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The Legal Framework of EU Military Operations with focus on International Humanitarian Law

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Contents

Summary

As the EU increasingly manifests its Common Security and Defence Policy by conducting military operations in third countries with troops put at its disposal from EU member states and non-member states, questions emerge with regards to the legal framework and the applicable law governing the conduct of EU military operations. This paper address how the legal framework, with focus on international humanitarian law, can apply to EU military operations.

The EU has a substantial legal framework for its military operations which includes the capability to launch a wide range of different military operations. Practice of commenced operations has illustrated that a EU military operation one day might become engaged in an armed conflict. The EU has international legal personality opposed of its member states and possesses rights and obligations under international humanitarian law (IHL). The EU does not explicitly include IHL in its own legal order. However, it could be argued that the Treaty of Lisbon indirectly, especially by way of human rights law, contains obligations for the EU to respect IHL.

The IHL-treaty realm excludes ratification by the EU. However, the EU is bound by customary IHL when it undertakes activities in the field in which IHL is relevant. The EU could in principle be considered as a party to an armed conflict, but it is uncertain if it is the EU or its member states (and third states) that should be regarded as a party, in the event of an armed conflict.

The rapid development of EU military operations makes it essential to clarify, and to regulate, the EU´s conduct as a military actor under IHL. The EU could be considered to exercise a significant degree of command and/or control over a EU military operation. It is recommended that the EU clarify the division of command and control between itself and the participating states in military operations. By doing this, the EU would also provide clarification with regard to the question of responsibility. For the benefit of a clear legal framework for the troops on the ground, the EU is recommended to regulate the conduct of its military operations under IHL. This would demonstrate that the EU accepts that its conduct as a military actor with international legal personality creates an obligation for it to act in a liable manner and by that, the EU could potentially contribute to develop the legal regime of IHL.

Sammanfattning

Denna uppsats behandlar frågan om hur det rättsliga ramverket för EUs militära operationer, med fokus på internationell humanitär rätt, kan tillämpas. Givet att EU snabbt utvecklat en militär kapacitet inom sin gemensamma säkerhets- och försvarspolitik genom verkställande av militära operationer utförda av EU medlemsstater och icke medlemsstater i tredje land, uppstår frågor om tillämplig lag och det rättsliga ramverk som reglerar utförandet av militära operationer.

Det rättsliga ramverket för EUs militära operationer är omfattande och ger EU möjlighet att utföra ett brett spektrum av olika militära operationer. Möjligheten att en EU militär operation en dag blir bli inblandade i en väpnad konflikt kan inte ignoreras. EU är en internationell juridisk person och har således rättigheter och skyldigheter enligt internationell humanitär rätt (IHL). EUs egna rättsordning omfattar inte en uttrycklig hänvisning till internationell humanitär rätt. Lissabonfördraget kan dock, framförallt genom en vid tolkning av EUs lagstadgade mänskliga rättigheter, indirekt anses innehålla en skyldighet för EU att respektera internationell humanitär rätt.

Rådande IHL-konventioner tillåter inte en ratificering av EU. Däremot kan EU konstateras vara bundet av IHL genom internationell sedvanerätt när EU genomför aktiviteter inom områden där IHL är relevant. EU kan i princip betraktas som en part till en väpnad konflikt, men det är osäkert om det är EU eller de deltagande länderna i en EU militär operation, som kommer att betraktas som part i händelse av en väpnad konflikt.

Den snabba utvecklingen av EUs militära operationer gör det nödvändigt att klargöra, och att reglera, EUs agerande som militär aktör under internationell humanitär rätt. I princip kan EU anses utöva en betydande grad av befäl och kontroll över EU militära operationer men rättsläget är osäkert varför EU rekommenderas att klargöra fördelningen av kontroll mellan EU och de deltagande staterna. Därigenom skulle EU också bidra till ett förtydligande i frågan om ansvarsfördelning. EU uppmanas att reglera genomförandet av sina militära operationer under internationell humanitär rätt, detta skulle underlätta för EU-trupper i fält och samtidigt visa att EU accepterar att dess agerande som en militär aktör och internationell juridisk person genererar en skyldighet för EU att agera på ett vederhäftigt sätt. Genom detta kan EU potentiellt bidra till att utveckla den internationella humanitära rätten.

Abbreviations

CIVCOM	Committee for Civilian Aspects of Crisis Management
CONOPS	Concept of Operation
COREPER	Committee of Permanent Representation
Council	European Council
CSDP	Common Security and Defence Policy
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	The European Court of Justice
ECtHR	The European Court of Human Rights
EDA	European Defence Agency
EEAS	European External Actions Service
ESDP	European Security and Defence Policy
EUMC	European Union Military Committee
EUMCWG	European Union Military Committee Working Group
EU	European Union
IHL	International Humanitarian Law
HTF	Headline Task Force
NATO	North Atlantic Treaty Organization
OJ	Official Journal
OPLAN	Operation Plan
PMG	Politico-Military Group

PSC	Political and Security Committee
ROE	Rules of Engagement
SC	Security Council
SOFA	Status of Forces Agreement
TEU	Treaty on the European Union
TFEU	Treaty on the Function of the European Union
UN	United Nations

1 Introduction

Since 2003 the European Union (EU) has been engaged in 27 civilian and military crisis management operations, thus rapidly increasing its capability and importance as a global security actor. As a result of the acquired and developed operational military capability over the course of the last decade the EU can now be considered a military actor[1], similar to the United Nations (UN) and the North Atlantic Treaty Organisation (NATO).

The first EU military operation was operation CONCORDIA deployed in the former Yugoslav Republic of Macedonia in 2003. Since then the EU has launched an additional seven military operations, the most recent being EUTM Mali in February 2013. Apart from EUTM Mali the EU is currently conducting four other military operations, the peacekeeping operation EUFOR ALTHEA launched in Bosnia – Herzegovina in 2004, operation EUNAVFOR Atalanta launched in 2008 at the sea coast of Somalia and EUTM Somalia launched in Somalia in 2010.

Practice of the commenced operations illustrates that EU military operations are performed in an increasingly complex, hostile and uncertain security environment. For example operation EUNAVFOR Atalanta has expanded in size and level of difficulty. In operation ARTEMIS EU-led forces were under attack and as they returned the fire, they killed two attackers. In EUFOR Tchad/RCA the environment for the operation was challenging with several on-going armed conflicts.

To date, no EU military operation has engaged in armed conflict. However, due to the EU´s increasing engagement in military operations, its focus on maintaining international peace and security, and the practice of conducted and launched operations, it is no longer premature to argue that EU-led forces may at some point become engaged in a conflict situation in which international humanitarian law (IHL) subsequently could apply. EU military operations are conducted in a third state by troops voluntarily placed at the disposal of the EU by member states and non-member states (third states), consequently aspects of international law become applicable in addition to EU law. Accordingly, the conduct of EU military operations fosters questions with regards to the legal framework governing an operation and the law applicable to the EU and its military forces.

[1] See further in Chapter 2, p. 14.

1.1 Purpose and research question

An examination of the legal framework governing EU military operations is crucial for an understanding of the EU´s activities within its Common Security and Defence Policy. Due to the EU´s increasing engagement in military operations and the fact that operations take place in complex and uncertain security areas, an exploration of the EU as a military actor and an assessment of the applicability of IHL in EU military operations is crucial. The peculiarity of the EU as an international organisation raises various questions with regards to the relationship between the EU and IHL, and the potential application of IHL obligations in EU military operations.

Accordingly, the author aims to initially explore the new acquired role of the EU as a military actor and the legal framework applicable to EU military operations. Thereafter the author aims to emphasize the relationship between the EU and IHL, and assess if and how, EU military operations can be bound by IHL obligations. In other words the research question is:

- How can the legal framework with focus on international humanitarian law apply to EU military operations?

1.2 Theory and method

What is the EU? As the EU stands today it contains both supranational and intergovernmental elements, hence it is not possible to define the EU as either a supranational entity or an intergovernmental organisation. Perhaps the EU is a mixture of both. Therefore the theory in this thesis is based on the assumption that it is uncertain what the EU *de facto* is. The unique and unclear nature of the EU is the point of departure for the examination of how the legal framework with focus on IHL can apply to EU military operations. The outset of the thesis is that law should govern military operations. Irrespective of the organisation involved, international humanitarian law must apply in all military operations encompassing an armed conflict.

The methodology applied by the author is based on traditional legal dogmatic approach, meaning that the author describes applicable law and regulations whilst different kind of sources of laws are recited and explained through preliminary work and other relevant sources. It is important to point

out that the thesis does not comprise a description of every feature or regulation in this area. Moreover, the topic and the scope of the thesis relate to a relatively new area, which have not been thoroughly examined by scholars why the legal work on this area is limited. Within the existing material the author has selected the material best suitable for the purpose of the thesis.

The law applicable to EU military operations can be divided into the internal legal framework (EU law) and the external legal framework (international law and to the extent agreed, the national law of the host country). International law applicable to EU military operations could hypothetically derive both from the internal and the external legal framework, since it, to a certain extent, could be understood as a part of EU law but at the same time maintain its distinct existence.

The basic of the thesis is primarily the Treaty of the European Union.[2] The author will examine primary and secondary sources of EU legislation. Official documents issued by EU institutions, mainly European Council decisions, will play a crucial role in the material of the thesis. The main international humanitarian law instruments, especially customary IHL and the 1949 Geneva Conventions and the 1977 Additional Protocols, complement this material. The author has attempted to include practice of EU military operations and to a certain extent reconcile practice aspects with the theoretical legal framework. The examination also finds its sources in jurisprudence and literature, such as articles, essays, working papers and EU guidelines. Internet sources, mainly deriving from the EU, are used since they can provide a practical perspective to the examination. It is important to note that some of the sources, mainly the EU planning documents, are classified and normally not in the public domain, wherefore the content cannot be examined by the author.

1.3 Thesis outline

For the purpose of a clear understanding and structure, the author has chosen to end every chapter with a section of conclusions whilst the final chapter contains concluding remarks. By way of introduction chapter two is devoted to the EU´s role as a new military actor and to enlighten the military operations undertaken by the EU so far. Chapter three examine the legal framework applicable to EU military operations, including the legal

[2] As amended by the Lisbon Treaty.

basis as it derives both from EU law and international law, the planning and decision-making process, the command and control and a short description of the applicability of human rights law. Chapter four analyses the relationship between the EU and international humanitarian law and in this regard different aspects of the applicability of IHL to EU military operations are examined. Chapter five assesses the role of international humanitarian law in the EU´s internal legal order, using the EU Treaty, the legal basis for EU military operations and EU soft law instruments. The final chapter contains concluding remarks and recommendations for the future.

1.4 Limitations

The thesis is limited to a description of the basic rules. The legal framework of EU military operations is very complex, especially with regards to the law applicable to the conduct of military operations which is a complex combination of EU law, domestic law (the law of the sending States and the host State) and international law. It is not the aim of the author to examine all international law questions relating to a military operation. Quite the opposite, as the focus of the thesis is on international humanitarian law, other aspects of international law are not examined. However, human rights law will be given attention in order to illustrate its existence and the extent that it could potentially work as a legal link for the integration of IHL into the EU´s legal order.

Another related aspect of the legal framework of EU military operations is the relationship between the EU and NATO, this is not a focus and only mentioned upon its existence. The scope of the thesis is limited to military operations as a part of the EU´s crisis management why civilian missions are not studied. Neither are the questions about financing or criminal law examined.

The aim of the thesis is to examine the relationship between the EU as an international organisation and the potential applicability of IHL in EU military operations. This excludes examining other features of IHL, e.g. the definition and threshold of an armed conflict, the question of international or non-international armed conflict, question of occupation and impact of UN Security Council intervention.

