

Chapter 21

**ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS
LAW BY EU FORCES****Frederik Naert***

1. INTRODUCTION

Armed forces engaged in peace operations are supposed to protect the human rights of the local population and to contribute to their promotion. Nevertheless, practice in past and current peace operations has shown that peace forces sometimes violate the human rights of these people (e.g., the sexual abuse that has plagued several UN operations). It cannot be excluded that this may also happen in EU-led operations. This contribution therefore looks at what human rights obligations are binding on EU-led forces and how accountability for respect of these obligations can be ensured. First, a brief overview will be given of some basic premises as regards the European Security and Defence Policy (ESDP) and the international legal status of the EU (section 2). Then the human rights obligations of EU-led forces will be analysed (section 3). This will be followed by an overview of mechanisms for ensuring accountability (section 4) and some conclusions and final thoughts (section 5). Given the constraints of this contribution, the analysis is necessarily succinct and references to doctrine are very limited.¹ Instead, the main international instruments and jurisprudence are cited more extensively.

* Frederik Naert is an Affiliated Junior Researcher at the KU Leuven's Institute for International Law, Director of Publications of the International Society for Military Law & the Law of War and a member of the Legal Service of the Council of the EU. He can be reached at frederik.naert@law.kuleuven.be. This contribution essentially comprises summarised sections of the author's draft Ph.D. thesis entitled 'International Law Aspects of the EU's Security and Defence Policy', which focuses on the applicability of international humanitarian law and human rights to EU operations and deals in more detail with extensive references to the points discussed below (except accountability mechanisms). The views expressed are his own and do not represent those of the Council or its Legal Service.

¹ Literature on the ESDP from this perspective is scarce: see J. Arloth and F. Seidensticker, *The ESDP Crisis Management Operations of the European Union and Human Rights* (Berlin, Deutsches Institut für Menschenrechte 2007), especially at 15-16; S. Bartelt, *Der rechtliche Rahmen für die neue operative Kapazität der Europäischen Union* (Münster, Lit Verlag 2003), at 163-168 and 176-177; H. Hazelzet, 'Human Rights Aspects of EU Crisis Management Operations: From Nuisance to Necessity', 13 *International Peacekeeping* (2006) 564-581; F. Naert, 'De binding van NAVO- en EU-strijdkrachten aan mensenrechten bij operaties tegen terrorisme', 30(7) *NJCM-Bulletin* (2005) 909-919; N. Ronzitti, 'L'applicabilità del diritto internazionale umanitario', in N. Ronzitti, ed., *Le forze di pace*

2. BASIC PREMISES ABOUT THE ESDP AND THE STATUS OF THE EU

2.1. The scope of the ESDP

First, under Article 17 TEU the Common Foreign and Security Policy ‘shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide’ and the ‘Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.’ In accordance with this provision an ESDP has been developed since 1999, comprising civilian and military crisis management, in particular through military, civilian and mixed ESDP crisis management operations that were first implemented in 2003.² Although it is often believed that the EU can only conduct low intensity operations like traditional peacekeeping, the inclusion of ‘tasks of combat forces in crisis management, including peacemaking’ in the non-exhaustive list of Article 17(2) TEU implies that peace enforcement and high intensity operations are not legally excluded. Obviously, whether the EU is politically and militarily ready for such operations is a different matter. This view is confirmed by practice and would be reinforced by the EU Reform Treaty.³ It is important, as higher intensity operations are more likely to

dell’Unione Europea (Roma, Rubbettino 2005), at 171-172 and 174-178; and N. Tsagourias, ‘EU Peacekeeping Operations: Legal and Theoretical Issues’, in M. Trybus and N. White, eds., *European Security Law* (Oxford, Oxford University Press 2007), at 118-120. See with respect to peace operations generally and/or with regard to the UN and/or NATO: A. Faite and J. Grenier, eds., *Report of the Expert Meeting on Multinational Peace Operations. Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces, organised by the International Committee of the Red Cross in cooperation with the University Centre for International Humanitarian Law (UCIHL)*, Geneva, 11-12 December 2003, available online at <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0912/\\$File/ICRC_002_0912.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0912/$File/ICRC_002_0912.PDF!Open)>; the contributions in S. Horvat, ed., *The Rule of Law in Peace Operations. Proceedings of the International Congress of Scheveningen (16-21 May 2006)*, *Recueil XVII of the International Society for Military Law and the Law of War / Le règne de droit dans les opérations de la paix, Actes du Congrès international de Scheveningen (16-21 mai 2006)*, *Recueil XVII de la Société internationale de Droit militaire et de Droit de la Guerre* (Brussels, Printing House of Defence 2006), at 421-487; R. Kolb, G. Porretto and S. Vité, *L’application du droit international humanitaire et des droits de l’homme aux organisations internationales. Forces de paix et administrations civiles transitoires* (Brussels, Bruylant 2005), 233-316; M. Zwanenburg, ‘Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Forces’, 11 *LJIL* (1998) 229-245; and N. White and D. Klaasen, eds., *The UN, Human Rights and Post-conflict Situations* (Manchester, Manchester University Press 2005).

² For an extensive overview from a legal perspective, see F. Naert, ‘ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations’, in Trybus and White, eds., *supra* n. 1, 61-101.

³ In line with the 2007 IGC mandate, the Reform Treaty (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007, *OJ* 2007 C 306/1, initially referred to as ‘Reform Treaty’ but now as ‘Treaty of Lisbon’) includes most ESDP-related provisions of the EU Constitution (see especially Title V, Chapter 2, Section 2 new TEU and compare the provisions of Art. I-41 and Part III, Title V, Chapter II, Section 2 of the EU Constitution). Therefore, most of the literature on the ESDP in the EU Constitution remains relevant. See, e.g., F. Naert, ‘European Security and Defence Policy in the EU Constitutional Treaty’, 10 *JCLS* (2005) 187-207.

involve participation in an armed conflict and thus trigger the application of international humanitarian law, which may affect applicable human rights (see section 3.3.). In fact, only self-defence operations are currently outside the EU's competence.

2.2. The legal framework in ESDP operations

Second, a basic understanding of the legal framework of ESDP operations is essential. This legal framework consists of various elements:

- i. There has to be an international mandate, usually a UN Security Council mandate, peace agreement and/or host state consent;
- ii. The EU will normally conclude a Status of Mission or Status of Forces Agreement (SOMA/SOFA) with the host state to define and regulate the status and activities of an operation in the host state (usually on the basis of Article 24 TEU).⁴ There may also be transit agreements with third states;
- iii. There will be an EU Council Joint Action establishing the operation and in some cases a separate Council Decision launching the operation and/or appointing the Head of Mission or Operation and Force Commanders;
- iv. There may be various decisions of the Political and Security Committee (PSC), which exercises political control and strategic direction of EU crisis management operations;⁵
- v. There are often EU agreements with third states participating in an operation⁶ or with partner organisations (e.g., with NATO where an ESDP operation will have recourse to NATO assets);
- vi. There will be an Operation Plan and rules of engagement,⁷ at least for military operations, but these are not in the public domain, as well as a number of decisions and documents implementing them, including standard operating procedures (taking into account generic ESDP documents);

⁴ See the contribution by Wessel and Fernandez Arribas to this volume.

