

## PERSPECTIVES ON IHL AND MULTINATIONAL FORCES

# Observance of international humanitarian law by forces under the command of the European Union

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### **Abstract**

*In this contribution, I will identify the main issues relevant for the applicability and application of international humanitarian law (IHL) in military operations under the command of the European Union (EU) and I will briefly describe the EU's practice and policy in this respect.<sup>1</sup>*

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### **The planning, decision-making, command and control, and conduct of EU operations<sup>2</sup>**

Key decisions in the planning and decision-making process for operations under the EU's Common Security and Defence Policy (CSDP)<sup>3</sup> are taken by the Council of Ministers of the European Union.<sup>4</sup> Legal issues are taken into account from the early stages of this process.

The planning culminates in the Operation Plan (OPLAN)<sup>5</sup> and, when the use of force is authorised beyond self-defence, the Rules of Engagement

\* The views expressed are solely those of the author and do not bind the Council or its Legal Service.

(ROE, requested by the Operation Commander and authorised by the Council, based on the EU's policy on the use of force<sup>6</sup>). The OPLAN for military operations usually contains specific annexes dealing with legal issues and with the use of force. The EU's policy on the use of force explicitly requires respect for international law and political guidance based on military and legal advice.<sup>7</sup>

The highest level of military command in EU military operations<sup>8</sup> rests with the Operation Commander. The Operation Commander will normally receive operational control over forces put at his disposal by the participating states via a transfer of authority.<sup>9</sup>

## Applicability and application of international humanitarian law<sup>10</sup>

### EU policy on the applicability of IHL

Under Article 42(1) of the Treaty on European Union (TEU)<sup>11</sup>, the CSDP shall provide the Union with a military and civilian operational capacity for 'missions

- 1 See more extensively Frederik Naert, 'Observance of international humanitarian law by forces under the command of the European Union', in Stanislas Horvat and Marco Benatar (eds.), *Recueil of the XIX<sup>th</sup> International Congress of the International Society for Military Law and the Law of War* (Québec City, 1–5 May 2012), *Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments*, International Society for Military Law and the Law of War, Brussels, 2013, pp. 373–404.
- 2 See Frederik Naert, 'The application of human rights and international humanitarian law in drafting EU missions' mandates and rules of engagement', in Mariano J. Aznar Gómez and Milena Costas Trascasas (eds.), *The Integration of the Human Rights Component and International Humanitarian Law in Peacekeeping Missions Led by the European Union*, CEDRI/ATLAS, 2011, pp. 61–71 (also available at: [www.law.kuleuven.be/iir/nl/onderzoek/wp/wp151e.pdf](http://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp151e.pdf)). All internet references were last accessed on 30 May 2013.
- 3 See generally [www.consilium.europa.eu/eeas/security-defence?lang=en](http://www.consilium.europa.eu/eeas/security-defence?lang=en); Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Intersentia, Antwerp, 2010 (based on a thesis available at: [https://lirias.kuleuven.be/bitstream/1979/1986/1/Doctoraatsthesis\\_Frederik\\_Naert\\_08-09-2008\\_final.pdf](https://lirias.kuleuven.be/bitstream/1979/1986/1/Doctoraatsthesis_Frederik_Naert_08-09-2008_final.pdf)); and Steven Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects*, TMC Asser Press, The Hague, 2008.
- 4 See the (revised) 'Suggestions for crisis management procedures for CSDP crisis management operations', EU Council Doc. 7660/2/13, 18 June 2013, available in the public register of Council documents at: [www.consilium.europa.eu/documents/access-to-council-documents-public-register?lang=en](http://www.consilium.europa.eu/documents/access-to-council-documents-public-register?lang=en) (unless stated otherwise, Council documents cited below are available there).
- 5 Sometimes called the Mission Plan.
- 6 See Concept for the Use of Force in EU-led Military Operations (partially declassified in EU Council Doc. 17168/09 EXT 1, 2 February 2010).
- 7 *Ibid.*, p. 6, paras. 1–2.
- 8 See especially EU Concept for Military Command and Control, Council Doc. 10688/08 REV 3, 13 September 2012. For civilian CSDP operations, see Council Doc. 9919/07 EXT 2, 1 February 2008 (partially declassified).
- 9 Operational Control (OPCON) is defined in Council Doc. 10688/08 REV 3, p. 25.
- 10 This section draws on Frederik Naert, 'Challenges in applying international humanitarian law in crisis management operations conducted by the EU', in Anne-Sophie Millet-Devalle (ed.), *L'Union européenne et le droit international humanitaire*, Paris, Pedone, 2010, pp. 139–150. See also generally F. Naert, above note 1; F. Naert, above note 3, pp. 463–540; and Marten Zwanenburg, 'Toward a more mature ESDP: responsibility for violations of international humanitarian law by EU crisis management operations', in S. Blockmans (ed.), above note 3, pp. 395–416.
- 11 *Official Journal of the European Union (OJ)*, C 326, 26 October 2012 (consolidated version after the Treaty of Lisbon).

outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the [UN] Charter'. These missions shall comprise, *inter alia*, 'peace-keeping tasks [and] tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation' (TEU, Article 43).<sup>12</sup> This includes peace enforcement.<sup>13</sup>

IHL applies to situations of armed conflict and occupation; thus, it also applies to peace operations when they amount to engagement in an armed conflict (or an occupation).<sup>14</sup> Consistent with the requirement that the EU respect international law in its external relations,<sup>15</sup> the EU and its member states accept that if EU-led forces become engaged in an armed conflict, IHL will fully apply to them.<sup>16</sup>

However, this is likely to be the case in only a few EU operations. Indeed, EU military operations have included training missions, an anti-piracy operation, and several operations closer to peacekeeping than to peace enforcement.<sup>17</sup> EU policy is accordingly that IHL does not necessarily apply in all EU military operations,<sup>18</sup> nor is it necessarily considered the most appropriate standard as a matter of policy in all EU military operations (when not applicable as a matter of law).

In fact, EU-led forces have not so far become engaged in combat as a party to an armed conflict in any of the EU's military operations. While IHL could have become applicable if the situation had escalated in some of these operations, especially Artemis (in the Democratic Republic of the Congo) and EUFOR Tchad/RCA, this did not happen.<sup>19</sup> Nevertheless, the EU and its member states remain fully aware of the potential obligations of EU-led forces under IHL, in particular when the situation escalates.

When IHL does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct of EU military operations (furthermore, human rights may be relevant when IHL does apply

12 See generally F. Naert, above note 3, pp. 97–191; and Frederik Naert, 'Legal aspects of EU operations', in *Journal of International Peacekeeping*, Vol. 15, 2011, pp. 218–242. In addition, Art. 42(7) of the TEU contains a mutual assistance clause.

13 See F. Naert, above note 3, pp. 197–206.

14 This is recognised, at least to some extent, in Art. 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel, New York, 9 December 1994, and in section 1.1 of the UN Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, 6 August 1999, available at: [www.icrc.org/eng/resources/documents/misc/57jq7l.htm](http://www.icrc.org/eng/resources/documents/misc/57jq7l.htm).

15 See Arts. 3(5), 21(1) and (2)b–c of the TEU; and Frederik Naert, 'The application of international humanitarian law and human rights law in CSDP operations', in Enzo Cannizzaro, Paolo Palchetti, and Ramses Wessel (eds), *International Law as Law of the European Union*, Martinus Nijhoff, Leiden, 2011, pp. 189–212.

16 See e.g. the Salamanca Presidency Declaration (outcome of the seminar of 22–24 April 2002, Doc. DIH/Rev.01.Corr1, on file with the author): 'Respect for [IHL] is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict to which the forces are party.'

17 See [www.consilium.europa.eu/eeas/security-defence/eu-operations?lang=en](http://www.consilium.europa.eu/eeas/security-defence/eu-operations?lang=en) for details on all operations.

18 Moreover, if the EU and/or its member states become a party to an armed conflict because of the actions of one CSDP operation, this may also affect the legal status of other EU operations in the same conflict area.

19 See F. Naert, above note 10, pp. 142–143.

as both regimes may apply concurrently<sup>20</sup>). I cannot elaborate on this here<sup>21</sup> except to say that the EU itself has extensive human rights obligations, especially under Article 6 of the TEU and its Charter of Fundamental Rights,<sup>22</sup> and is in the process of acceding to the European Convention on Human Rights (ECHR).<sup>23</sup> Combined with all member states being parties to the ECHR, this limits legal interoperability challenges.

Nevertheless, the controversies regarding the applicability of human rights law to peace operations also arise for EU military operations,<sup>24</sup> notably the extraterritorial scope of application of human rights, the derogation from human rights on the basis of UN Security Council resolutions, recourse to ‘extraterritorial derogations’, and the IHL–human rights relationship.<sup>25</sup> In any event, at least as a matter of *policy*, human rights provide significant guidance in EU military operations, and in practice, EU operational planning and ROE reflect human rights standards. Moreover, some of the legal acts relating to CSDP operations explicitly require respect for human rights.<sup>26</sup>

An assessment must be made for each operation of whether IHL and/or human rights law are, or may become, applicable to the mission as a matter of law and/or should be applied as a matter of policy. In addition, it may be relevant to determine the obligations of the parties in theatre.