As part of the examination of the relationship between the EU and IHL, the question of responsibility of wrongful acts under IHL is highlighted. However this question relates to other fields of international law, e.g.

international institutional law, the law of responsibility of states, the law of responsibility of international organisations and IHL. Consequently an extensive examination of this question is too wide for the scope of this paper.

Instead of regional organisation the author has chosen to use the definition international organisation (created on the basis of a treaty by states and encompassing international legal personality separated from its members states) when referring to the EU as an organisation performing military operations outside the EU territory.

2 The EU as a new military actor

A part of what makes the EU unique as an organisation is that it contains supranational cooperation, although at the same time operating on an intergovernmental basis. Evidently making the status of the EU unclear but thus unique.

The EU acquires a *sui generis* (unique in characteristics) nature as an international organisation.[3] The EU possesses peculiarities contrary to other organisations, e.g. the EU has an own currency, a concept of citizenship, jurisdiction over a given territory and an own defence policy with the capability to lead to a common defence.[4] Moreover the EU´s treaty foundation has a constitutional nature and is additionally formed as internationally agreements, making the way for a new international legal system.[5]

The unique, and unclear, nature of the EU is the point of departure for the continued examination of how the legal framework with focus on IHL can apply to EU military operations. By a way of introduction for the examination in the following chapters this chapter presents the new acquired role for the EU in the field of security and defence issues and how the EU in practice has developed into a military actor.

The scene of crisis management have long been dominated by the UN and NATO, thus legal scholars have mainly focused on these organisations when examined the military conduct of multilateral peacekeeping forces. However, the operational framework of the EU´s security and defence policy has gone through a crucial development during the last decade and the responsibility of the EU in maintaining international peace and security has increased rapidly.[6]

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[3] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations,* 2012, p. 66.
[4] Falco, Valentina. *Human Rights and International Humanitarian Law in the Common Security and Defence Policy: Legal Framework and Perspectives for PMSC Regulations,* 2009, p. 12.
[5] Falco, Valentina. *The Internal Legal Order of the European Union as a Complementary Framework for its Obligations under IHL,* 2009, p.189.
[6] Ibid., p. 172.

The starting point for the EU´s role as a military actor arose in 1992 in the Treaty of Maastricht that referred to "the eventual framing of a common defence policy, which might in time lead to a common defence policy".[7] Following the outcome of the 1998 British-French Summit of Saint-Malo,[8] the President of the European Commission and the heads of the member states of the EU stated at the 1999 Cologne European Council *inter alia* "the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises"[9]. Subsequently the EU´s Security and Defence Policy (ESDP) came into force in 1999 as a part of the EU´s Common Foreign and Security Policy.[10] The ESDP became operational in 2003 when the General Affairs and the External Relations Council stated "the EU now has operational capability across the full range of the Petersberg tasks".[11] The entry into force of the Treaty of Nice gave the legal basis for the EU´s involvement in military operations by virtue of Art. 17 that declared, "the common foreign and security policy shall include all questions relating to the security of the Union. The questions referred to shall include humanitarian and rescue tasks and task of combat forces in crisis management, including peacemaking".[12] Art. 17 contained the so-called "Petersberg Tasks".[13]

Succeeding Council meetings of the 1999 European Council of Cologne resulted in the founding of a permanent military structures within the European Council, for example the Political and Security Committee[14], the

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[7] Treaty on the European Union, Treaty of Maastricht of 29 July 1992, Article J.4 (1), O.J. (C 191/1).

[8] Joint Declaration issued at the British-France Summit, Saint Malo France, 3-4 December 1998. Available at: http://www.consilium.europa.eu/uedocs/cmsUpload/French-British%20Summit%20Declaration,%20Saint-Malo,%201998%20-%20EN.pdf

[9] Presidency Conclusions, Cologne European Council, 3 and 4 June 1999. Available in Annex III p.33: http://www.consilium.europa.eu/uedocs/cmsUpload/Cologne%20European%20Council-Presidency%20conclusions.pdf.

[10] Zwanenburg, Marten. *Toward a more mature ESDP: Responsibility for violations of international humanitarian law by EU crisis management operations*, 2008, p. 395.

[11] Declaration on EU military capabilities, 19-20. V. 2003. 9379/03 (Presse 138) p. 2. Available at: http://consilium.europa.eu/uedocs/cmsUpload/Declaration%20on%20EU%20Military%20Capabilities%20-%20May%202003.pdf.

[12] Consolidated version of the Treaty on European Union, of 29 December 2006, article 17, O.J. (C 321/5).

[13] The Petersberg Tasks were set out in the Petersbergs Declaration adopted at the Ministerial Council of the Western European Union in June 1992; Petersbergs Declaration of the Western European Union Council of Ministers, para. II.4, June 19, 1992. Available at: http://www.weu.int/documents/920619peten.pdf.

[14] Council Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee, 2001 O.J. (L 27/1).

EU Military Committee[15] and the EU Military Staff[16]. In the year of 2004 the European Defence Agency[17] was set up and 2007 a EU Operation Center was established in Brussels with the purpose that the EU would be able command operations of smaller size from Brussels.[18] Furthermore the EU has developed operational military capabilities,[19] e.g. the EU Battle groups that received fully operation capability in January 2007. With the Battle group concept the EU has instruments for, when necessary, an early and rapid response. If so decided by the Council, the EU is able to undertake two concurrent single Battlegroup-sized (about 1 500 personnel strong) rapid-response-operations.[20] With the Treaty of Lisbon running into force in 2009 the ESDP were renamed to the Common Security and Defence Policy (CSDP).

2.1 EU military operations

Since the EU´s Common Security and Defence Policy (CSDP) became operational in 2003 the EU has to today launched 27 crisis management missions, 9 of them being military operations.[21] The first EU military operation was operation CONCORDIA[22] deployed in the former Yugoslav Republic of Macedonia in 2003. The same year the humanitarian and rescue

15 Council Decision 2001/79/CFSP of 22 January 2001 setting up the Military Committee of the European Union, 2001 O.J. (L 27/4).
16 Council Decision 2005/395/CFSP of 10 May 2005 amending Decision 2001/80/CFSP on the establishment of the Military Staff of the European Union, 2005 O.J. (L 132/17).
[17] European Union External Action webpage: http://consilium.europa.eu/eeas/security-defence/csdp-structures-and-instruments/eu-agencies-on-csdp/european-defence-agency-(brussels)?lang=en; European Defence Agency webpage: http://www.eda.europa.eu/Aboutus.
[18] Factsheet, The activation of the EU operations center, 22 May 2012. Available at: http://consilium.europa.eu/media/1634515/factsheet_opscentre_22_may_12.pdf, p 2. The EU Operations Centre was activated the first time in 2012 when the Foreign Affairs Council on 23 March 2012 decided to activate the EU Operation Centre in order to coordinate and strengthening civil-military synergies between the EU military operation EUNAVFOR ATALANTA, the EU military mission EUTM Somalia and the EU civilian mission EUCAP NESTOR.
[19] Deployment of European Military Capabilities, Common Security and Defence Policy, Updated January 2011. Available at: http://consilium.europa.eu/media/1222506/110106%20updated%20factsheet%20capacites%20militaires%20-%20version%208_en.pdf.
[20] Factsheet from the EU Council Secretariat on the EU Battle groups: http://consilium.europa.eu/media/1222503/110106%20factsheet%20-%20battlegroups%20-%20version%207_en.pdf.
[21] Overview of the missions and operations of the European Union April 2013: http://consilium.europa.eu/eeas/security-defence/eu-operations?amp;lang=en.
[22] Council Joint Action No. 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia, 2003 O.J. (L 34/26).

task operation ARTEMIS[23] occurred in RD Congo. The peacekeeping operation EUFOR ALTHEA[24] was deployed in Bosnia – Herzegovina in 2004 and is still on going. Operation AMIS II[25] was a mixed military-civilian operation, which took place in Sudan/Darfur in 2005-2006. Operation EUFOR RD Congo[26] occurred 2006 in the Democratic Republic of Congo. The crisis management operation EUFOR Tchad/RCA[27] was deployed in eastern Chad and northeast of the Central African Republic between 2008-2009 under a Chapter VII resolution.[28] In 2008 operation EUNAVFOR Atalanta[29] was launched at the cost of Somalia. The European Council has decided to extend operation EUNAVFOR Atalanta until 2014.[30] Operation EUTM Somalia[31] was launched in Somalia 2010 in support of UN Security Council Resolution 1872[32] and is still ongoing. The recently launched EU military operation is EUTM Mali[33] in 2013, aimed to contribute to the training of the Malian armed forces.

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[23] Council Joint Action No. 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Republic of Congo, 2003 O.J. (L 143/50).

[24] Council Joint Action 2004/319/CFSP of 12 July 2004 on the European Union military operation Bosnia Herzegovina, 2004 O.J. (L 252/10); Council Decision 2004:803/CFSP of 25 November 2004 on the launching of the European Union military operation in Bosnia and Herzegovina, 2004 O.J. (L 34/39).

[25] Council Joint Action 2005/557/CFSP of 20 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan, O.J. (L 188/46).

[26] Council Joint Action 2006/319/CFSP of 27 April 2006 on the European Union military operation in support for the United Nations Missions in Democratic Republic of Congo (MONUC) during the election process, 2006 O.J. (L 116/98).

[27] Council Decision 2008/101/CFSP of 28 January 2008 on the launching of the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA), 2008 O.J. (L 34/39).

[28] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373. http://www.consilium.europa.eu/uedocs/cmsUpload/N0751615.pdf

[29] 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 Somalia coast, 2008 O.J. (L 301) 33; Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), 2008 O.J. (L 330/19).

[30] For an overview about EUNAVFOR Atalanta see: http://eunavfor.eu/.

[31] Council Decision 2010/96/CFSP of 15 February on a European Union military mission to contribute to the training of Somali security forces, 2010 O.J. (L 22) 16; Council Decision 2010/197/CFSP of 31 March 2010 on the launch of a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia), 2010 O.J. (L 87/33); Council Decision 2012/835/CFSP of 21 December 2012 extending Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2010 O.J. (L 357/13).

[32] UNSC Res 1872 (26 May 2004) UN Doc S/RES/1872. http://www.consilium.europa.eu/uedocs/cmsUpload/RES-1872%20EN.pdf

[33] Council Decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali), 2013 O.J. (L 14/19); Council Decision 2013/87/CFSP of 18 February 2013 on the launch of a European Union military mission to contribute to the training of the Malian Armed Forces

2.3 Conclusions

This chapter has illustrated that EU military operations, and EU crisis management as a whole, is a moderately new phenomenon. During a time period of ten years the EU has launched 27 crisis management operations including 9 military operations. Hence, since the EU´s Common Defence and Security Policy became operational the EU has launched almost one military operation per year. The figures clearly demonstrate that the EU has progressively have added military capabilities and progressed its operational framework in the area of security and defence issues. The rapid development described in this chapter leads the author to conclude that it is no longer premature to argue that the EU as an international organisation today plays a prominent role in the maintenance of peace and security in the world.

The EU has proven to have a military structure and an operational capability to conclude operations long outside the European territory, hence the EU can now be regarded as a military actor. Moreover, the EU´s development in security and defence issues over the past years makes the author to believe that the EU as an international organisation has broken the traditionally monopoly held by the UN, and to some extent the NATO and perhaps the African Union, as military actors in this field.

Even if the EU at present can be considered a military actor, it should not be forgotten that it EU is still also somewhat a newcomer in the field of military operations. Nevertheless it is beyond the “age of innocence”, and it is thus now necessary to place attention to the EU´s role as a military actor and to examine its engagement in military operations and the legal framework governing it.

(EUTM Mali), 2013 O.J. (L 46/27).

3 The Legal Framework of EU Military Operations

The previous chapter provided an overview of the EU´s development in becoming a military actor and how the EU in this regard has acquired an operational capability allowing it to deploy military operations in third countries within its Common Security and Defence Policy (CSDP). With the increasing number of launched EU military operations questions emerge as for example the legal basis for military operations, the scope of the CSDP in the EU Treaty and the law governing the conduct of military operations.