⁵ See Art. 25 TEU. Practice of ESDP operations so far has confirmed this key role: the PSC is usually granted the authority to amend the operation plan, the chain of command – sometimes including the appointment of the Head of Mission – and the rules of engagement, to accept third states' contributions and to set up a committee of contributors, while the powers to decide on the objectives and termination of the operation remain vested in the Council. The role of the PSC would essentially remain the same under the EU Reform Treaty (see Art. 38 new TEU).

⁶ There are framework agreements with a number of third states as well as operation-specific agreements.

⁷ The Operation Plan contains the specifics of the operation and is often lengthy with many annexes which normally, *inter alia*, address legal issues and the use of force. Rules of engagement (ROE) are essentially instructions concerning the use of force. Within NATO, ROE are defined as 'Directives issued by competent military authority which specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered.' See NATO, NATO Glossary of Term and Definitions, AAP-6(2006), available online at <<http://www.nato.int/docu/stanag/aap006/aap6.htm>>, at 2-R-8.

- vii. There may be additional agreements (usually technical arrangements or memoranda of understanding) between participating states, which are often not in the public domain either, as well as technical arrangements implementing any of the above agreements;
- viii. Other rules of EU law may also be relevant, e.g. on financing⁸ or human rights (see section 3.5);
- ix. Staff and especially military forces will remain bound by a significant part of the domestic law of their sending state;
- x. Host state domestic law will also be relevant and *respect*⁹ for this law will usually be required by the SOFA/SOMA;
- xi. General international law may include further rules that are relevant, including international humanitarian law (which will only apply if EU-led forces become actively engaged in an armed conflict and/or occupy a territory without the consent of the host state) and human rights law (see section 3).

Hence, the applicable law varies from case to case and is a complex puzzle of pieces from various regimes and mission-specific instruments.¹⁰

2.3. The EU's international legal personality

Third, the EU has international legal personality. Although so far it has not been explicitly accorded such personality (this would change under the EU Reform Treaty),¹¹ under international law it may be granted implicitly. For the EU, the implicit grant, *inter alia*, arises from the EU having distinct rights and duties under European/international law as well the power to adopt legally binding decisions (e.g., Third Pillar framework decisions and Second Pillar joint actions), the EU's treaty-making power (see Article 24 TEU), which is now firmly established in practice (notably in the ESDP),¹² its power to set up agencies with legal personal-

⁸ See Art. 28 (especially paragraph 3) TEU and Council Decision 2007/384/CFSP of 14 May 2007 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena) (codified version), *OJ* 2007 L 152/14; and EU Council Secretariat, 'Financing of ESDP Operations', Factsheet, June 2007, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/ATHENA_june_2007.pdf>. See also the changes which the EU Reform Treaty would make to Art. 28 TEU (Art. 41 new TEU), including the introduction of a start-up fund.

⁹ In the EU and NATO it is understood that this term entails a lesser obligation than 'to apply' or to 'comply with' and essentially obliges the staff to take due account of local law. However, the precise scope of this obligation is not always entirely clear.

¹⁰ See generally R. Arnold and G.-J. Knoops, eds., *Practice and Policies of Modern Peace Support Operations under International Law* (Ardsley, Transnational 2006); U. Häußler, *Ensuring and Enforcing Human Security: The Practice of International Peace Missions* (Nijmegen, Wolf Legal Publishers 2007); and US Judge-Advocate General's Corps, *Operational Law Handbook* (2006 edition), available online at <<https://www.jagcnet.army.mil/8525736A005BC8F9>>.

¹¹ Art. 47 new TEU reads: 'The Union shall have legal personality.' It was/is not disputed that this includes international legal personality. See also Art. 1(3) new TEU: 'The Union shall replace and succeed the European Community.'

¹² See the contribution by Wessel and Fernandez Arribas to this volume.

ity¹³ and the distinct rights and duties of ESDP operations under SOFAs/SOMAs. Though there is reluctance to acknowledge this personality in some quarters, endowing the EU with these legal capacities and powers necessarily implies that it has international legal personality.

2.4. The EU's international obligations

Fourth, as a result of this legal personality the EU is bound by a number of legal obligations, both under EU law and under general international law. These include, *inter alia*, obligations arising from agreements entered into by the EU, such as SOFAs, and obligations under customary international law,¹⁴ including customary international humanitarian and human rights law.¹⁵ They also include obligations under the EU's constitutive instrument, in particular Article 6 TEU, general principles of EU law, including certain human rights (see *infra*) and other internal EU rules. Until recently, it was generally considered that these obligations did not include Member States' treaty obligations, with the exception of the GATT and two customs agreements.¹⁶ However, the Court of First Instance's judgments in *Kadi*¹⁷ and *Yusuf*¹⁸ have arguably opened the possibility for a broader application of the substitution theory,¹⁹ though it remains to be seen how the European Court of Justice (ECJ) will deal with this issue on appeal.²⁰

2.5. Command, control and responsibility in ESDP operations

Fifth, the command and control arrangements in ESDP operations are such that these operations are *de facto* organs of the EU under its effective control and/or that

¹³ See, especially in the area of the ESDP, Council Joint Action 2001/555/CFSP of 20 July 2001 on the establishment of a European Union Satellite Centre, *OJ* 2001 L 200/5 (as amended); Council Joint Action 2001/554/CFSP of 20 July 2001 on the establishment of a European Union Institute for Security Studies, *OJ* 2001 L 200/1 (as amended) and Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, *OJ* 2004 L 245/17.

¹⁴ See, e.g., International Court of Justice (ICJ), Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 20 December 1980, *ICJ Reports* (1980), para. 37, 89/20-90/21: 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general international law.' See also ECJ, Case C-286/90 *Poulsen and Diva Navigation* [1992] *ECR* I-6019, para. 9: 'the European Community must respect international law in the exercise of its powers.'

¹⁵ Similarly, T. Ahmed and I. de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective', 17 *EJIL* (2006) 778-781. On customary international human rights law, see, e.g., T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Clarendon Press 1989), 79-135; and R.B. Lillich, 'The Growing Importance of Customary International Human Rights Law', 25 *Georgia JICL* (1996) 1-30.

¹⁶ ECJ, Joined Cases 21-24/72 *Internationale Fruit* [1972] *ECR* 1219, especially paras. 10-18; and ECJ, Case 38/75 *Nederlandse Spoorwegen* [1975] *ECR* 1439, para. 21.

