst CSDP missions⁹⁷.

It is also worth mentioning that, although it is clear that the CSDP missions should respect human rights in all the phases of its operations, and it

⁹³ NAERT, F., *op. cit.* p 47.

⁹⁴ Human Rights applied to CSDP Operations and Missions, EPRS Briefing 21/01/2014, p.4. at [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130712/LDM_BRI\(2014\)130712_REV2_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130712/LDM_BRI(2014)130712_REV2_EN.pdf) (accessed on 20 April 2015).

⁹⁵ NAERT, F., *International law...op. cit.* pp 525-526.

⁹⁶ BARRUECO, M., *op. cit.* p. 164.

⁹⁷ Human Rights applied to CSDP Operations and Missions, EPRS Briefing 21/01/2014, *op. cit.*, p. 4.

effectively has tools to do this, it is relatively different from integrated them in the legal system of the country in which the mission is deployed.

While limited reflection is made regarding how military operations can contribute to promote human rights in the field, which chiefly refers to human rights respect amongst the military personnel themselves, civilian missions takes a deeper approach. Typically, EU civilian missions involve technical advice and substitution of local structures⁹⁸, with human rights *culture at the core*.

3. Accountability for human rights violations in CSDP missions

Apart from the challenge of determining which human rights instruments are applicable to CSDP missions, there is still another important difficulty: their application in practice. Human rights violations or abuses have devastating effects, such as the loss of credibility, trust, respect and confidence amongst the local population. Consequently, leaving them unpunished could negatively affect the legitimacy of these missions and the credibility of the EU.

Experts attribute cases of misconduct and abuse to the lack of adequate training, as well as the lack of specific accountability mechanisms, and the difficulty for individuals affected during EU missions to access justice⁹⁹.

Despite the fact that the TFUE states in its Article 340.2 that the *EU must compensate for any damage caused by its institutions or its servants in the performance of their duties*, there is no EU court dealing with reparation for damages incurred during EU missions and operations, since the CJEU has no jurisdiction over CSDP¹⁰⁰. Consequently, Naert argues that the responsibility to deal with claims against the EU for its CSDP operations, would be national courts¹⁰¹.

Another controversial challenging aspect concerns the regime-regulation of immunity. There has been criticism of the full immunity that personnel of EU-led operations sometimes enjoy, due to the establishment in agreements on status of forces for military operations (SOFAs) and status of missions (SOMAs) for civilian missions. These are bilateral or multilateral treaties that regulate the legal position of military forces and civilian

⁹⁸ BARRUECO, M., *op. cit.*, p 165.

⁹⁹ ZYBERI, G., "The applicability of general principles and instruments of international law to peace missions of the EU", CLEER Working paper 2012/6, p. 35.

¹⁰⁰ Articles 24(2) TEU, 275 TFEU.

¹⁰¹ NAERT, F., *op. cit.*, p. 331.

personnel deployed by one or more states or by an international organization in the territory of another state with the latter's consent¹⁰². They usually involve such issues as criminal jurisdiction, the entry and departure of foreign personnel, the carrying of arms, taxation, the settlement of claims, and the modalities for the exercise of civil and criminal jurisdiction over members of the visiting force or mission¹⁰³.

However, it should be noted that the exemption from local jurisdiction contained in SOFAs and SOMAs does not necessarily lead to impunity. Instead, they usually set up specific claim mechanisms. For instance, the EULEX-Kosovo civilian mission, deployed in 2010, introduced a *Human Rights Review Panel* which reviews alleged human rights violations by the staff of the mission. Although it is not exactly a judicial or disciplinary body, it is a really useful tool to examine victim's claims and to propose remedies to them¹⁰⁴.

It is also worth mentioning that the need to achieve operational capabilities, special expertise, and budgetary constraints, have led Member States to increasingly make use of private military and security services (PMS) during military and civilian operations¹⁰⁵. The EU has also been employing PMS, mainly as security guards or support services for transport and logistics¹⁰⁶. In this regard, the eventual responsibility of the EU will be determined, if the private contractors' conduct can be attributed to it. Article 340.2 TFEU stipulates the non-contractual liability for any damage caused by its institutions and servants, which include private contractors authorised by the Union to fulfil official duties¹⁰⁷. Hence, the EU cannot avoid its human rights obligations by contracting PMS for its CSDP missions.