Even if the EU can be considered as a newcomer in the field of security and defence issues, the rapid development of the EU in this area makes it reasonable to predicate that the EU has past the "age of innocence" and thus a solid level of legal standards governing the conduct of EU in this respect can be demanded. Consequently this chapter provides an illustration of the legal framework applicable to EU military operations. Initially possible legal bases for a EU military operation are presented, followed by a description of the planning and decision making process. Thereafter an explanation of the command and control are given. The chapter ends with a brief overview of the relationship between human rights law and EU military operations.

The EU initiates a military operation on the basis of an international mandate.[34] Usually the mandate derives from a UN Security Council resolution, a peace agreement and/or the consent from the host state, thus several bases can be combined.[35] Other bases in international law are also possible, for example the UN Convention on the Law of the Sea, which is a part of the legal basis in operation EUNAVFOR Atalanta.[36]

[34] Naert, Frederik. *Accountability For Violations of Human Rights Law by EU Forces,* 2008, p. 377.
[35] Ibid.
[36] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 230.

3.1 Legal basis in the EU Treaty

The Common Defence and Security Policy (CDSP) of the EU is regulated in Title V, Chapter 2, Section 2 of the TEU.[37] According to Art. 42 TEU the CDSP is a part of the wider Common Foreign and Security Policy (CFSP) of the EU and is therefore subject to the general CFSP rules listed in Title V of the TEU.

The basis for CSDP missions is set out in Art. 42 TEU, expressing *inter alia "*The common security and defence policy shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peacekeeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States".

The CSDP task-catalogue is further defined in Art. 43 TEU stating that "The tasks 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 stabilization. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories". The missions referred to in Art. 43 TEU contains the so-called "Petersberg Tasks Plus".[38] It is argued that the phrase "task of combat forces in crisis management, including peacemaking" in Art.43 TEU involves peace enforcement and thus potentially high intensity operations involving combat.[39] Due to the wide range of possible missions to undertake, the EU can create a military operation aimed to serve the specific situation on the ground.[40]

As regards the EU as a defence community Art. 42 (2) TEU provides for the "possibility to frame a common Union defence policy that will lead to a common defence, when the European Council, acting unanimously, so

[37] Treaty on European Union (TEU). All articles of the TEU referred to in this text are the articles of the Consolidated version of the Treaty on European Union of 30 March 2010, 2010 O.J. (C 83/1).
[38] See *supra* note 13. When Art. 43 in Treaty of Lisbon came into force the Petersberg Tasks was extended to include e.g. joint disarmament operations, military advice and assistance tasks, thus the name changed to Petersberg Tasks Plus.
[39] Naert, Frederik. *International Law Aspects of the EU´s Security and Defence policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, 2009, p. 435.
[40] Naert, Frederik. *Legal Aspects of EU Military Operations,* 2011, p. 222.

decides". Nevertheless, it is understood as an accepted opinion that the EU´s Common Security and Defence Policy (CSDP) will not establish a EU army responsible for the defence of the EU member states.[41] Art. 42 (2) furthermore contain the relationship between the EU and the NATO and the so-called Berlin Plus arrangements.[42] Art. 42 (7) TEU includes a mutual assistance clause, "If a member state is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain member states. Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation". Although there is no provision in the TEU stipulating that the obligation in Art. 42 (7) TEU has to be provided in the framework of the Union.[43] For those EU member states that are a member of the NATO, this organisation should remain the foundation of their collective defence and the forum for their implementation, by virtue of Arts. 42 (2) and 42 (7).

Art. 42 (5) and Art. 44 TEU provides for enhanced cooperation between the member states by making it possible to entrust the execution of a task within the CSDP framework to a group of member states that are willing and have the necessary capabilities for such a task. According to Art. 44 the member states involved shall in association with the High Representatives agree among themselves on the management of the task and keep the Council regularly informed about its process. If the completion of the task should entail major consequences or require amendments of the objective, scope and conditions determined for the task, the Council shall adopt the necessary decisions, according to Art. 44 TEU.

The European Defence Agency (EDA) is the main body in charge, subject to the authority of the Council, of military capabilities pursuant to Arts. 42 (3) and 45 TEU. Art. 42 (3) stipulate that member states shall make civilian and military capabilities available to the Union for the implementation of the Common Security and Defence Policy.

Arts. 42 (6) and 46 TEU provides the possibility for structured cooperation for "those member states whose military capabilities fulfill higher criteria

[41] Falco, Valentina. *The Internal Legal Order of the European Union as a Complementary Framework for its Obligations under IHL, 2009,* p. 175.
[42] For more information see: http://www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf.
[43] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 222.

and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework." Consistent with Art. 42 (6) the structured cooperation is governed by Art. 46 TEU and shall not affect the provisions of Art. 43.

3.2.1 Council decision

A EU military operation is performed under a mandate decided by the European Council (hereafter referred to as the Council). Hence the basic legal instrument for each EU military operations is a Council decision (previously called Council Joint Action) adopted on the basis of Art. 43 TEU, in conjunction with Art. 28 TEU.[44] In accordance with Art. 31 TEU the Council decides with unanimity, with the possibility of abstentions.[45]

A Council decision is not merely a decision adopted by the member states collectively, it is an act of the Union.[46] A Council decision generally contains the mission and the mandate, the political and military control and direction.[47] Furthermore a Council decision designate the commanders and headquarters, specify the command and control relations and contain provisions on the status of the mission, status of forces, financial arrangements, participation of third states (*i.e.* non-EU member states), relations with other actors, handling of EU classified information and information about the launching and duration of the operation.[48]

It is not uncommon that a Council decision is adopted before the planning process is completed. As a consequence, when the planning process is completed the Council adopts a further separate decision for the launching

[44] Zyberi, Gentian. *The applicability of general principles and instruments of International Law to peace missions of the European Union,* 2012, p. 27.
[45] According to Art. 31 TEU, second subparagraph, any member of the Council may qualify its abstention by making a formal declaration, in that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the member state concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other member states shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the member states comprising at least one third of the population of the Union, the decision shall not be adopted.
[46] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 5.
[47] Ibid.
[48] Zyberi, Gentian. *The applicability of general principles and instruments of International Law to peace missions of the European Union*, 2012, p. 30; Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 226.

of the operation, together with a decision approving the Operation Plan and when applicable, the Rules of Engagement.[49]

3.2.2 International agreements

Pursuant to Art. 37 TEU and Art. 318 Treaty of the Function of the European Union (TFEU), the EU "may conclude agreements with one or more States or international organisations", thus provides the EU the authority to conclude international agreements in the realm of their Common Security and Defence Policy. An international agreement is established by the EU as a separate legal person[50] and not by the member states collectively.[51] By virtue of Art. 216 (2) TFEU an international agreement is binding upon the institutions of the European Union and on its member states.

International agreements are concluded regularly, agreement on the participation of a third State (see below) and on the status of forces (see below) are the most frequently signed agreements.[52] Other types of agreements can e.g. comprise the extension of a status of forces agreement from a non-EU operation to a EU military operation by an agreement or through a UN Security Council resolution. The latter was the practice in operation Althea in Bosnia and Herzegovina.[53]

Two agreements between the EU member states themselves are still pending its entry into force, "Agreement between the Member States of the European Union" (EU SOFA)[54] and "Agreement between the member states of the European Union concerning claims introduced by each member state against any other member state for damage to any property owned, used or operated by it or injury or death suffered by any military or civilian staff of its

[49] Zyberi, Gentian, *The applicability of general principles and instruments of International Law to peace missions of the European Union*, 2012, p. 30.
[50] The EU has legal personality in accordance with Art. 47 TEU.
[51] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 5.
[52] Naert, Frederik, *Accountability for Violations of Human Rights law by EU forces*, 2008, p. 337.
[53] UNSC Res 1551 (9 July 2004) UN Doc S/RES/1551,§ 20. http://www.consilium.europa.eu/uedocs/cmsUpload/N0441937.pdf
[54] Council Agreement 2003/C 321/02 of 31 December 2003 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, 2003 O.J. (C 321/6)

services, in the context of an EU crisis management operation*"*.[55]

The EU can also conclude a transit agreement (comparable to status of forces agreement but of a smaller dimension) with third states. For example did the EU establish a transit agreement with Cameroon in operation EUFOR Tchad/RCA.[56] Alternative status agreements may also be used.[57]

3.2.2.1 Status of Forces Agreement

Normally the EU concludes a Status of Forces Agreement (SOFA) with the host state in order to regulate and define the status and activities of the EU military operation in the host state.[58] A model SOFA exists for EU military operations. The SOFA comprise regulations concerning the entry into the host states territory, the exercise of criminal jurisdiction by sending states, freedom of movement, immunities and privileges, the wearing of uniforms and carrying of arms, security of the forces and military police, handling of deceased personnel, communications, handling of claims, implementing arrangements and the settling of disputes.[59]

A SOFA includes the consent from the host state. However, ordinarily the consent from the host state is already managed before the conclusion of the SOFA takes place. On the other hand, if the legal basis of the EU military operation is a Chapter VII mandate from the UN Security Council, the consent from the host state is not needed, but can still be recognized.[60] If a EU military operation is established on short notice and the SOFA cannot be concluded or entry into force in time, the host state can grant the military operation some immunities and privileges via unilateral declarations.[61]

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[55] Council Agreement 2004/C 116/01 of 20 April 2004 between the Member States of the European Union concerning claims introduced by each Member State against any other Member State for damage to any property owned, used or operated by it or injury or death suffered by any military or civilian staff of its services, in the context of an EU crisis management operation, 2004 O.J. (C 116/1).
[56] Council Decision 2008/178/CFSP of 28 January 2008 concerning the conclusion of the Agreement between the European Union and the Republic of Cameroon on the status of the European Union-led forces in transit within the territory of the Republic of Cameroon, 2008 O.J. (L 57/30).
[57] Naert, Frederik. *Legal Aspects of EU Military Operations,* 2011, p. 231.
[58] Ibid.
[59] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 6.
[60] Naert, Frederik. *International Law Aspects of the EU´s Security and Defence Policy, with a particular focus on the Law of Armed Conflict and Human Rights,* 2008, p. 68.
[61] Ibid. p. 69.