¹⁷ CFI, Case T-315/01 *Kadi* [2005], *ECR* II-3649, especially paras. 193-204.

¹⁸ CFI, Case T-306/01 *Yusuf and Al Barakaat* [2005] *ECR* II-3649, especially paras. 243-254.

¹⁹ Similarly, Ahmed and de Jesús Butler, *supra* n. 15, at 789-790.

²⁰ This issue cannot be further explored within the confines of this contribution. The appeal cases are ECJ, C-402/05 and C-415/05, pending.

the actions of Member States' armed forces put at the disposal of the EU for these operations are, in principle, attributable to the EU and not to the Member States. In the case of civilian operations, the personnel is normally hired or appointed by the EU/EC and/or seconded by the Member States and thus clearly acts on behalf of the EU and not of any single state.²¹ Even for military contingents from the Member States (or third states), the transfer of authority to the EU Operation²² means that the forces are put at the disposal of the EU²³ so that the EU (particularly through the Council, PSC and Operation and Force Commanders)²⁴ exercises effective control over them. Such control is usually regarded as the crucial factor for the attribution of conduct under international law,²⁵ though obviously a sending state will be

²¹ This is inherent in secondments. According to the International Law Commission (ILC), in the comments on Art. 5 of the provisional version of its Draft Articles on the Responsibility of International Organisations in the case of secondment, the conduct of a seconded person is to be considered as that of an agent or organ of the organisation without a need to have recourse to the separate rule on organs put at the disposal of an organisation (UN Doc. A/59/10, at 110). Also, Art. 5(1)a of the Council Decision of 16 June 2003 concerning the rules applicable to national experts and military staff on secondment to the General Secretariat of the Council and repealing the Decisions of 25 June 1997 and 22 March 1999, Decision 2001/41/EC and Decision 2001/496/CFSP (2003/479/EC), *OJ* 2003 L 160/72, stipulates that a seconded national expert 'shall carry out his duties and shall behave solely with the interests of the Council in mind.'

²² Different degrees of command and control exist. See, e.g., NATO, *NATO Glossary of Terms and Definitions*, AAP-6(2006) (available at <<http://www.nato.int/docu/stanag/aap006/aap6.htm>>), at 2-C-7, 2-F-6 and 2-O-2. In operations conducted under the command of an international organisation, some degree of command and control is normally transferred to the organisation, usually operational command or control. In the case of the EU there is also such a transfer of authority, see, e.g., Council Doc. 11096/03 EXT 1 (on the command and control (C2) in military ESDP operations) of 26 July 2006 (partially declassified version), at 15-16 ('For the conduct of an EU-led military [crisis management operation], the [Operation Commander] will be vested with the appropriate Command authority, allowing him sufficient flexibility (e.g. [operational control] or possibly [operational command]) over forces by Transfer of Authority (TOA) from the contributing Member States and non-EU [troop contributing nations]' and 'For the conduct of the operation in theatre, the [Force Commander] will be vested with the appropriate Command authority giving him sufficient flexibility (in principle [operational control]) over the required forces by the [Operation Commander]'). See, e.g., Art. 10(3) of the Agreement between the European Union and Canada establishing a framework for the participation of Canada in the European Union crisis management operations, *OJ* 2005 L 315/21.

²³ Art. 5 of the provisional version of the ILC's Draft Articles on the Responsibility of International Organisations stipulates that 'The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.' See UN Doc. A/59/10, at 99. This was mainly written with peace operations in mind. See *idem*, at 110-115.

²⁴ Including through the mandate, Operation Plan and rules of engagement. While most nations have caveats or reservations to these common rules, such caveats may only be more restrictive than the common rules, certainly with regard to rules of engagement. See also N. Ronzitti, *supra* n. 1, at 190-192.

²⁵ See the ILC's view *supra* n. 23; UN Doc. A/51/389 (20 September 1996), paras. 17-19 ('In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements (...) In the absence of formal arrangements (...) responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation. The principle that in coordinated operations liability (...) is vested in the entity in effective command and control of the operation or the specific

responsible if its forces act pursuant to national instructions but in violation of EU operational control. In fact, according to the decision of the European Court of Human Rights (ECtHR) in *Behrami and Saramati*, if the operation is mandated under Chapter VII of the UN Charter, the conduct may even be attributable to the UN.²⁶ However, this is highly questionable as the Security Council in fact hardly exercises any meaningful control and certainly no effective control over operations that are authorised by the UN but that are not under its command and control (in contrast to UN operations *sensu stricto*).²⁷ Furthermore, from the claims settlement provisions it appears that the operation, and thus arguably the EU, is the entity that may be held responsible towards third parties.²⁸

action reflects a well-established principle of international responsibility') and the International Law Association (ILA)'s 2004 *Final Report on the Accountability of International Organisations* (available at <<http://www.ila-hq.org>>), at 24. While this is now well accepted for the UN, it seems less clear with regard to NATO and the EU, even though there is no substantial difference in the level of control transferred. See also the contribution by Zwanenburg to this volume.

²⁶ ECtHR, joined cases *Behrami and Behrami v. France* (Application No. 71412/01) and *Saramati v. France, Germany and Norway* (Application No. 78166/01), 31 May 2007. The Court held that conduct by forces in Kosovo under operational control of NATO (KFOR) was in principle attributable to the UN because it considered that the UN (Security Council) 'retained ultimate authority and control' (paras. 121-143).

²⁷ For a brief critical discussion, see F. Naert, 'ECtHR Dismisses Kosovo Mission Cases', International Society for Military Law & the Law of War, *Newsletter* 2007/2 (available online at <http://home.scarlet.be/~ismllw/publication/bulletin_info.htm>), at 10-12. The ECtHR applied a very low threshold of control which does not correspond to the one envisaged by the ILC and the ILA. Similarly, the Venice Commission in its Opinion No. 280/2004 on *Human Rights in Kosovo: Possible Establishment of Review Mechanisms* (CDL-AD (2004)033, 11 October 2004, at 18, para. 79) notes the difficulty of attributing KFOR conduct to NATO or to the troop-contributing nations but not to the UN. However, the ECJ has held that damage suffered as a consequence of EC sanctions adopted pursuant to sanctions imposed by the UN Security Council are not attributable to the EC but only to the UN, see the judgment of 28 April 1998 in Case T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission* [1998] ECR II-667, paras. 73-74 (the appeals judgment, the judgment of 15 June 2000 in Case C-237/98 P, *Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission* [2000] ECR I-4549, did not address this point). However, this situation is arguably different in that sanctions are more precisely defined and compulsory whereas authorisations for the use of force are usually very general as to the means and not compulsory. See the distinction that the ECJ makes between specific anti-terrorism lists enacted by the UN Security Council and more generic UN Security Council anti-terrorism measures that leave the EU some discretion in their implementation: see *Kadi and Yusuf* (*supra* n. 17 and n. 18) on the one hand and the judgment of 12 December 2006 in Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR II-4665 on the other hand. Interestingly, in a case concerning detention by UK forces in Iraq, the House of Lords ruled on 12 December 2007 that conduct of UN-mandated UK forces in Iraq (after the occupation phase, when the UN mandate was not disputed) was attributable to the UK and not to the UN (*R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent)*, [2007] UKHL 58, available online at <<http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm>>), distinguishing the case from *Behrami and Saramati*, with the dissent of Lord Roger, who persuasively rejected such a distinction. While the result is the same, the House of Lords would arguably better have simply rejected the ECtHR's views on this point, though it may not have been at liberty to do so.