20 See e.g. European Court of Human Rights (ECtHR), *Varnava and Others v. Turkey* (18 September 2009, para. 185) and *Al-Jedda v. UK* (7 July 2011, para. 107); and the EU’s guidelines on promoting compliance with IHL (OJ, C 303, 15 December 2009, p. 12), para. 12.

21 See F. Naert, above note 3, pp. 397–408, 418–419, and 544–567; Aurel Sari and Ramses Wessel (eds.), *Human Rights in EU Crisis Management Operations: a Duty to Respect and to Protect?*, Centre for the Law of EU External Relations, Working Paper 2012/6, The Hague, 2012, available at: [www.asser.nl/upload/documents/20121221T112600-CLEER%20Working%20Paper.pdf](http://www.asser.nl/upload/documents/20121221T112600-CLEER%20Working%20Paper.pdf); and Frederik Naert, ‘Applicability/application of human rights law to international organisations involved in peace operations – a European/EU perspective’, in Stéphane Kolanowski et al. (eds.), *Proceedings of the Bruges Colloquium. International Organisations’ Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12<sup>th</sup> Bruges Colloquium, 20–21 October 2011*, ICRC & College of Europe, Bruges, 2012, pp. 45–56, available at: [www.coleurope.eu/sites/default/files/uploads/page/collegium\\_42\\_0.pdf](http://www.coleurope.eu/sites/default/files/uploads/page/collegium_42_0.pdf).

22 OJ, C 326, 26 October 2012, p. 391. See also TEU, Arts. 3(5) and 21.

23 See ECHR, Art. 59, as amended by Protocol 14 to the ECHR and Council of Europe Doc. 47 + 1(2013)008 of 5 April 2013, available at: [www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp).

24 See e.g. Doc. 47 + 1(2013)008, above note 23, pp. 5 and 19–20.

25 See the contribution by Kjetil Larsen and my response thereto in S. Horvat and M. Benatar (eds.), above note 1, pp. 324–335 and 336–344; and especially ECtHR, *Al-Jedda v. UK* and *Al-Skeini v. UK*, both 7 July 2011; as well as the agora in *Military Law and the Law of War Review*, Vol. 50, 2011, pp. 315–445.

26 See e.g. Art. 12 of Council Joint Action 2008/851/CFSP of 10 November 2008 (Atalanta), OJ, L 301, 12 November 2008, p. 33 (as amended); and Art. 3(i) of Council Joint Action 2008/124/CFSP of 4 February 2008 (EULEX KOSOVO), OJ, L 42, 16 February 2008, p. 92. These Joint Actions (now Council Decisions) are the basic legal instrument governing each EU operation. They are adopted unanimously (abstentions are possible) and *inter alia* set out the mandate, political direction, military command and control, status and funding provisions, relations with other actors, handling of EU classified information, launching and termination/duration of the operation, and participation of third states (i.e. non-EU member states). The modalities for the latter are usually agreed in participation agreements with the EU, either for a given operation (e.g. with Croatia on Atalanta, OJ, L 202, 4 August 2009, p. 84) or in a framework agreement covering participation in any EU operation (e.g. with the US (OJ, L 143, 31 May 2011, p. 2) and with Ukraine (OJ, L 182, 13 July 2005, p. 29)). See Panos Koutrakos, ‘International agreements in the area of the EU’S Common Security and Defence Policy’, in E. Cannizzaro, P. Palchetti, and R. Wessel (eds.), above note 15, pp. 157–187.

In some cases, this analysis is relatively simple: for instance, IHL does not apply to the EU's counter-piracy operation *Atalanta*.<sup>27</sup> In some cases, however, the assessment is more complex. For instance, in the case of a military mission in a theatre where an armed conflict is ongoing, a robust mandate may lead to the EU forces becoming engaged in combat and becoming a party to the conflict, even if this is not intended. This risk was present in EUFOR Tchad/RCA, for example. In such a case, the planning documents and the ROE should be flexible enough to address an escalation. There are various ways to achieve this flexibility, including defining the circumstances that will trigger more offensive/robust ROE combined with retaining such ROE at the level of the Operation Commander. Also, the Operation Commander may request additional or amended ROE.