3.2.2.2 Participating agreements

A participating agreement is used when a third state take part in a EU military operation and encompasses the modalities of the third states participation.[62] On the basis of a model agreement a participating agreement can be settled on ad hoc basis for a specific operation. A participating agreement can also be settled as a framework agreement, than covering EU operations in generally.[63] A framework participating agreement has been signed with for example Turkey[64], Norway[65], Canada[66], The United States of America[67] and the former Yugoslav Republic of Macedonia[68]

In a participating agreement the participating state usually associates itself with the Council decision governing the operation and commits itself to provide and contribute to the operation and to bear the cost for its involvement.[69] Additionally a participating agreement stipulates e.g. that the personnel from the third state is included by any Status of Forces Agreement established by the EU and the regulations concerning transfer of command and control.[70]

Within the framework of participating agreements the EU decision-making autonomy is safeguarded, nonetheless all participating states normally have

[62] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 6.
[63] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 232.
[64] Council Decision 2006/482/CFSP of 10 April 2006 concerning the conclusion of the Agreement between the European Union and the Republic of Turkey establishing a framework for the participation of the Republic of Turkey in the European Union crisis management operations, 2006 O.J (L 189/17), entered into force 1 August 2007.
[65] Council Decision 2005/191/CFSP of 18 October 2004 concerning the conclusion of agreements between the European Union and the Republic of Iceland, the Kingdom of Norway and Romania establishing a framework for the participation of the Republic of Iceland, the Kingdom of Norway and Romania in the European Union crisis-management operations 2006 O.J. (L 67/8).
[66] Council Decision 2005/851/CFSP of 21 November 2005 concerning the conclusion of the Agreement between the European Union and Canada establishing a framework for the participation of Canada in the European Union crisis management operations, 2005 O.J. (L 315/20).
[67] Council Decision 2011/318/CFSP of 31 March 2011 on the signing and conclusion of the Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, 2011 O.J. (L 143/1).
[68] Council Decision 2012/768/CFSP of 9 March 2012 on the signing and conclusion of the Agreement between the European Union and the former Yugoslav Republic of Macedonia establishing a framework for the participation of the former Yugoslav Republic of Macedonia in European Union crisis management operations, 2012, O.J. (L 338/3), entered into force 1 April 2013.
[69] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 233.
[70] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 6.

the same rights and obligations as EU member states when it comes to the day-to-day organisation of the operation. A Committee of Contributors may be established to provide a forum for the exercise of these rights.[71] The EU will consult with the participating states regarding the terminating of an operation.[72] Furthermore there are normally additional agreements between the EU and the participating states regulating different aspects of their cooperation in the operation, e.g. technical arrangements and memoranda of understanding.[73]

3.2 The planning and decision-making process

The scope of the EU´s Common Security and Defence Policy (CSDP) within the EU Treaty includes regulations as regards the process to plan a EU military operation and regulations regarding the power to adopt decisions related to EU military operations. The planning and decision-making process is important for an understanding of the division of labor between the different actors involved at EU level in a military operation and the legal documents adopted by them. Also, the decision-making process is significant for the question of responsibility (further examined in chapter four).

As previously described, the Council is the key decision-making body as regards the EU´s CSDP and for the launching of military operations. The ability to initiate or propose a decision to be taken by the Council is designated to the member states or the High Representative of the Union for Foreign Affairs and Security Policy (Lady Ashton), assisted by the European External Actions Service pursuant to Arts. 27 and 30 TEU. The High Representative, assisted by EEAS, is also preparing a Council decision according to Art. 27 TEU. The preparation is also conducted by different kind of preparatory bodies that prepare and advice an upcoming Council decision, these bodies e.g. includes the Political and Security Committee (PSC),[74] the EU Military Committee (EUMC), including the European Union Military Committee Working Group/Headline Goal Task Force

[71] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 233.
[72] Ibid.
[73] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 6.
[74] Council Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee, 2001 O.J. (L 27/1).

(EUMCWG/HTF),[75] the Committee for Civilian Aspects of Crisis Management (CIVCOM),[76] the Political-Military Group (PMG) and geographical and thematic working groups.[77]

The task to ensure the implementation of a Council decision is attributed to the High Representative, assisted by the European External Actions Service, by virtue of Art. 27 TEU. Additionally also the Political and Security Committee (PSC) shall monitor the implementation of agreed policies, without prejudice to the powers of the High Representative according to Art. 38 TEU. Moreover the PSC shall, pursuant of Art. 38 TEU, exercise under the responsibility of the Council and the High Representative, the political control and strategic direction of the crisis management operations referred to in Art. 43 (the task-catalogue). The PSC is a permanent body composed of national representatives at ambassador's level[78]which have an important role in the planning and decision making process.[79] By virtue of Art. 38 the PSC can be delegated some decision making power as the Council may authorize the PSC, for the purpose and for the duration of a crisis management operation as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation, e.g. decisions to modify the planning documents including the Operation Plan, the Chain of Command and the Rules of Engagement and to decide on the appointment of the EU Operation Commander and the EU Forces Commander.*[80]* However the power to adopt decisions relating to the objectives and the termination of the operation is entrusted with the Council.[81] When a EU Operation Commander has been chosen for the operation he/she also plays a role in the planning process.[82]

[75] Council Decision 2001/79/CFSP of 22 January 2001 setting up the Military Committee of the European Union, 2001 O.J. (L 27/4).
[76] Council Decision 2000/354/CFSP of 22 May 2000 setting up a Committee for Civilian Aspects of Crisis Management, 2000 O.J. (L 127/1).
[77] Naert, Frederik. *Legal Aspects of EU Military Operations,* 2011, p. 224.
[78] Zwanenburg, Marten, *Toward a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations,* 2008, p. 397.
[79] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 227.
[80] Ibid.
[81] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 5.
[82] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 225.

3.2.3 The Operation Plan, Rules of Engagement and other operational documents

Before an operational document is handed over to the Council, via the Committee of Permanent Representatives (COREPER), it is transferred to the Political and Security Committee, following a survey by the appropriate predatory body, normally the EU Military Committee (EUMC), the Committee for Civilian Aspects of Crisis Management (CIVCOM) and/or the Political-Military Group (PMG) that provides guidance and suggestion and might modify the document.[83]

For each EU military operation an Operation Plan (OPLAN) is established. The OPLAN is ordinarily developed by the EU Operation Commander and agreed upon by the Council in unanimity. The OPLAN covers the features of the operation and is often extensive, because of many annexes. The annexes to the OPLAN usually address *inter alia* the legal issues and the question of use of force in the operation.[84]

If a EU military operation might involve use of force beyond self defence Rules of Engagement (ROE) are established after a request from the EU Operation Commander and after authorization from the Council.[85] Equally with the OPLAN, the Council agrees on the ROE in unanimity.[86] The RUE is based on the EUs policy on the use of force[87] and can be explained as instructions concerning the use of force. Ordinarily both the OPLAN and the ROE are classified documents and hence not legal instruments.[88] Member states can issue caveats applicable to the forces they put at disposal to a EU military operation. However the caveats may merely impose further limitations on the use of force. The use of caveats license member states to guarantee that their national forces respect political or legal restrictions that are specific to that special member state, without imposing these limitations on other states. The ROE and the OPLAN cannot oblige a specific force of a member state to do something contrary to their national law or to a specific

[83] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 9.
[84] Ibid.; See Sanitised version of the FYROM Operation Plan, EU Council Doc. 7855/03 of 28 March 2003, http://register.consilium.europa.eu/pdf/en/03/st07/st07855.en03.pdf.
[85] Ibid., p. 9.
[86] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 227.
[87] EU Council Doc. 17168/09 of 2 January 2010 on EU Concept for the Use of Force in EU-led Military Operation, http://register.consilium.europa.eu/pdf/en/09/st17/st17168-ex01.en09.pdf.
[88] Naert, Frederik. *Legal Aspects of EU Military Operations,* 2011, p. 227.

treaty obligation.[89] Other use of force, e.g. to detain criminals are also covered in the ROE.[90]

The OPLAN is complemented and executed with a range of other operational documents, such as the Crisis Management Concept, a conceptual framework that explains the EU´s general approach to the management of a certain crisis.[91] Another operational document is the Military Strategic Options, which includes among other things a valuation of the feasibility and risk, an organisation for the Command and Control and a valuation of personnel necessities. The EU Operation Commander normally develops Concept of Operations document (CONOPS) that contains the guidelines on the use of force. The CONOPS is complemented by a Statement of Requirements, which contains the details of the forces, personnel and assets in the operation.[92] The planning process also contains a force generation process.[93]

3.3 The command and control

A clarification of the command and control in a EU military operation is crucial for the question of division of authority between the EU and the participating states in an operation. The command and control has a close link to the questions of responsibility (further examined in chapter four) and to determine who has the responsibility to ensure that the conduct of the EU military operation respects IHL.

The EU Operation Commander, appointed by the Council, has the highest level of military command in a EU military operation. The EU Operation Commander leads the EU military operation under the strategic guidance and direction of the Political and Security Committee. The member states that participate in an operation transfer the authority of their troops to the EU Operation Commander who then obtain operational control and/or command over the troops put at his/her disposal.[94] When national authorities transfer such an authority, the state is in principle no longer allowed to give

[89] F. Naert, *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement* (2011) p. 10.
[90] Ibid.
[91] Ibid., p. 9.
[92] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 9.
[93] EU Council Doc. 10690/08 of 16 June 2008 on EU Concept for Forces Generation, http://register.consilium.europa.eu/pdf/en/08/st10/st10690.en08.pdf.
[94] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 225.

the forces operation directions.[95] The next command level under the Operation Commander is the Force Commander, the highest individual in the field.[96]

Full command covers every aspect of military operations and administration and exists only within national services.[97] Thus full command is only available for participating States, due to the wording "national services".[98] However via the transfer of authority participating states transfer specific features of the command and control to the EU Operation Commander. When the participating states wish to get back their forces to their command and control they can make a reverse transfer of authority.[99]

A member state, or the NATO under the Berlin plus arrangements can provide Operational Headquarters to a military operation. If the EU Operations Centre is activated it can also work as an operational headquarter in a military operation.[100]

Even if not a part of the military chain of command the EU Military Committee (EUMC) is the highest military body established within the Council. The EUMC consists of the defence ministers in the member states, represented by their military representatives.[101] The EUMC offer guidance and suggestions to the Political and Security Committee on military matters and gives military direction regarding all military activities. The EUMC moreover supervise the performance of a military operation executed under the responsibility of the EU Operation Commander.[102]

[95] Zwanenburg, Marten, *The duty to respect international humanitarian law during European Union-led operations*, 2012, p. 74.
[96] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 11.
[97] EU Council Doc. 11096/03 of 26 July 2006, on EU Military C2 Concept, EXT 1 p. 11 c, http://register.consilium.europa.eu/pdf/en/03/st11/st11096-ex01.en03.pdf.
[98] Naert, Frederik. *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions Mandates and Rules of Engagement*, 2011, p. 11.
[99] Ibid.
[100] See *supra* note 16.
[101] Zwanenburg, Marten. *Toward a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations,* 2008, p. 398.
[102] The European External Actions Service webpage on the EU´s Common Security and Defence Policy structures and instruments, http://www.consilium.europa.eu/eeas/security-defence/csdp-structures-and-instruments?amp;lang=en.

3.4 The relationship between EU military operations and International Human Rights law

This section exemplifies very briefly the correlation between international human rights law and EU military operations, as human rights law is the most apparent alternative and/or complementary legal regime of international humanitarian law.

The EU mainly focuses on human rights law as the proper standard of conduct for a military operation.[103] The applicability of human rights as a legal regime in EU military operations are debated as regards the context of extraterritorial application of the European Convention on Human Rights, the question of derogation in times of emergencies, the applicability of human rights to peace operations, the relationship between human rights and international humanitarian law[104] and the impact of UN Security Council mandates on human rights.[105]

According to Art. 6 TEU the EU "recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties". The EU must obey human rights as general principles of EU law and is in the process to accede to the European Convention on Human Rights.[106]

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[103] Naert, Frederik. Legal Aspects of EU Military Operations, 2011, p. 236.

[104] Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), 2009 O.J. (L 303/12), article 12 states: " It is important to distinguish between international human rights law and IHL. They are distinct bodies of law and, while both are principally aimed at protecting individuals, there are important differences between them. In particular, IHL is applicable in time of armed conflict and occupation. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them", http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:303:0012:0017:EN:PDF.

[105] By virtue of Article 103 of the UN Charter, obligations under the UN Charter prevail over other international agreements. Where UN Security Council resolutions authorize the use of all necessary means, State often invoke this as a basis for partially limiting or setting aside some human rights in peace operations.

[106] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 237; Press Release Council of Europe DC041 (2013), Milestone reached in negotiations on accession of EU to the European Convention on Human Rights, https://wcd.coe.int/ViewDoc.jsp?Ref=DCPR041(2013)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE.

EU military planning documents (such as the Operational Plan) acknowledge internationally accepted standards of human rights law.[107] As an example, in operation EUNAVFOR Atalanta suspected pirates or armed robbers who are captured by EU-led forces at sea "may not be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subject to the death penalty, to torture or to any cruel, inhuman or degrading treatment".[108]

3.5 Conclusions

This chapter has given an overview of the legal framework of EU military operations. The examination demonstrates that the EU has a substantial and compound legal framework for its military operations, governed both in the EU treaty, in international law and developed in practice. Although a more truthful description of the EU´s Common Security and Defence Policy would entail a modification of the wording "common defence policy" as a common defence of the EU does not exist at present.