²⁸ In the claims procedures under SOFAs/SOMAs, there is no mention of (a representative of) the sending state but only of (a representative of) the mission or EU for the operation side. References to the responsibility of a third participating state for claims concerning its personnel in participation agreements or to such responsibility of sending states or institutions in joint actions setting up opera-

This is not to say that Member States have no obligations at all. In addition to the specific obligation under international humanitarian law (if applicable) to ‘respect and to ensure respect (...) in all circumstances’,²⁹ the jurisprudence of the European Court of Human Rights has, in particular, affirmed that there is some room for Member State responsibility in the framework of international organisations, including for some instances of decision-making and implementation of decisions.³⁰ However, the *Behrami and Saramati* judgment limits this in respect of peace operations in two main ways: firstly, the Court made clear that it is not prepared to review any action pertaining to an operation mandated under Chapter VII of the UN Charter and secondly, it sees no room for the application of the *Matthews* and *Bosphorus* principles where an international organisation exercises jurisdiction over an area that was not previously under the jurisdiction of the Member States. In contrast, the Human Rights Committee considers that Member States remain bound by the International Covenant on Civil and Political Rights (ICCPR) with respect to their forces taking part in peace operations.³¹

tions, appear to deal with the internal distribution of responsibility only. Hence, in Art. 3(4) of the generic participation agreement with Canada (*supra* n. 22), this responsibility is correctly qualified as being ‘Without prejudice to the agreement on the status of mission/forces.’ Nevertheless, practice and the financing rules suggest that payment for claims resulting from an action of a national contingent will ultimately be made by the Member State concerned and claims concerning headquarters jointly by the Member States through Athena (see the Decision *supra* n. 8, Art. 42(4)) rather than by the EU. However, it is submitted that this is an internal matter and that the lack of recognition of the EU’s responsibility is probably related to lingering doubts about its legal personality (see *supra* section 2.3). But note its exceptional recognition in Council Joint Action 2007/192/CFSP of 27 March 2007 amending Joint Action 2005/355/CFSP on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC), *OJ* 2007 L 87/22, Art. 1(1) *in fine* (‘Under no circumstances may the European Union or the [SG/HR] be held liable by contributing Member States as a result of acts or omissions by the Head of Mission in the use of funds from those States’).

²⁹ Art. 1 common to the 1949 Geneva Conventions and Art. 1 of the Additional Protocol thereto.

³⁰ See especially *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, para. 155; *Matthews v. UK*, 18 February 1999, paras. 32-33; *Beer & Regan v. Germany* and *Waite and Kennedy v. Germany*, both 18 February 1999, respectively paras. 57 and 67; *Cantoni v. France*, 15 November 1996, para. 30, and European Commission of Human Rights (EComHR), Decisions of 9 February 1990 in *M & Co v. Germany* and of 16 January 1995 in *Gestra v. Italy*. See also *Segi e.a. & Gestoras Pro-amnistia and others v. Germany and others*, 23 May 2002, Admissibility Decision (‘CFSP decisions are therefore intergovernmental in nature. By taking part in their preparation and adoption each State engages its responsibility. That responsibility is assumed jointly by the States when they adopt a CFSP decision’).

³¹ General Comment 31 (21 April 2004, CCPR/C/74/CRP.4/Rev.6), para. 10 (‘a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party (...) This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, (...), such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.’).

3. THE APPLICABILITY OF HUMAN RIGHTS IN ESDP OPERATIONS

3.1. Extraterritorial scope of application of human rights

Whether human rights apply in ESDP operations is less obvious than one might think because human rights were traditionally conceived for the relations between a state and its own citizens/residents. However, as states also exercise powers extraterritorially, the extraterritorial scope of application of human rights instruments came to the fore. It remains a controversial issue to date, although human rights bodies seem to have generally accepted at least some extraterritorial applicability, especially for persons or territory under the effective control of a state.³² This is, *inter alia*, the case with the European Convention on Human Rights (ECHR) according to the jurisprudence of the European Court of Human Rights³³ and with the ICCPR according to the Human Rights Committee (HRC)³⁴ and the International Court of Justice.³⁵ However, not necessarily all states have accepted this view. Moreover, in situations involving lesser degrees of control, the case-law is not yet settled. The HRC has accepted a gradual approach to the applicability of human

³² See, generally, J. Wouters and F. Naert, 'Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism', in C. Fijnaut, J. Wouters and F. Naert, eds., *Legal Instruments in the Fight against International Terrorism. A Transatlantic Dialogue* (Dordrecht, Martinus Nijhoff 2004) 514-525; F. Coomans and T. Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia 2004); and D. Lorenz, *Der territoriale Anwendungsbereich der Grund- und Menschenrechte – zugleich ein Beitrag zum Individualschutz in bewaffneten Konflikten*, (Berlin, Berliner Wissenschafts-Verlag 2005).

³³ See, e.g., *Loizidou v. Turkey*, preliminary objections, 23 February 1995, para. 62, confirmed in *Loizidou v. Turkey*, 18 December 1996, merits, para. 52; *Öcalan v. Turkey*, Grand Chamber, 12 May 2005, para. 91 and *Halima Musa Issa and others v. Turkey*, 16 November 2004, para. 74. For the limits of this extraterritorial reach, see especially the Grand Chamber admissibility decision in *Vlastimir and Borka Bankovic and others v. Belgium, et al.*, 12 December 2001, especially paras. 59-82 (arguably overturned in some respects by the above *Öcalan* and *Issa* judgments). See also in the UK, *R (Al-Skeini and others) v. Secretary of State for Defence*, [2007] UKHL 26, available at <<http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf>>. Art. 1 ECHR states that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

³⁴ See, e.g., *López Burgos v. Uruguay* (CCPR/C/13/D/52/1979, No. 52/1979, 29 July 1981), para. 12; *Celiberti de Casariego v. Uruguay* (CCPR/C/13/D/56/1979, No. 56/1979, 29 July 1981), para. 13 and *Montero v. Uruguay* (CCPR/C/18/D/106/1981, No. 106/1981, 31 March 1983), para. 5. See very clearly General Comment 31 (*supra* n. 31), para. 10: 'States Parties are required by Art. 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.' Art. 2(1) ICCPR states that 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind (...).'