¹⁰² See BOWETT, D., "Military Forces Abroad", 3 *Encyclopaedia of Public International Law* (1997) 388; ERICKSON, "Status of Forces Agreements: A Sharing of Sovereign Prerogative", 37 *Air Force L Rev* 1994, p. 137. For a comprehensive treatment of the subject see FLECK, D., (ed.), *The Handbook of the Law of Visiting Forces*, 2001.

¹⁰³ *Ibid.*

¹⁰⁴ Human Rights applied to CSDP Operations and Missions, EPRS Briefing 21/01/2014. *Op. cit.*, p. 5.

¹⁰⁵ *Ibid.*, p. 5.

¹⁰⁶ KRAHMANN, E., and FRIESENDORF, C., *The role of private security companies (PSCs) in CSDP missions and operation*, European Parliament Directorate-General for External Policies, Policy Department, 2011, pp. 6-7.

¹⁰⁷ Judgment of the CJEU in the case C-9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, p. 42-47; case C 33/82, *Murri Frères v Commission of the European Communities*, paras. 34 et seq.

V. Conclusions

The implementation of the obligation to ensure respect for and to promote respect for human rights and humanitarian law in the field of crisis management encounters a number of difficulties and challenges at the conceptual, legal and operational levels.

CSDP operations are not established for the mere purpose of promoting human rights. However, in view of the nature of their priority areas, human rights constitute an integral part thereof. Human rights must be respected and the EU is also committed to promote them. Despite all the references to human rights in the EU legal framework for CSDP Missions, in practice, human rights should be more than just an appropriate standard in line with the EU's own legal obligations and policy commitments. It is necessary to reinforce the applicability of international human rights law and IHL instruments to CSDP missions and operations through *explicit mention of legal sources in EU Missions' planning documents*. A general reference can lead to loose interpretations of the applicable framework, human rights violations in the implementation of the mandate and lack of commitment in promoting human rights within and out of the mission. A more detailed description bridges the gap between State's different treaty obligations and interpretations. In order to ensure that all the Mission's activities respect international standards concerning human rights, the applicability of international and domestic legal instruments should be present in all the documents regulating the mandate and its implementation. This approach should also be taken with regards to all internal instructions and regulations.

Secondly, all staff members should receive *appropriate and regular training* to ensure that human rights are consistently promoted and respected, regardless of national and professional background. Otherwise these differences among the Mission's personnel may lead to a different perception of human rights standards. It is more likely that personnel from participating member states share a similar understanding of human rights. However, some CSDP Missions involve active participation from third States and international organisations, which are not necessarily familiar with the 'European best practices and standards'.

All CSDP Missions should have *human rights experts* in situ to provide legal advice in the implementation of the mandate. Their recommendations may serve to prevent human rights violations if staff members make use of their expertise prior to taking decisions. These legal experts could play a key role in the human rights and gender mainstreaming within and out of the mission, as stipulated in the operational documents.

Regarding remedies to human rights violations, an extension of the CJEU jurisdiction to the CSDP area is unlikely. However the EU is bound

to make reparations for violations of international law under non-contractual responsibility. The establishment of non-judicial accountability mechanisms serves to preserve the credibility in the Mission. However the decisions issued by these bodies may result meaningless, since they are non-binding and the proposed remedial actions do not include financial compensation. Furthermore it is difficult to assess whether a violation of human rights law has taken place in the exercise of a non-executive mandate. There are also a few grey areas when the Mission assumes the role of 'second responder'. In this sense, the Mission will only exercise executive functions in case of failure by the local authorities. In such a case, acts of omission could amount to human rights breaches.

All the same, when violations occur, despite providing adequate human rights training and exercising supervision over the implementation of the mandate, the establishment of independent accountability mechanisms is a better option than its non-existence. In order to counter the lack of binding effect of their decisions, prior disciplinary action, and resort to immunity waiver if appropriate, could deter further cases of misconduct and abuse.

The EU has a vast and well-detailed number of policy documents which assert the applicability of human rights, however it is necessary to create more mechanisms and to provide remedies when human rights violations take place. All in all, these improvements will reinforce the applicability of international human rights and humanitarian instruments, providing further concretion than the general legal and policy framework.