The wide range of possible military operations for the EU to undertake referred to in Art. 43 TEU makes it reasonable to state that the legal framework can differ from operation to operation. Consequently the EU has instruments at its disposal to designee an operation to meet the specific circumstances on the ground. Art. 43 refers to "peace-making" which could be argued to have a close link to "peace-enforcement", thus the EU Treaty might provide a reference to an operation involving high level combat.

At the same time as the legal framework is substantial, it is also complex with a lot of mechanism. It is the impression of the author that the planning and decision-making process is an extensive procedure with a lot of different actors and bodies involved. The process seems to occur between planners and experts on the one side, and with politicians and diplomats on the other side, making the way for a rather complex management and a fragment of confusion as regards the division of labour between the different actors. For the purpose of clarification, it is only the Council who

[107] Ibid., p. 237.
[108] 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 of the Somali coast, 2008 O.J. (L 301/12).

has the power do adopt legal acts concerning the launching, termination and conduct of a EU military operation. Legal regulations appear in the Operation Plan, Rules of Procedure, Status of Forces Agreement and participating agreements. The Political and Security Committee (PSC) plays a central role, with the possibility to exercise, under the responsibility of the Council, political control and strategic direction of the military operation and to take relevant decisions hereto, being the most far-reaching. The EU Military Committee (EUMC) provides advices and makes recommendations to the PCS on military matters and converts the strategic directions from the PSC to military directives that are transferred to the EU Operation Commander. The EUMC monitors the accurate execution of an operation, which is conducted under the responsibility of the EU Operation Commander. Regardless the fact that the EUMC is the highest military body set up within the Council, the EUMC is not a part of the military chain of command.

The question of command and control also requires clarification. The chain of command and control goes from the political level to military-strategic and an operational level. It is beyond doubt that the EU does not have an exclusive competence of the conduct of an EU military operation since the EU have to relay on its member states and third states to contribute forces to the operation. A EU military operation is governed by a decision from the Council, thus an operation is performed under the general authority by the Council, exercised by the Political and Security Committee (PSC) on the Councils behalf. It is described that member states and third states participating in the operation normally transfer to a certain extent the command and control over their troops to the EU Operation Commander, but keep the highest authority, the full command, for them selves. This is contradictory for the author, how can the participating states keep the “full command” but at the same time transfer authority to the EU Operation Commander? Additional, the fact that the participating states make a reverse transfer of authority when they wish to get back their forces to there complete command and control shows that if they would possess full command during the operation, the transfer for authority would not be needed. Moreover, the legal instruments governing a EU military operation is binding on all participating states and thus limit their freedom and power. It is problematic to accept that the participating states can maintain the “full command” during a military operation. It leads the author to conclude that the division of command and control are not a fully developed system. In the view of the author a significant degree of the authority over the EU-led forces are transferred to the EU in a military operation.

Another aspect of the legal framework is the political influence which most likely is apparent as the decision-making bodies consist of ministers (the European Council) and ambassadors (the Political and Security Committee). On the other hand, while these bodies consist of representatives from the member states and the decision-making by rule takes place unanimously, this is a way for the member states to exercise a form of control over the operation. Also, the unanimously decision-making gives the CSDP an intergovernmental element to it. It is not unlikely to become increasingly difficult to reach consensus among all EU member states. A likely consequence is that EU member states are seeking bilateral deals. In this regard the possibility for enhance cooperation in Arts. 42 (5) and 44 TEU can be useful in simplifying the procedure to launch an operation and to make the planning and decision-making process more efficient.

The legal framework of EU military operations appears to contain instruments for the EU to launch and perform a wide range of military operations and to manage legal challenges that might occur. However outstanding issues exists, for example certain aspects regarding the application of human rights law and the division of command and control. The maturity test for the legal framework will occur when the EU launch, or an operation develops into, a more complex military operation in a higher risk theatre. In such a context the EU Battle groups, a significant military capability for the EU which have been operational since 2007 but still have not been deployed, could be tested for the first time and potentially raise legal challenges.

4 The EU and International Humanitarian Law

The previous chapters concluded that after rapid developments in military operations, the EU can now be considered an important global player and military actor in maintaining peace and security. As a consequence, the EU´s role as an international organisation and a military actor deserves more attention, with regard to questions in terms of applicable law that may arise. One of the questions is the relationship between the EU as an international organisation and international humanitarian law (IHL). Chapter three described the legal framework applicable to EU military operations, with the exception of IHL, which requires its own examination in relation to EU military operations.

The widespread accepted sui generis nature of the EU speaks against to make parallels between the EU and other subject of international law regarding the relationship with IHL[109] By virtue of the EU´s *sui generis* (unique in characteristics) nature as an international organisation and of the EU´s development in crisis management operations the EU can be considered as novice in the field of IHL. The attention from scholars regarding studies of international organisations as military actors and their relationship to international humanitarian law have been focused on the UN and NATO, while research with regard to the EU in this field has been very modest.[110]

This chapter highlights the relationship between the EU and IHL. In this regard potential IHL obligations for the EU and the troop contributing states are examined and it is examined if EU-led operations may become "a party to an armed conflict" according to IHL.

[109] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, pp. 171-172.
[110] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations,* 2012, p. 66.

4.1 International legal personality

In order for the EU to obtain obligations under international humanitarian law it is required that the EU have internal legal personality, distinguished from its member states.[111] According to the International Court of Justice´s Advisory Opinion in the *Reparation for Injuries Suffered in the Service of the United Nations* "international legal personality is the capacity to bear rights and obligations under international law".[112] This finding is a part from the UN, also acknowledged to relate to other international organisations.[113] Consequently, with lack of international legal personality it is not possible to obtain rights and obligations under international law.[114] The EU has legal personality by virtue of Art. 47 TEU. It has been accepted that the legal personality of the EU includes international legal personality and thus the EU can bear rights and obligations under international law.[115]

4.2 Treaty law

The main realm of IHL obligations are laid down in treaty law, *inter alia* the 1949 Geneva Conventions and the 1977 two Additional Protocols. However, the EU is not a party any IHL treaties.[116] An immense difficulty for the applicability of IHL to the EU as such (a military actor distinct from its troop contributing member states) is that regional and international organisations are barred from becoming parties to the IHL treaties.[117] It is only possible for a "Power" to accede to the Geneva Conventions and the Additional Protocols[118] and the prevailing interpretation of the word "Power" only addresses states, thus only they can ratify the IHL treaties.[119]

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[111] Zwanenburg, Marten. *Toward a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations,* 2008, p. 395.
[112] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, 1949 ICJ Rep. 174, at 179.
[113] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations,* 2012, p. 66.
[114] Zwanenburg, Marten. *Toward a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations,* 2008, p. 399.
[115] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations,* 2012, p. 66.
[116] Zwanenburg, Marten. *Toward a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations,* 2008, p. 400.
[117] Falco, Valentina. *Human rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and Perspective for PMSC Regulations*, 2009, p. 14.
[118] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 67.
[119] Ibid.

Consequently the Geneva Conventions and the Additional Protocols do not generate any IHL obligations for the EU.[120]

EU military operations are executed by troops put at the disposal of EU member states and non-member states, hence these states has their own IHL obligations.[121] The two Geneva Conventions are universally ratified and subsequently all states are parties thereof. Moreover all EU member states are parties to the two Additional Protocols.[122] Nevertheless examples illustrates that the IHL-treaty framework of the states participating in EU military operations are far from uniform. For example, neither the United Kingdom nor Ireland have ratified the 1954 Convention on the Protection of Cultural Property in Times of War,[123] hence in a EU military operation where troops are put at the disposal of the United Kingdom or Ireland these troops would not be bound by this treaty. Furthermore, neither Finland nor Poland has ratified the 1997 Ottawa Treaty on anti-personnel land mines,[124] though Finland has agreed with the EU not to use antipersonnel landmines in CSDP operations.[125] As already mentioned, EU military operations are often, in addition to the EU-member states, composed of non-member States.[126]An illustrative example is Turkey who has e.g. participated in operation Concordia, Althea and EUFOR RD Congo but has not signed, nor ratified the two Additional Protocols. This is controversial since these Protocols are crucial in order to complement the protection granted by the Geneva Conventions to victims of both international and non-international conflicts.[127] Although it could be argued that those countries that have not ratified the Additional Protocols could be bound by them via customary law. Noteworthy is thus that Additional Protocol I has been acknowledged as customary law, while the customary nature of Additional Protocol II is debated.[128] Furthermore, other IHL treaties, such as the Optional Protocol

[120] Zwanenburg, Marten. *Toward a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations,* 2008, p. 400.
[121] Sari, Aurel & Wessel, Ramses A. *International Responsibility for EU military operations: Finding the EU´s place in the global accountability regime*, 2012, p. 1.
[122] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 182.
[123] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769 (1999).
[124] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sep. 18, 1997, 2056 U.N.T.S 211.
[125] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 183.
[126] For example in operation Althea did Albania, Argentina, Canada, Chile, Morocco, New Zealand, Norway, Switzerland and Turkey participated as non-EU member states.
[127] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009 p. 183.
[128] Ibid., p. 184.

on the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict[129] are not uniformed ratified by either EU member states or the non-member states that have been engaged in EU military operations.[130]

4.3 Customary International Law

Moreover, IHL obligations can be laid down in customary international law.[131] The EU has confirmed that most of the rules in the main IHL treaties are considered as customary international law: "the Geneva Conventions enjoy universal acceptance, and most of the provisions of the Conventions and their 1977 Additional Protocols are generally accepted as customary law".[132]

It is acknowledged that international organisations that possess international legal personality are subject to the rules of general international law.[133] The possession of international legal personality means to be bound by general international law (customary international law and general principles of law).[134] Further, the International Court of Justice has pointed out "international organisations are subjects of international law, and, as such, are bound by any obligations incumbent upon them under general rules of international law".[135] As aforementioned, the EU has international legal personality why these reasoning can apply to the EU.[136] Moreover the European Court of Justice (ECJ) has found that the European Communities are bound by general international law, e.g. in the *Racke* case the ECJ stated

[129] Optional Protocol on the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000).
[130] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 184.
[131] Zwanenburg, Marten. *Toward a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations*, 2008, p. 400.
[132] Statement by Ms. Anna Sotaniemi, Legal Advider, Permanent Mission of Finland to the United Nations, on behalf of the European Union, UN 61st Session, VI Committee, Agenda Item 75: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, 18 October 2006, New York, in Zwanenburg, Marten. *Toward a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations*, 2008, p. 400.
[133] Falco, Valentina. *Human rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and Perspective for PMSC Regulations*, 2009, p. 2.
[134] Zwanenburg, Marten. *Toward a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations*, 2008, pp. 400-401.
[135] Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion of 20 December 1980, I.C.J. 73, at 89-90, para 37.
[136] Zwanenburg, Marten. *The duty to respect international humanitarian law during European Union-led operations*, 2012, p. 67.