³⁵ Advisory Opinion on the *Legal consequences of the construction of a wall in the occupied Palestinian territory*, 9 July 2004, paras. 108-111, especially para. 111: 'the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'

rights, corresponding to the degree of jurisdiction exercised.³⁶ The ECtHR rejected this approach in *Bankovic* but some of its later jurisprudence has arguably softened this point of view.³⁷

This means that if peace operations are undertaken at the national level, human rights instruments may apply to such operations, in particular where they entail effective control over a territory or person (e.g., in the case of detention) and possibly to a more limited extent in operations involving lesser degrees of control.

3.2. Derogation and its extraterritorial application

However, further complications arise with regard to such operations, the first one being whether derogation clauses under human rights treaties³⁸ may also apply extraterritorially. This seems to be predominantly rejected in doctrine on the basis that in such operations there would generally not be a threat to the life of *the* nation *of the sending state*. However, I would argue that where the scope of application of human rights is extended to the host nation of an operation, a threat to that nation would justify a derogation with regard to *that* nation in case of an emergency.³⁹ The

³⁶ See *Ibrahim Gueye et al. v. France*, No. 196/1985, 6 April 1989, UN Doc. CCPR/C/35/D/196/1985, para. 9.4: ‘the authors are not generally subject to French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights’ (concerning Senegalese nationals who were retired after service in the French armed forces and lived in Senegal but were affected by a discriminatory French pensions law).

³⁷ In particular, in *Issa (supra n. 33)*, para. 74, the Court did not exclude that ‘as a consequence of (...) military action, [a] State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of [another State]’ and that ‘if (...) at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of [that State].’ Given the nature of the limited incursion that was at stake, this arguably comes very close to a gradual concept of jurisdiction.

³⁸ Art. 15 ECHR (‘1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Art. 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. (...)’) and Art. 4 ICCPR (‘1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination (...). 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. (...).’)

³⁹ This is supported by the view of the EComHR, which stated in respect of Cyprus that ‘Turkish armed forces in Cyprus brought any other persons or forces there “within the jurisdiction” of Turkey, in the sense of Art. 1 (...) It follows that, to the same extent, Turkey was (...) competent *ratione loci* for any measures of derogation under Art. 15’; see *Cyprus v. Turkey*, 4 EHRR 1982, 482-582 para. 525.

lack of derogations as regards extraterritorial situations need not exclude this and may to a significant extent be explained by a reluctance on the part of states to acknowledge the extraterritorial applicability in the first place. Furthermore, there may possibly be *de facto* derogations without official notification.⁴⁰

3.3. Human rights and international humanitarian law

Another difficulty is the relationship between human rights and international humanitarian law when both apply concurrently. In addition to the issue of derogation, the precise relationship between these two bodies of law has not yet been fully clarified either. There has been much support for the application of the *lex specialis* rule and international humanitarian law is often deemed to generally be the *lex specialis* when applicable alongside human rights.⁴¹ However, there have been instances where international human rights bodies have (also) endorsed the most favourable protection principle,⁴² which does not necessarily correspond to the *lex specialis* (e.g. international humanitarian law may more liberally allow killing and detention than human rights). It is submitted that a case-by-case analysis is required as the *lex specialis* principle operates on the level of specific rules/situations and not between entire sub-regimes of international law;⁴³ in some cases human rights

The ECtHR also linked Art. 1 and 15 ECHR in *Bankovic* (*supra* n. 33), para. 62, though in the reverse sense.

⁴⁰ The effects of a lack of notification have not been decisively settled. *Contra* an automatic invalidating effect: EComHR, *Cyprus v. Turkey*, *supra* n. 39, at 531-533 (paras. 309-313) and 555-557 (paras. 525-531) and the dissenting opinion of Commission members Sperduti and Trechsel, *idem*, at 561-565, especially para. 3, and *Al-Jedda, R (on the application of) v. Secretary of State for Defence* [2006] EWCA Civ 327, 29 March 2006 (available at <<http://www.bailii.org/ew/cases/EWCA/Civ/2006/327.html>>), paras. 55-87 (accepting a derogation on the basis of a UN Security Council Resolution absent any notification; the case is on appeal).

⁴¹ See especially ICJ, Advisory Opinion on the *Legal consequences of the construction of a wall in the occupied Palestinian territory*, 9 July 2004, para. 106 ('More generally, (...) the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Art. 4 [ICCPR]. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law'). The Human Rights Committee has expressed its view on the matter as follows: 'the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive' (General Comment 31, *supra* n. 31, para. 11).

⁴² See, e.g., the views of the Inter-American Commission on Human Rights in its *Report on Terrorism and Human Rights* (Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, available at <<http://www.cidh.oas.org/Terrorism/Eng/toc.htm>>), where it endorses the *lex specialis* principle (para. 61) but at the same time also the most favourable treatment principle (para. 45).

⁴³ See also H. Krieger, 'A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', 11 *JCSL* (2006) 265-291, especially at 268-270 and 270-276. On the *lex specialis* principle and difficulties in applying it, see generally the Report

may be the *lex specialis* but this is not the same as the most favourable treatment rule that normally applies between human rights instruments. In addition, in some cases the *lex posterior* principle may also be relevant.

3.4. The impact of Security Council Resolutions

A further complication is the impact of UN Security Council Resolutions. For the sake of brevity, reference is made to the Court of First Instance's counter-terrorism decisions, which accept the primacy of obligations under the UN Charter over other (human rights) treaties by virtue of Articles 25 and 103 of the UN Charter,⁴⁴ except for those human rights principles that are *ius cogens*.⁴⁵ However, the additional problem that arises in peace operations is that UN Security Council mandates that according states allow certain human rights obligations to be set aside are authorisations rather than obligations in the strict sense.⁴⁶ The priority of UN obligations over customary international law is also less clear given the text of Article

of the Study Group of the International Law Commission, finalised by M. Koskeniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, 35-36, para. 58 and 60-65, paras. 111-122. See A. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law', 56 *JCLQ* (2007) 623-639.

⁴⁴ Art. 25 stipulates that 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter' and Art. 103 states that 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' See also ICJ, Order of 14 April 1992 in the cases *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK and Libya v. US)*, Provisional Measures, para. 39 and para. 42 respectively.

⁴⁵ See especially *Kadi*, *supra* n. 17, paras. 181-184 and 226-230 and *Yusuf*, *supra* n. 18, paras. 231-234 and 277-281 and the separate opinion of Judge Lauterpacht to the Order of the ICJ in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* of 13 September 1993, paras. 99-104.

⁴⁶ A UK appeals court held in *Al-Jedda* (*supra* n. 40) that 'in acting as a member of the [Multinational Force in Iraq] pursuant to the authority of UNSCR 1546 (2004) the United Kingdom must be taken as performing an *obligation* within the meaning of Art. 25 that was imposed on it by that resolution for the purposes of Art. 103' (emphasis added). Para. 63 of this judgment states that the Government's agent argued that 'If and in so far as UNSCR 1546 (2004) *obliged* member states (...) to intern people (...) in order to fulfil the mandate' (emphasis added). The House of Lords' judgment in this case (*supra* n. 27), is more explicit and indicates that authorisations may also be covered (see paras. 31-39; 115-118 and 135-136). In *Behrami and Saramati* (*supra* n. 26) the ECtHR mentions that various States parties referred to Art. 103 of the UN Charter and phrases it as a priority of UN obligations notwithstanding the authorising rather than obligating nature of UN Security Council Resolution 1244 (10 June 1999). The Court itself mentions Art. 103 but does not elaborate on its effect. In contrast, the Court of First Instance has essentially limited the effect of Art. 103 to obligations only and in some of its cases concerning the implementation of UN sanctions has not accepted it for discretionary conduct, see especially the judgment of 12 December 2006 in Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR II-4665, para. 103 and the judgments of 11 July 2007 in Cases T-47/03 *Jose Maria Sison v. Council* [2003] ECR II-2047, paras. 137-206 and T-327/03 *Stichting Al-Aqsa v. Council* [2007], nyr, paras. 53-67.

103 of the UN Charter, but practice and effectiveness suggest that UN obligations prevail in this case too.⁴⁷

3.5 The EU's human rights obligations under EU law

It is well known that despite the absence of a provision in the constitutive instruments of the European Communities that binds them to human rights, the ECJ, after some initial reluctance, ruled that the EC was bound to certain human rights as part of the general principles of EC law,⁴⁸ derived from the common constitutional traditions of the Member States but also from their international treaty obligations,⁴⁹ including especially the ECHR⁵⁰ and, albeit to a lesser extent, the ICCPR.⁵¹

This case-law was subsequently codified in Article 6(2) TEU, which stipulates that 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed

⁴⁷ Similarly, R. Bernhardt, 'Art. 103', in B. Simma, ed., *The Charter of the United Nations. A Commentary*, 2nd edn. (Oxford, Oxford University Press 2002), at 1298-1299 and *Fragmentation of International Law*, *supra* n. 43, 168-181, especially at 175-176 (concluding that 'the practice of the Security Council has continuously been grounded on an understanding that Security Council resolutions override conflicting customary law. (...) it seems sound to join the prevailing opinion that Art. 103 should be read extensively – so as to affirm that charter obligations prevail also over United Nations Member States' customary law obligations'). However, this is not undisputed, see, e.g., the dissenting opinions of Judge Bedjaoui to the ICJ's Orders of 14 April 1992 in the cases *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK and Libya v. USA)*, both at para. 29 ('Art. 103 (...) does not cover such rights as may have other than conventional sources and be derived from general international law') and the separate opinion of Judge Rezek to the ICJ's judgment of 27 February 1998, para. 2 ('Art. 103 of the Charter is a rule for settling conflicts between treaties (...) However, it is not designed to operate to the detriment of customary international law and even less so to the detriment of the general principles of the law of nations').

⁴⁸ The main early cases are the judgment of 12 November 1969 in Case 29/69 *Erich Stauder v. City of Ulm – Sozialamt* [1969] ECR 419, para. 7; the judgment of 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, paras. 3-4. and the judgment of 13 December 1979 in Case 44/79 *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, paras. 13-15, as well as *Nold (infra, n. 49)*.

⁴⁹ See especially the judgment of 14 May 1974 in Case C-4/73 *J. Nold, Kohlen- und Baustoff-großhandlung v. Commission* [1975] ECR 985, para. 13 ('(...) fundamental rights form an integral part of the general principles of law (...) In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the member States (...) Similarly, international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.').

⁵⁰ See, e.g., the judgment of 28 October 1975 in Case 36/75 *Roland Rutili v. Ministre de l'intérieur* [1975] ECR 1219, para. 32; the judgment of 21 September 1989 in Joined Cases 46/87 and 227/88 *Hoechst AG v. Commission* [1989] ECR 2859, para. 13 (noting the particular significance of the ECHR) and Opinion 2/94 of 28 March 1996 on *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para. 33.

⁵¹ See, e.g., the judgment of 18 October 1989 in Case 374/87 *Orkem v. Commission* [1989] ECR 3283, paras. 18 and 31; the judgment of 18 October 1990 in Joined Cases C-297/88 and C-197/89 *Massam Dzodzi v. Belgian State* [1990] ECR I-3763, para. 68 and the judgment of 17 February 1998 in Case 249/96 *Lisa Jacqueline Grant and South-West Trains Ltd*, [1998] ECR I-621, para. 44.

in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’

Although this provides only for respect of fundamental rights as general principles of *Community* law, it is stipulated that these must be respected by the *Union* and not (just) the Communities. Therefore, the EU is also bound to respect these human rights in its non-EC activities, including the CFSP and ESDP.⁵² In fact, the applicability to the CFSP is reinforced by Article 11(1) TEU.⁵³ This would become very clear under the EU Reform Treaty.⁵⁴

It is also worth noting that the ECJ has held that these obligations are not only binding on the EC institutions but also on the Member States when acting within the sphere of EC law.⁵⁵ This has been confirmed in the EU Charter of Fundamental Rights⁵⁶ and in the EU Reform Treaty,⁵⁷ at least to some extent.⁵⁸ It is relevant to ESDP operations, assuming it also applies to the EU and not just to the EC (in line with the scope of Article 6 TEU put forward above), in that it results in Member States being bound by the EU’s human rights obligations when implementing EU Joint Actions, including those concerning ESDP operations.

⁵² In this sense the judgment of 16 June 2005 in Case C-105/03 *Maria Pupino* [2005] ECR I-5285, para. 58 (‘in accordance with Art. 6(2) EU, the *Union* must respect fundamental rights, (...) as general principles of law’ (emphasis added; this case concerns the Third Pillar). See also the Opinion of Advocate General Maduro of 16 December 2004 in Case C-160/06 *Kingdom of Spain v. Eurojust*, paras. 32-33.

⁵³ Part of this provision reads: ‘The Union shall define and implement a [CFSP] (...), the objectives of which shall be: – to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter; (...) – to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.’ This would be even more the case under Art. 21(3) new TEU, which provides that ‘The Union shall *respect* the principles and pursue the objectives set out in paragraphs 1 and 2 [including human rights and principles of international law] in the development and implementation of the different areas of the Union’s external action (...)’ (emphasis added).

⁵⁴ See Art. 6 new TEU. Paragraph 3 would read ‘Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the *Union’s law*’; (emphasis added); paragraph 2 would provide for the EU’s accession to the ECHR as well as the succession of the EC and EU by one EU with international legal personality (see *supra* 2.3). See also *supra* n. 53.