"the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law".[137] The latter finding referred to the European Community, because the ECJ at that time lacked jurisdiction over the EU´s Common Foreign and Security Policy.[138] However, in the case *Air Transport Association of America* the ECJ in the Grand Chamber found that "the European Union is bound to observe international law in its entirety, including customary international law".[139] Thus the ECJ has acknowledged that customary international law applies to the EU.[140]

Due to the principle of functionality, international organisations are not bound to the full range of customary international law, but only to those rules of customary law that are relevant for their activities.[141] An analogy has been made in this regard[142] to the applicability of IHL in UN peacekeeping operations and an argument raised by Shraga: *"The principle of functionality which circumscribes the international personality of the organisation and its legal capacity, also determines the scope of the applicable law to activities carried out by United Nations in the performance of its functions…The ever-growing involvement of UN forces in situations of armed conflict warrants that International Humanitarian Law be made applicable to them by analogy and as appropriate, when they, like states, are engaged in military operations as combatants".*[143]

Thus, customary IHL applies when an international organisation has the possibility to preform military operations that could involve armed force.[144]

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[137] Case C-162/96, Racke GmbH & Co. v. Hauptzollamt Mainz (1998) ECR I-3655, para. 45.
[138] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 68.
[139] Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Judgment the Court of Justice of 21 December 2011, para. 101.
[140] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 68.
[141] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 67.
[142] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 187.
[143] Shraga, Daphna. *The United Nations as an Actor Bound by International Humanitarian Law"* 5 International Peacekeeping, 1998 pp. 64-65 in Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, pp. 187-188.
[144] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 188.

4.4 EU military operation as a party to an armed conflict

According to the main legal treaty instruments of IHL, i.e. common Art. 2 of the Geneva Conventions, Art. 1 of Additional Protocol 1 and Art. 1 of Additional Protocol II, international humanitarian law or the *ius in bello* only applies to situations of armed conflict and occupation. Hitherto no EU military operation has been involved in an armed conflict,[145] but the likelihood for EU-led forces to become engaged in an armed conflict, voluntary or not, cannot be ignored.[146] Some illustration thereof is provided.

The EU military operations Artemis and EUFOR Tchad/RCA were governed by a Chapter VII mandate, subsequently these operations was authorized to use all necessary measures including the use of armed force beyond self-defence in order to achieve their mandate.[147] According to reports from operation Artemis EU-led forces where under attack and returned fired at two occasions, at one of these occasion two attackers where killed.[148] Operation EUFOR Tchad/RCA took place in Chad and the Central African Republic in a tense political and security environment. Both international and non-international armed conflicts where occurring in the area and in addition, due to the ethnic violence that took place in Darfur, a humanitarian crisis on a regional scale emerged.[149] The planned deploying of the EU-led forces was postponed because the circumstances on the ground did not permit, i.e. because the violence in the country had escalated as a consequence of attacks by the armed opposition against the governmental forces in the Chadian capital N´Djamena.[150] The authorities of Chad and Central-African Republic gave their consent to the deploying of the EU-led forces while the leaders of the Chad armed opposition jointly questioned the impartiality of the EU military operation and advocated the EU countries to "refrain from sending their troops to serve within the framework of the EUFOR".[151] Later in June 2008, when the deploying was

[145] Naert, Frederik. *Legal Aspects of EU Military Operations*, 2011, p. 235.
[146] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 65.
[147] Falco, Valentina, *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 176.
[148] Ibid.
[149] Ibid., p. 177.
[150] EU Presidency Statement on the Republic of Chad (Brussels, Feb. 3, 2008). Available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/cfsp/98543.pdf
[151] Paul Kirby, EU Forces on Risky African Mission. BBC News, Jan 28, 2008. Available at http://news.bbc.co.uk/2/hi/europe/7213551.stm; Leigh Phillips, Chad Rebels say France

completed, EU-led forces consisting of Irish troops designed to protect internally displaced persons and refugee camps were attacked and fired upon, and the EU-led forces returned the fire.[152] Two months later in August 2008 a EUFOR patrol was fired upon more than once by "an unidentified armed group" and returned the fire.[153] As a consequence of hostile fire in a cross border incident a EU military operation had its first fatality when a French soldier lost his life in a deadly attack in operation EUFOR Tchad/RCA.[154]

4.4.1 Party to the conflict

It is the party to an armed conflict who must respect its obligations under IHL. By virtue of the stating "each party to the conflict" in common Art. 3 in the Geneva Conventions it has been recognized that one of the parties to a non-internationally armed conflict can be a non-state actor.[155] Non-state actor or non-state armed group is often called "insurgents" or "rebels". Similarly as these groups can be regarded as a party to an armed conflict, international organisations should be able to be regarded as a party to an armed conflict. It could be considered that the EU as an international organisation even has a stronger argument to be regarded as a party to a conflict since the EU, in contrary to many non-state armed groups, has international legal personality.[156]

The degree of organisation is usually a significant element to decide if a non-state actor has the capacity to become "a party to a conflict". The party involved in the conflict must have a certain level of organisation to be able to implement IHL rules, as the rules in common Art. 3 of the Geneva Conventions.[157]

EU peacekeepers "not neutral". Euro Observer, Feb 12, 2008. Available at: http://euobserver.com/defence/25646

[152] Press Release, EUFOR Action under Fire Protect IDP´s Refugees (June 14, 2008). Available at: http://www.consilium.eu.int/uedocs/cmsUpload/RezzouGozBeida.pdf

[153] Press Release, EUFOR Troops Challenge and Disperse Ambushers (Aug. 19, 2008). Available at http://www.consilium.europa.eu/uedocs/cmsUpload/Press_Release_19_august_2008.pdf

[154] Press Release, EUFOR Tchad/RCA, EUFOR Suffers its first Fatality, March 10, 2008. Available at http://www.consilium.europa.eu/uedocs/cmsUpload/080310EUFORsuffersfirstfatality.pdf

[155] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations,* 2012, p. 68.

[156] Ibid., p. 72.

[157] Falco, Valentina, *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 180.

One consequence of the EU´s international legal personality is that the EU could be considered a party to an armed conflict, without that its member states have to be considered as a party to that conflict.[158]

According to the April 2002 Salamanca Presidency Declaration, "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",[159] hence the EU recognized that IHL applies if EU-led forces become a party to the conflict, and thus also recognized that EU-led forces can become a party to a conflict.[160]

If acknowledged that a EU military operation can qualify as a party to an armed conflict, the fact that an EU military operation is composed of forces made available to the EU by member states and non-member states raises the question about who should be regarded as a party in the event of an armed conflict, the EU or the troop participating States.[161] Also, but not further examined here, it is important to determine who is the party to a conflict in order to identify who is responsible for wrongful acts committed by a EU military operation.[162]

The IHL instruments do not provide any pure answer to the question if it is the EU or the troop participating states that in the event of an armed conflict should be regarded as a party to the conflict.[163] A thorough examination of this question relates to different fields of international law[164] why the limited scope of this thesis exclude such an examination. However in order to provide some perspective on the issue, two aspects involved are briefly illustrated. A EU military operation is lead by the EU Operation Commander under the strategic guidance and direction of the Political and Security Committee.[165] Via a transfer of authority from the participating

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[158] Naert, Frederik. *International Law aspects of the EU´s Security and Defence Policy, with a particular focus on the law of armed conflict and human rights*, 2008, p. 341.
[159] A final document of a seminar organised by the Spanish presidency of the EU 22-24 April 2002 on the enforcement and application of international law, including IHL, in EU-led operations, in Salamanca, Doc. DIH/Rev.01.Corr1 in Naert, Frederik. *Legal Aspects of EU Military Operations,* Journal of International Peacekeeping 15, 2011, pp. 233 -234.
[160] Naert, Frederik. *Legal Aspects of EU Military Operations,* Journal of International Peacekeeping 15, 2011, pp. 233 -234.
[161] Sari, Aurel & Wessel, Ramses A. International Responsibility for EU Military Operations: Finding the EU´s Place in the Global Accountability Regime, 2012, p. 1.
[162] Ibid.
[163] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 72.
[164] Such as international institutional law, the law of responsibility of states, the law of responsibility of international organisations and IHL etc.
[165] *Supra* note 96.

states, the EU Operation Commander usually receives operation control over the troops put at his/her disposal[166] and when national authorities transfer such an authority, the states are in principle no longer allowed to give their forces operation directions.[167] On the other hand, according to the April 2002 Salamanca Presidency Declaration, the obligation to respect IHL seems foremost to be an obligation for the participating states[168] since the Salamanca Presidency Declaration stipulates "the responsibility for complying with IHL, in cases where it applies, in a European Union-led operation, rests primarily with the State to which the troops belong."[169] Accordingly indicating that EU member states believe that it should be them, and not the EU, that should be considered as a party to an armed conflict.[170]

4.5 Conclusions

The examination in this chapter verifies that a consideration of IHL as applicable law to the EU is not premature. The examination has illustrated that even if EU military operations themselves have not yet been involved in an armed conflict, operations have been deployed in areas with ongoing armed conflicts between other actors and in situations where deadly combat has been used. It must be an accurate belief that the EU does not desire a situation of armed conflict, but it is not for the EU to decide if an armed conflict is occurring or not, it is determined by the actual situation on the ground. Albeit the EU lacks the intention to enter an armed conflict, EU military operations might nevertheless be fired and attacked upon to a level for the situation to reach an armed conflict. This is especially true when an operation is performed under a Chapter VII mandate and the EU operation is performed in a hostile and unpredictable environment and involves tasks of compound security issues, for example as in EUFOR TCHAD/RCA. Hence the likelihood for EU military operations to become involved in an armed conflict cannot be ignored and EU military operation may at one-day find themselves engaged in an armed conflict.

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[166] *Supra* note 96.
[167] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations,* 2012, p. 74.
[168] Zwanenburg, Marten. *Towards a more mature ESDP: Responsibility for violations of International Humanitarian Law by EU crisis management operations*, 2008, p. 402.
[169] Salamanca Presidency Declaration, 24 April 2002, DIH/Rev.01/Corr.1, para. 2; see *supra* note 162.
[170] Zwanenburg, Marten, *The duty to respect International Humanitarian Law during European Union-led operations,* 2012, p. 74.

4.5.1 International Humanitarian Law as applicable law

By virtue of the explicit reference in Art. 47 TEU to the legal personality of the EU, acknowledge to include international legal personality, the EU is able to possess obligations under international law. Meaning that the EU would be bound by agreements it concludes which encompass IHL obligations, thus the EU could in theory become a party to IHL treaties. However as shown in this chapter, the current IHL treaties are designed to exclude such a construction as the EU since they are only open for ratification by states. With its new acquired role as a military actor and its peculiarities as an international organisation, the EU displays holes within the IHL scope and validates that when a non-state entity enter the IHL treaty realm the fairly old assumption that merely states are subjects of international law contains weaknesses.

On the contrary to the EU as such all EU member states are parties to the Geneva Conventions and their Additional Protocols. What is often forgotten, but exemplified in this chapter, is that non-member states are also participating in EU military operations and this leads *de facto* to a less uniform IHL-treaty framework between EU-led forces. It leads to concern that one of the most frequent participating non-member states, Turkey, has not signed, nor ratified the two Additional Protocols. Additionally, also EU member states contribute to make the IHL-treaty framework less uniform since divergences are also occurring among member states with regards to the ratification of numerous IHL treaties (who's customary nature has not been recognised). The legal dissonance could affect the unity and effectiveness of a military operation on the ground, even more, it could lead to the contradictive situation where behaviour of EU military operations could violate IHL depending of the nationality of the forces. Could the discrepancy in a uniform IHL-treaty framework be solved with the help of customary law?

It has been acknowledged in jurisprudence that customary international law applies to the EU (the European Court of Justice explicitly declared in the case *Air Transport Association of America* that the EU is bound to observe international law in its entirety including customary international law).
With regard to the principle of functionality illustrated in this chapter, the author posits that the EU as an international organisation has to obey customary IHL when it undertakes activities in the field where IHL is relevant. Meaning that the EU as an international organisation need to have

the possibility and capability to commence military action that could resort to an armed conflict. This leads the author to conclude, on account of the conclusions in chapter 3 (particular the task-catalogue in Art. 43 TEU and the EUs operational capability) and due to the illustration of the commenced and launched military operations that the EU has the capacity to be bound by customary IHL.

4.5.2 Party to the conflict and the question of responsibility

According to the April 2002 Salamanca Presidency Declaration "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", hence it appears that the EU has recognized that IHL applies if EU-led forces become engaged in a situation of armed conflict and by that also accepts that EU-led forces can become "a party" to an armed conflict.