⁵⁵ See, e.g., the judgment of 15 May 1986 in Case 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paras. 18-19; the judgment of 13 July 1989 in Case 5/88 *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para. 19; the judgment of 18 June 1991 in Case C-260/89 *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925, paras. 42-45; the judgment of 4 October 1991 in Case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others* [1991] ECR I-4685, para. 31 and the judgment of 24 March 1994 in Case C-2/92 *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*, [1994] ECR I-955, para. 16.

⁵⁶ *Infra* n. 59.

⁵⁷ Art. 51 of the version proclaimed on 12 December 2007 (published in *OJ* 2007 C 306/1) reads: ‘The provisions of this Charter are addressed to the institutions, bodies and organs of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law (...)’

⁵⁸ Both texts use a more restrictive wording than the ECJ’s case-law and there is some debate over whether this limits this case-law, especially under the EU Reform Treaty.

Finally, mention should be made of the Charter of Fundamental Rights of the European Union,⁵⁹ which was solemnly proclaimed by the European Parliament, the Council and the Commission in Nice on 7 December 2000, but of which the legal nature has not yet been determined.⁶⁰ It would essentially be incorporated into primary treaty law under the EU Reform Treaty, subject to some changes.⁶¹ In that case, it would obviously become legally binding.

Thus, it is submitted that in the ESDP, including the conduct of ESDP operations, the EU and its Member States are bound by human rights as general principles of EU law.

However, at least two further issues arise in this particular context. First, to what extent is the extraterritoriality issue discussed above (section 3.1) relevant? Arguably, it is less relevant because these rights apply as general principles of EU law and are thus transformed. This arguably includes that their scope of application coincides with that of EU law, which, especially in the case of the CFSP and ESDP, includes extraterritorial effect.⁶² In addition, it may be argued that the functional nature of the competences of international organisations, including the EU, means that the primarily territorial notion of jurisdiction which applies to states does not apply to these organisations and yields to a functional exercise of jurisdiction.⁶³

Second, can the EU invoke a derogation? Although the Charter and EU Reform Treaty do not explicitly mention a derogation possibility for the EU,⁶⁴ it is submitted that the derogation mechanism, as an inherent part of the human rights system, is applicable. In addition to the substantive conditions derived from Member States' common legal systems and treaty obligations, some form of publicity would be required.⁶⁵ Since the EU is not (yet) a party to any specific human rights treaty (see *infra*, next section), a specific treaty-based *notification* requirement seems excluded (for the time being).

⁵⁹ OJ 2000 C 364/1.

⁶⁰ See para. 2, Presidency Conclusions, 7-9 December 2000, Nice European Council ('the question of the Charter's force will be considered later').

⁶¹ See Art. 6(1) new TEU: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

⁶² See P. Torremans, 'Extraterritoriality in Human Rights', in N. Neuwahl and A. Rosas, eds., *The European Union and Human Rights* (The Hague, Nijhoff 1995), 281-296, who argues for some extraterritorial effect of human rights in the EU consistent with the extraterritoriality in other areas of EC/EU law.

⁶³ That is not to say that international organisations are not limited by territorial considerations as to the legality of the exercise of their jurisdiction.

⁶⁴ However, the explanations to the EU's Charter of Fundamental Rights as amended in 2007 state that 'The Charter does not affect the possibilities of *Member States* to avail themselves of Art. 15 ECHR, (...), when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Art. 4(1) of the Treaty on European Union and in Articles 72 and 347 of the Treaty on the Functioning of the European Union' (emphasis added).

⁶⁵ See, e.g., *Cyprus v. Turkey*, Report of 10 July 1976, 4 EHRR 1982, at 556, paras. 526-528, especially para. 527 (requiring 'some formal and public act of derogation').

3.6. The EU's human rights obligations under (other) international law

In this section, I will briefly discuss two sources of international human rights law that may bind the EU. The first one involves treaties concluded by the EU. While the EU is not a party to any human rights treaty yet, its accession to the ECHR is envisaged in the EU Reform Treaty.⁶⁶ Moreover, the EU could include human rights obligations in SOFAs/SOMAs, which it has not done so far.

Second, as argued above, the EU is bound by those human rights that are part of customary international law. Although it may be difficult to determine the precise extent to which human rights have acquired this status, there can be little doubt that this is at least the case for a number of core rights. However, it does raise further questions, in particular about the extraterritorial scope of application of customary international human rights⁶⁷ (insofar as this is relevant for international organisations given the argument made above about the nature of their competences) and the possibility of derogation,⁶⁸ including extraterritorially. However, this cannot be addressed within the confines of this contribution.

4. ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY EU-LED FORCES

It follows from the above that EU-led forces are bound by human rights in so far as they exercise jurisdiction over persons or territory in ESDP operations.

There are various ways in which respect for these human rights is ensured. The main ones are the domestic law of the troop-contributing nations and generic and mission-specific EU documents, such as the Operation Plan, rules of engagement, standard operating procedures, etc. These must respect applicable human rights – which in my experience they certainly generally do in practice – although some of the issues set out above may raise questions as to the applicability of specific hu-

⁶⁶ See Art. 6(2) new TEU and Protocol 14 to the ECHR (Strasbourg, 13 May 2004, *ETS* 194), Art. 17(1) ('The European Union may accede to this Convention').

⁶⁷ The ICJ stated in its judgment of 19 December 2005 in the *Case concerning armed activities on the territory of the Congo (DRC v. Uganda)*, para. 216, that 'international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"' (emphasis added). This seems to have a general scope not limited to any specific instrument and to therefore arguably support a similar conclusion for customary law. See also the US Judge-Advocate General's *Operational Law Handbook* 2006 (available online at <<https://www.jagcnet.army.mil/8525736A005BC8F9>>), at 47: 'If a "human right" is considered to have risen to the status of customary international law, then it is likely considered binding on U.S. State actors wherever such actors deal with human beings. (...) it is the customary international law status of certain human rights that renders respect for such human rights a legal obligation on the part of U.S. forces conducting operations outside the United States, and not the fact that they may be reflected in treaties ratified by the United States'.

⁶⁸ Which some have argued would be possible under the conditions for a state of necessity under general international law; see Art. 25 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 194-206.

man rights instruments in certain cases. In addition, respect for local law may also further respect for human rights.⁶⁹

However, this may not *prevent* a human rights violation from occurring. If that is the case, how can this be *remedied*? Two aspects can be distinguished.

First, where the violation is such as to require disciplinary action or criminal prosecution, the question arises which authority is competent. SOFAs/SOMAs and other arrangements normally reserve jurisdiction exclusively for the sending state, certainly where it involves military contingents, and include various immunities from the jurisdiction of local courts. While this has become a subject of debate in the UN following abuse and an apparent inadequate response by sending states,⁷⁰ one has to be aware that any submission to local courts would hand host states a tool which they could well use to unduly influence or hamper the operation.⁷¹ It is therefore submitted that a better – and more realistic – approach is to enhance the enforcement by sending states. This, *inter alia*, requires that their legislation should cover abuse abroad by their personnel as well as adequate provisions for obtaining evidence and testimony in areas of operations and other necessary procedures. Moreover, the EU Reform Treaty would introduce an obligation for Member States to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’, which, given this broad wording, also covers the CFSP and ESDP.⁷² In addition, ways may be considered to increase the powers of international organisations in this regard for personnel under their command.