The author implies that the EU as an international organisation has the necessary degree of organisation and structure to be considered "a party" to an armed conflict. This is based on the conclusions in chapter three, which declared that the EU has a substantial legal framework, with a structured planning and decision-making process, governed by the EU Treaty. Moreover, as concluded in chapter three and further deliberated here, the fact that the operational control and/or command over the EU-led forces are in the hands of the EU Operation Commander during an operation, and the fact that the Political and Security Committee exercises the political control and strategic direction, under the responsibility of the Council, of EU military operation proves that the EU has a sufficient level of organisation and a chain of command.

After showing that the EU in principal can be considered as a party to a conflict the question of weather, in the event of an armed conflict, the EU or the participating states should be considered as a party to the conflict arises. The often referred to Salamanca Presidency Declaration points towards the participating states by stating "the responsibility for complying with IHL, in cases where it applies, in a European Union-led operation, rests primarily with the State to which the troops belong". Noteworthy is however that the Salamanca Declaration was adopted in 2002 before the EU had required, and started use, its military operational capability. Hence, perhaps during

the time of adoption the rapid development of military operations and the issue regarding attribution of responsibility was not foreseen. Moreover the Salamanca Declaration was adopted before it was explicitly confirmed that the EU had legal personality and could thus possess rights and obligations under international law, why perhaps member states, because of the lack of other options, had to be consider as the right actors to possess obligations under IHL. As analysed in chapter three and further deliberated above, albeit the intergovernmental nature of EU military operations, the point of departure in practice must be that the EU exercise control over a military operation. Seeing that the EU, via the Council and the Political and Security Committee are exercising political control and strategic direction for a military operation. And since the operational control of EU military operations, via the transfer of authority from participating states, during the operation itself is in the hands of the EU Operation Commander. To have operation control and/or command must be understood to *de facto* control the conduct of the EU-forces in the field. Thus a significant degree of authority over the forces is assigned to the EU during EU military operations. Subsequently, it is difficult for the author to accept that the EU would be free from responsibility for the conduct of a military operation. Even if is not accepted that the EU primarily should be regarded as the party to a conflict and thus obtain obligations under IHL, it should, by dint of the analysis above, at least be sufficient enough to argue that the EU cannot avoid responsibility.

5 The role of International Humanitarian Law in the EU´s internal legal order

The previous chapter described that if a EU military operation becomes involved as a party to an armed conflict, IHL will apply by customary law. Nevertheless not all IHL obligations are accepted as customary law and customary law might prove to be of abstract guidance and provide penurious operation directions to the EU-led forces on the ground. To the extent the EU in its legal order has incorporated the relevant legal standards of IHL EU military operations might in principle be bound by IHL not only by customary law but also by EU law. Therefore it could be of value to examine the EU´s internal legal order with the aim to search for IHL obligations complementary to customary law. Hence this chapter investigates if, and to what degree, the EU has integrated IHL into its own legal order. Soft law instruments adopted by the EU in the realm of IHL are also examined, even their non-binding character they might be valuable in clarify the EU´s approach to IHL.

5.1 The EU Treaty and International Humanitarian Law

A first generally IHL oriented examination of the TEU gives a gentle result. The TEU do not explicitly mention IHL. During the negotiations of the Treaty of Amsterdam in 1999 the International Committee of the Red Cross (ICRC) made an effort to convince the member states to refer to IHL in the foreign and security section of the Treaty but the member states did not then, or any time thereafter, follow the recommendation.[171] The lack of clear references to IHL does not automatically have to lead to the conclusion that IHL have no place in the EU´s legal order.[172] Indeed, IHL principles might implicitly be found in the TEU.[173]

[171] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 190.
[172] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 69.
[173] Falco. Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 190.

It has been argued that IHL obligations might derive via a wide understanding of the EU´s internal obligation to respect human rights.[174] IHL obligations have also been suggested to mainstream into EU´s internal order via human rights through general principles of EU law.[175]

General principles of IHL, such as impartiality, neutrality and non-discrimination are mentioned in Art. 214 (2) TFEU, which relates to the EU´s humanitarian aid policy. Art. 214 (2) states "humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination". This provision has been argued to serve as an indication for the actual incorporation of IHL into EU´s legal order.[176]

5.1.1 Article 6 (3) TEU

Art. 6 (3) has been said to contain legal grounds for the incorporation of IHL into EU´s legal order. Art. 6 (3) TEU stipulates "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union´s law". At first glance this article seems to dismiss IHL and simply refer to human rights, especially those in the European Convention of Human Rights (ECHR) and those which results from the constitutional traditions of the EU member states. Arguably human rights are usually understood as a separate branch of international law from IHL.[177] On the other hand IHL might be considered as a special subset of human rights and thus if accepted, IHL obligations can derive from the realm of Art. 6 (3).[178]

Another possible way of interpret IHL obligations by way of Art. 6 (3) is via the phrase "fundamental rights". Fundamental rights most not unconsciously be understood as merely human rights but possible also IHL, if human rights are acknowledge as fundamental rights the same could be hold for IHL.[179] The element "the constitutional traditions common to the Member States"

[174] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 190.
[175] Falco, Valentina. *Human rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and Perspective for PMSC Regulations*, 2009, p. 16.
[176] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL,* 2009, p. 192.
[177] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 69.
[178] Ibid.
[179] Ibid.

are also proposed to include IHL. The main IHL treaties have been extensive ratified by the EU member states and thus numerous IHL obligations are shared by and are common to the EU member states.[180] And moreover, as a source of inspiration and guidance for identifying general principles of EU law the European Court of Justice has referred to the "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories".[181] Due to the fact that all EU member states are parties to the Geneva Conventions and their Additional Protocols it has been claimed by a analogy interpretation that IHL treaties, likewise as human rights treaties, can be certain essential sources of inspiration for the establishment of "general principles of Union law" as stated in Art. 6 (3).[182]

5.1.2 Articles 21 and 3 (5) TEU

The Treaty of Lisbon is the first EU-treaty in history which makes a reference regarding the relationship between international law and the EU.[183] Art. 21 (1) TEU advocates the objectives of the EU external action and express "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." The expressing "international law" is claimed to include IHL[184] and therefore it has been stated that this article might provide an incorporation of IHL into the EU legal order.[185]

International law is also referred to in Art. 3 (5) TEU. According to this article the EU shall in its relations with the wider world "contribute…to the strict observance and the development of international law". However neither Art. 21 (1) TEU nor Art 3 (5) TEU provide any expression to enforce direct obligations to the EU, on the contrary these articles seems to

[180] Naert, Frederik. *International Law Aspects of the EU´s Security and Defence Policy with a Particular Focus on the Law of Armed Conflict*, 2008, p. 531.
[181] Falco, Valentina. *Human rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and Perspective for PMSC Regulations,* 2009, p. 18.
[182] Falco, Valentina. *The internal legal order of the European Union as a complementary framework for its obligations under IHL,* 2009, p. 195.
[183] Ibid, p. 191.
[184] Ibid, p. 192.
[185] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 70.

be of a programmatic character.[186] Nevertheless Art. 21 (3) TEU further states, "The Union shall respect the principles and pursue the objectives set out in in paragraphs 1 and 2 in the development and implementation of different areas of the Unions external action". Thus in comparison to Art. 3 (5) TEU the wording in Art. 21 TEU is more far reaching and indicate an obligation for the EU to respect international law, and hence IHL.[187] Further it has been claimed that Art. 21 (1) TEU has to impose obligations on the EU since it would be wrongful to consider that this article would have no legal substantive consequence for the EU and its member states, due to the articles binding nature as a constitutional objective of EU law.[188] On the other hand, the European Court of Justice in the Grand Chamber in the case *Air Transport Association of America* referred to Art. 3 (5) TEU when they found that the European Union is bound to observe international law in its entirety, including customary international law.[189]

5.2 The legal basis of EU military operations and International Humanitarian Law

As described in chapter three, a EU military operation is governed by a Council decision. A Council decision is normally not addressing IHL or including any reference to IHL obligations.[190] A Status of Forces Agreement established between the EU and the host State, and/or a participating agreement concluded with another participating state in a EU military operation, are a part of the legal basis of a EU military operation and the EU has the possibility to include an obligation to be bound by IHL in these agreements. However the EU do normally include any reference to IHL in these legal acts.[191] A clear example in this regard is the participating agreement with Turkey who as described, is not a party to the two Additional Protocols of 1977, but nevertheless no reference is made to IHL

[186] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 70.
[187] Ibid.
[188] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, pp. 70-71.
[189] Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Judgment the Court of Justice of 21 December 2011, para. 101.
[190] Falco, Valentina. *Human rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and Perspective for PMSC Regulations,* 2009, p. 19.
[191] Zwanenburg, Marten. *The duty to respect International Humanitarian Law during European Union-led operations*, 2012, p. 71.

in the participating agreement.[192] A partial exception is operation EUFOR RD Congo where the Status of Forces Agreement concluded between the UN and the Democratic Republic of Congo referred to IHL and applied to the EU-led forces because of UN Security Resolution 1671.[193]

5.3 EU soft law and International Humanitarian Law

The EU has agreed on a number of soft law instruments relating to IHL. An essential instrument in this regard is the EU Guidelines on Promoting Compliance with IHL,[194] which has been adopted by the Council.[195] The Guidelines have been considered to offer a valuable outline of the EU´s approach to IHL and to be the most far-reaching IHL instrument adopted by the EU.[196] The purpose of the Guidelines is to set out operational tools for the EU and its institutions and bodies to promote compliance with IHL.[197] For example paragraph 3 of the Guidelines states "The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. This includes the goal of promoting compliance with IHL". Thus the Guidelines accept that the goal of promoting compliance with IHL is one of the founding principles of the EU.[198] However the Guidelines aims to address compliance with IHL by third states, as paragraph 2 of the Guidelines states "these Guidelines are in line with the commitment of the EU and its Member States to IHL, and aim to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States. Whilst the same commitment extends to measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct, including by their own forces, such measures are not covered by these Guidelines". Hence the Guidelines do not

[192] Ibid., p. 19.
[193] Zwanenburg, Marten. *The duty to respect international humanitarian law during European Union-led operations*, 2012, p. 65.
[194] Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), 2009 O.J. (L 303/12), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:303:0012:0017:EN:PDF.
[195] Falco, Valentina. *Human rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and Perspective for PMSC Regulations*, 2009, p. 20.
[196] Breselin, Andrea. *Ensuring respect: The European Union´s guidelines on promoting compliance with international humanitarian law,* 2010, p. 396-398.
[197] Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL), 2009 O.J. (L 303/12), paragraph 1.
[198] Falco, Valentina. *Human rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and Perspective for PMSC Regulations,* 2009, p. 17.

contain any obligation for the EU and its member states to comply with IHL, on the contrary it primarily promote compliance with IHL amongst third states.[199] Nevertheless it has been argued that this reading should not be underestimated since it acknowledges the EU´s role as a military actor with the capability to undertake IHL obligations.[200]

Three additionally instruments concerning the conduct of the EU-led troops are of primary interest for IHL obligations. The 2008 EU Guidelines on Children in Armed Conflict explicitly refers to IHL as a source guiding the EU in its activity to ensure protection of children affected by an armed conflict, and moreover mention a list of relevant IHL treaties.[201] Further the EU Draft Guidelines on Protection of Civilians in EU-led Crisis Management Operations are aimed to guarantee protection of civilians in EU military operations, for example Art. 7 stipulates "bearing in mind their obligations under national and international law, States contributing personnel deployed in EU-led crisis management operations should in particular ensure monitoring and reporting of alleged violations of human rights, international humanitarian or international criminal law".[202] Though these Guidelines have not been adopted by the Council why the value of the Guidelines is trivial.[203] The Generic Standards of Behavior for the ESDP operations[204] was developed after a request from the Political and Security Committee and is a document on standards of behavior to be used in the planning for future common security and defence operations.[205] According to paragraph 4 "The standards of behavior are complementary to the legal obligations of personnel. Personnel must apply the provisions of international law, including, when applicable, the law of armed conflict, and the laws of the contributing state." The Standards have been claimed to be valuable because they at EU level express fundamental principles of IHL