Second, where and how can a victim obtain reparation? Here too, immunities from the jurisdiction of local courts will normally block these courts from dealing with such cases. Instead, SOFAs/SOMAs usually provide for a specific claims mechanism.⁷³ This may however be subject to restrictions: e.g., claims arising from

⁶⁹ On these elements of the legal framework, see *supra* 2.2.

⁷⁰ See, e.g., the *Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations* (UN Doc. A/60/980), which is being discussed within the UN. See also F. Hampson, *Working Paper on the accountability of international personnel taking part in peace support operations*, UN Doc. E/CN.4/Sub.2/2005/42, 7 July 2005.

⁷¹ As an example of what could happen, one may refer to the detention of volunteers working for the UN Mission in Ethiopia and Eritrea in Eritrea in early 2006 (see International Society for Military Law & the Law of War, *Newsletters* 2006/2 and 2006/4 (available online at <http://www.home.scarlet.be/~ismllw/publication/bulletin_info.htm>), respectively at 5-6 and 7.

⁷² Art. 19 new TEU. To some extent this obligation may already exist under the ECJ’s case-law. See T. Corthaut, ‘An Effective Remedy for All? Paradoxes and Controversies in Respect of Judicial Protection in the Field of the CFSP under the European Constitution’, 12 *Tilburg Foreign Law Review* (2004), at 116-117, with regard to the corresponding provision under the EU Constitution (Art. I-29(1), subparagraph 2).

⁷³ See, e.g., the Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led Forces (EUF) in the Former Yugoslav Republic of Macedonia, OJ 2003 L 82/46, Art. 13. Compare the UN model SOFA, UN Model SOFA, UN Doc. A/45/594, 9 October 1990, paras. 51-54. See more generally K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen* (Frankfurt am Main, Peter Lang 2004) and K. Schmalenbach, ‘Third Party Liability of International Organizations: a Study on Claim Settlement in the Course of Military Operations and International Administrations’, 10 *International Peacekeeping* (2006) 33-51.

activities in connection with civil disturbances or protection of the force or those which are incidental to operational necessities or similar ones are often excluded.⁷⁴ This may be criticised in that, depending on the interpretation, claims may be excluded that relate to unlawful conduct committed during such activities, e.g., excessive force during riot control activities. However, it should be noted that in practice, the operation often compensates victims even in cases where it is not obliged to do so under the SOFA/SOMA and even when it is not at fault. In addition, a victim may seek redress before the courts of the sending state, where the SOFAs/SOMAs may not apply, against the individual human rights violator, the sending state and/or the international organisation concerned. The *Al-Skeini*⁷⁵ and *Bici*⁷⁶ cases show that this may offer a chance of success in respect of the sending state, although it may not be easy for a victim to bring a case there. In contrast, claims against an international organisation are likely to be rejected on the basis of these organisations' immunities, which may foreclose a remedy when the conduct is solely attributable to them. Claims against an individual may have a considerable chance of success where the individual is subject to criminal prosecution, especially in legal systems that have a '*partie civile*' institution. Finally, individual complaints before international human rights bodies may also be envisaged, especially before the European Court of Human Rights. However, the Court's ruling in *Saramati and Behrami*⁷⁷ has severely limited this option.

5. CONCLUSIONS AND FINAL REFLECTIONS

The applicability of human rights in peace operations is a complex and still controversial issue from a legal perspective. In this respect, the EU is in a unique position by virtue of its strong commitment to human rights, its legally binding obligation to respect human rights in the exercise of its jurisdiction under Article 6 TEU and its possible future accession to the ECHR, while it is also bound by customary international human rights law. Furthermore, as a matter of policy, it is difficult to see how the EU could not accept that it is bound by human rights in peace operations, which usually, at least in part, aim at promoting the rule of law and human rights as part of the EU's foreign policy objectives, without losing its credibility.

However, conditions in most peace operations, especially in military ESDP operations, are unlike those in normal peace time. Applying human rights in these circumstances is possible only when due account is taken of the limited nature of the jurisdiction exercised in most ESDP operations, of the possibility of derogating from certain human rights, of the impact of overriding UN Security Council Resolutions and of the possible concurrent applicability of international humanitarian

⁷⁴ See Art. 13 of the SOFA with FYROM, *supra* n. 73.

⁷⁵ *Supra* n. 33.

⁷⁶ *Bici and Bici v. Ministry of Defence*, 7 April 2004, 2004 EWHC 786 (QB), available online at <<http://www.hmcourts-service.gov.uk/judgmentsfiles/j2458/bici-v-mod.htm>>.

⁷⁷ *Supra* n. 26.

law, which may be more suitable as *lex specialis*. Under these conditions, the EU and its Member States should have nothing to fear from the application of human rights in ESDP operations. I therefore subscribe to the view expressed by Watkin that:

‘The long-term solution to this issue may not be to “bar the door” to human rights principles and their advocates but, rather, to ensure that human rights accountability mechanisms take into consideration both the nature of warfare and the unique aspects of international humanitarian law.’⁷⁸

As to enforcement and accountability, human rights are taken into account in ESDP operations to an extent that should prevent most human rights violations. Where such violations nevertheless occur, venues exist for disciplinary action and criminal prosecution, although sending states’ capacities in this field may require enhancement in some respects and claims for reparation are subject to a number of limitations. However, such restrictions should not prevent accountability for individual violations that occur despite efforts to ensure respect for human rights. As a British court stated with regard to a shooting by some UK KFOR forces:

‘The British Army can justifiably be proud of the operation it carried out in Kosovo. (...) It displayed professionalism and discipline of the highest quality. The soldiers on the ground had to carry out difficult and highly responsible tasks which required a combination of courage and sensitivity. In general, they discharged their duties with considerable credit. But soldiers are human; from time to time mistakes are inevitable, and even the most rigorous discipline will crack. In this case the fall from the Army’s usual high standards led to tragic consequences for the victims and their families. The Queen’s uniform is not a licence to commit wrongdoing, and it has never been suggested that it should be. The Army should be held accountable for such shortcomings, even where the victims are from the very community which has benefited so much from the Army’s assistance. A proper system of justice requires no less.’⁷⁹

This is equally applicable to EU-led forces: an EU badge cannot be a licence to commit human rights violations and the EU’s underlying values and principles also require accountability.

⁷⁸ K. Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’, 98 *AJIL* (2004), at 24.

⁷⁹ *Supra* n. 76, para. 113.