[199]Falco, Valentina, *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, pp. 199-200.
[200] Falco, Valentina. *Human rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and Perspective for PMSC Regulations*, 2009 p. 20.
[201] EU Council Doc. 10019/18 of 5 June 2008, Update of the EU Guidelines on Children and Armed Conflict, http://register.consilium.europa.eu/pdf/en/08/st10/st10019.en08.pdf.
[202] EU Council Doc. 14805/03 of 14 November 2003, Draft Guidelines on Protection of Civilians in EU-led Crisis Management Operations, http://register.consilium.europa.eu/pdf/en/03/st14/st14805.en03.pdf.
[203] Falco, Valentina, *The internal legal order of the European Union as a complementary framework for its obligations under IHL*, 2009, p. 201.
[204] EU Council Doc. 8373/3/05 REV, 3 of May 18 2005, Generic Standards of Behavior for the ESDP Operations, http://register.consilium.europa.eu/pdf/en/05/st08/st08373-re03.en05.pdf.
[205] Falco, Valentina. *Human rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and Perspective for PMSC Regulations*, 2009, p. 22.

regarding for example the distribution of IHL around EU-led forces and the duty to prosecute alleged violations of IHL committed by EU-led forces.[206]

Nevertheless the instruments mentioned above are all of a non-legally binding character, why the legal values of them are highly uncertain.[207]

5.4 Conclusions

As described in this chapter the constitutional instruments of the EU do not include any explicit reference to IHL. However, several submissions for an indirect incorporation of IHL into EU´s legal order have been illustrated.

In contrary to IHL, the TEU refers to human rights. The question is if human rights can be recognized to include IHL. The close relationship between IHL and human rights law in an armed conflict speaks affirmative for such a connection. On the other hand, IHL is a legal regime of its own and the EU could potentially be criticized if it thinks of IHL as a subgroup of human rights, instead of acknowledge IHL´s own existence. If accepted that IHL within the EU´s legal order can be considered as a subgroup of human rights law IHL will consequently be included in the realm of Art. 6 (3) TEU and thus the EU´s legal order contain an obligation for the EU to respect IHL.

There is also another way to interpret IHL in EU´s constitutional order via Art. 6 (3) TEU. Even if precluded that IHL is a subgroup of human rights, the element "fundamental freedoms" could potentially include IHL, since this reading explicitly not merely refer to human rights. Moreover, the Geneva Conventions and the two Additional Protocols have been ratified by the EU member states, hence numerous IHL rules are *de facto* shared by the member states as they are included in both the member states national and treaty legislations and could therefore be considered to be a part of the "constitutional traditions common to the Member States" in Art. 6 (3) TEU. And further, if the criteria "general principles of the Union´s law" is accepted to include IHL, by the fact that the Geneva Conventions and their Additional Protocol are ratified by all member states and therefore, similar to "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories" could serve as a source of guidance to pinpoint general principles of Union law, the EU would be bound by IHL by way of EU law.

[206] Ibid.
[207] Ibid.

Art. 3 (5) TEU stipulate that in relation with the wider world "the EU shall contribute to the strict observance and the development of international law". This wording can give different result depending on the way of interpretation. With a narrow reading of "shall contribute" the article seems to merely include a sort of goal for the EU in its engagements as a military actor. However, in the case of *Air Transport Association of America* the European Court of Justice (ECJ) based its finding, that the EU is bound to observe international law in its entirety, on Art. 3 (5) TEU and hence the ECJ seems to believe that Art. 3 (5) can enforce a substantive obligation on the EU. If Art. 3 (5) TEU is read together with Art. 21 (1) and (3) TEU which provides that the EU shall respect international law in its external action, it could be argued that these provisions are not merely stipulating that the EU´s role in its external actions are based on international law, they could be claimed to acknowledge that international law, and hence international humanitarian law, impose certain boundaries on the EU when it acts as a military actor on the international scene.

The examination has disclosed that there is no custom behavior for the EU to include IHL obligations in the legal basis for its military operations. In the described exception it was the UN who refereed to IHL in a SOFA that was extended to a EU military operation. With regard to the non-member state Turkey, bearing in mind that Turkey has not ratified the two Additional Protocols, it could be considered odd not to include such a reference in the participating agreement governing Turkeys involvement in the EU military operation. For the benefit of a uniform IHL framework, that is something the EU should consider to change in future agreements.

This chapter also examined EU soft law instrument. The soft law instruments served its purpose (regardless their non-legal binding character) to clarify the EU´s attitude against IHL. The instruments demonstrates awareness from the EU as regard IHL, but also a caution to make IHL obligations legally binding. The EU Guidelines on Promoting Compliance with IHL are adopted by the Council and has in this since the highest value of the instruments refereed too. However the Guidelines do not create any obligation for the EU, but for the clarification of the EU´s attitude against IHL they are valuable as they clearly state that the IHL guidelines are in line with the commitment of the EU and its member states to IHL, thus illustrate to some extent that the EU have a will to comply with IHL. But due to the rather general nature of the Guidelines it is too far-reaching to state that they can create any obligation for the EU. The other mentioned IHL soft law

instruments appears to work as a kind of internal instructions for the behavior of the EU-led troops on the ground. However due to their non-binding character, they do not create any IHL obligations for the EU and the level of compliance is uncertain.

In summary, with some interpretation it can be understood that Art. 3 (5), Art. 21 and Art. 6 (3) TEU indirectly contains obligations for the EU to respect IHL, especially with regard to the latter. Due to the relatively close link between IHL and human rights and the fact that the EU is bound by human rights law and due to the ratification by EU member states of the main IHL treaties, it could be argued that IHL, similar to human rights law, have reached the status of "general principles of EU law", as this is expressed in Art. 6 (3) TEU.

6 Concluding remarks

The purpose of the thesis was to examine how the legal framework of EU military operations, with focus on IHL, can apply to EU military operations. The thesis has portrayed that the EU as a relatively new military actor has conducted several military operations in third countries with troops put at its disposal by EU member states and non-member states. The rapid development of EU military operations makes it essential to examine the law governing EU´s activities within its Common Security and Defence Policy. As the legal framework of EU´s military operations stands today it provides sufficient and substantial tools for the launch and deployment of a wide range of different EU military operations. However the maturity test for the legal framework will occur when the EU launch, or when an operation develops into, a more complex military operation in higher risk theatre possible involving combat of armed conflict. Thus challenges for the legal framework might arise in the future, particularly related to the relationship between the EU and IHL in the event of an armed conflict.

The thesis has concluded that the EU as an international organisation is a capable military actor, with a permanent military structure and a confirmed operational capability to undertake peace-making operations in conflict situations (with a possible link to peace enforcement in Art.43 TEU). Practice of commenced operation has illustrated that the likelihood for a EU military operation to become engaged in an armed conflict cannot be ignored. This leads the author to submit that it is vital to clarify if and how IHL could apply to the conduct of EU military operations. The thesis has established that the EU has international legal personality opposed of its member states. As a result of its legal personality the EU has rights and obligations under IHL, a treaty-making capacity and a possibility to conclude binding decisions. The EU is a subject of IHL because it has international legal personality.

It is an undisputable fact that current IHL treaties are not open for ratification for such a construction as the EU. The thesis has concluded that to a certain extent, diverse legal standards of IHL-treaty obligations exist among participating states within EU military operations. However, a substantial part of international humanitarian law qualifies as customary international law and could thus limit the affect of diverse legal obligations.

International customary law is the most significant source of IHL obligations for the EU as an international organisation with multinational troops engaged in military operations. As an international organisation the EU is bound by customary IHL when it undertake activities in the field in which IHL is relevant, *inter alia* a situation of armed conflict. Nevertheless not all IHL obligations are considered as customary law and customary law could be of abstract guidance to the EU-led forces on the ground.

The EU´s internal legal order could possibly clarify and complement IHL customary law. However, contrary to human rights law, the TEU does not include any explicit reference to IHL. Nevertheless, this paper has shown that IHL could potentially stream into the EU´s legal order by way of human rights law and/or via a possible interpretation of Arts. 6 (3), 3 (5) and 21 TEU to include IHL. Especially, with regard to the EU member states ratification of the main IHL treaties, and the close link between IHL and human rights law and the fact that EU is bound by human rights law, IHL could be argued to have reach the status of "general principles of EU law" as this is expressed in Art 6 (3) TEU. If accepted, the EU would be bound by IHL not merely by customary law but also by EU law. However the uncertainty in this regard provide minor help with regard to clarify IHL obligations for the troops on the ground.

The EU risks jeopardizing its credibility as an international organisation with multinational troops engaged in military operations by not regulating the conduct of its troops under IHL. As the EU stands today, with both intergovernmental and supranational elements, it is too far-reaching to argue that the EU could be considered a state in the sense of the IHL-treaty realm. Therefore, the EU could at most be bound by IHL by way of customary law in the field in which they undertake activities. The EU´s internal order could merely with some interpretation be considered to include some IHL obligations. The EU´s future accession to the European Court of Human Rights (ECtHR) could conceivably instigate a crucial change in the relationship between the EU´s legal order and IHL since the ECtHR in principle could interpret IHL as a way of human rights law and thus stream IHL into the EU´s legal order. However, the EU can already today be considered to possess the main command and control over EU military operations due to the fact that the EU exercises political control, strategic direction, operational command, and/or control over EU military operations. Due to this, it becomes vital to further clarify the relationship between the EU as an international organisation and IHL as a legal regime. Evidently,

this is also important for attributing responsibility for a possible violation of IHL.

Hence, the author gives the following recommendations for the future:

It is recommended that the EU and its member states further acknowledge the fact that the EU has explicit international legal personality and therefore possesses rights and obligations under the EU´s Common Security and Defence Policy and under IHL. The EU has to uphold its credibility as an international organisation and cannot merely entrust the implementation of its Common Security and Defence Policy to its member states and other third states, without regulating the conduct of the EU-led forces under IHL.

The EU could make self-regulatory acts and unilaterally bind itself to respect IHL, for example by making the "EU Guidelines on Promoting Compliance with IHL" binding on the conduct of EU military operations. It hampers the credibility of the EU to encourage other actors to comply with IHL without acknowledging that it should also do this itself.

It is recommendable that IHL is taken into account in the planning phrase of a EU military operation. The EU could use the possibility to include a reference obliging compliance with IHL in a Status of Forces Agreement or participating agreement, and thus be bound by IHL obligations by way of treaty law. If no reference to IHL is included in a Operation Plan or Rules of Procedure, the author hopes that these documents are elastic enough to embrace a possible change of condition (if the EU-led forces on the ground suddenly are in risk to become involved in a armed conflict) as regards the applicability of IHL. This could be achieved by giving the EU Operation Commander the authority to amend the Rules of Procedure.

The EU should clarify the division of command and control between the EU and the participating states in military operations. By doing this, the EU would also provide clarification with regard to the question of responsibility. As a suggestion, the Council could make an official acknowledgment in a decision when launching a military operation regarding who is responsible for the conduct of the operation. An acknowledgement of the Council that the conduct of the EU military operation is attributable to the EU would echo to the international community that the EU accepts that its conduct as a military actor and engagement in international security creates an obligation for it to act in a liable manner.

With its unclear and unique nature as an organisation the EU challenges the IHL-realm. A clear position from the EU concerning the relationship between its conduct as a military actor and IHL would enhance the EU´s credibility and hopefully contribute to develop the legal regime of IHL.

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