### Convergence of member states' IHL obligations and EU IHL commitments

States' different treaty obligations in the field of IHL can create problems of 'legal interoperability' in multinational operations.<sup>28</sup> However, the importance of such divergences is limited by the fact that a significant body of IHL rules has become part of customary international humanitarian law.<sup>29</sup> Furthermore, there is a marked convergence between EU member states' treaty obligations relating to IHL. All 27 EU member states are parties to the 1949 Geneva Conventions, the two 1977 Additional Protocols and the Statute of the International Criminal Court,<sup>30</sup> as well as to the 1980 Convention on Certain Conventional Weapons and the 1993 Chemical Weapons Convention. Yet even within the EU, if one looks at all IHL treaties, there are still differences because of differentiated ratifications,<sup>31</sup> reservations or divergent interpretations of common obligations.

So far, IHL obligations in EU military operations seem to be primarily conceived as resting on the participating states.<sup>32</sup> However, the EU may also have its own IHL obligations, especially under customary IHL.<sup>33</sup> In fact, the question of who the parties are to a conflict involving multinational operations is currently being examined by the International Committee of the Red Cross

27 SC. Res. 1851, 16 December 2008, para. 6, refers to 'applicable international humanitarian and human rights law' but the word 'applicable' leaves open the question of whether IHL does in fact apply.

28 Art. 21(3) of the 2008 Convention on Cluster Munitions specifically addresses the matter of joint operations by state parties and non-state parties. However, most treaties do not (explicitly) address this.

29 See especially [www.icrc.org/customary-ihl/eng/docs/home](http://www.icrc.org/customary-ihl/eng/docs/home) (but note that some of the ICRC's views on this are contested).

30 Moreover, the EU strongly supports the International Criminal Court in several ways.

31 For example, Ireland and Malta are not party to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, and several member states are not party to the 2008 Convention on Cluster Munitions.

32 For example, the Presidency Conclusions of the 19–20 June 2003 Thessaloniki European Council, para. 74 (available at: [www.european-council.europa.eu/council-meetings/conclusions?lang=en](http://www.european-council.europa.eu/council-meetings/conclusions?lang=en)) and the Salamanca Presidency Declaration (above note 16).

33 See F. Naert, above note 3, esp. pp. 515–537; and Zwanenburg, above note 10, pp. 400–406 and 412–415.

(ICRC).<sup>34</sup> The EU has not developed a position on this,<sup>35</sup> but it has started to make political commitments in the field of IHL. In addition to its guidelines on promoting respect for IHL (by others),<sup>36</sup> it has made pledges at recent International Conferences of the Red Cross and Red Crescent<sup>37</sup> and has signed up to the Montreux Document on Private Military and Security Companies.<sup>38</sup>

Issues of attribution, responsibility, and remedies are not addressed here.<sup>39</sup> It would seem, however, that as of now, very few issues of responsibility have actually arisen in practice.<sup>40</sup>

## EU policy options and mechanisms to deal with divergences

Difficulties may arise when member states have different views on the qualification of a situation/mission and/or the applicable law.<sup>41</sup> Fortunately, a number of factors limit such disagreements or their impact.

First, policy choices may overcome different legal positions. For instance, Finland accepted that its forces would not use anti-personnel mines in EU military

34 See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, October 2011, 31IC/11/5.1.2, pp. 30–33, available at: [www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf](http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf).

35 Compare F. Naert, above note 3, pp. 524–526. In the framework of operation EUFOR Libya (which was established but never launched; see [www.consilium.europa.eu/eeas/security-defence/eu-operations/completed-eu-operations/eufor-libya?lang=en](http://www.consilium.europa.eu/eeas/security-defence/eu-operations/completed-eu-operations/eufor-libya?lang=en)), the question arose as to whether forces from a member state which was participating in NATO's Operation Unified Protector could participate in an EU-led operation that was to support humanitarian assistance and not be regarded as the forces of a party to the conflict in the latter operation. Compare generally Ola Engdahl, 'Multinational peace operations forces involved in armed conflict: who are the parties?', in Kjetil Larsen *et al.* (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge University Press, Cambridge, 2013, pp. 233–271.

36 See above note 20.

37 See Pledge P091 at the 30<sup>th</sup> International Conference (available at: [www.icrc.org/applic/p130e.nsf/va\\_navPage/POAI?openDocument&count=-1](http://www.icrc.org/applic/p130e.nsf/va_navPage/POAI?openDocument&count=-1)); and Pledges P1311, P1318, and P1319 at the 31<sup>st</sup> International Conference (available at: [www.icrc.org/pledges](http://www.icrc.org/pledges)).

38 See [www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html](http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html) and the Council conclusions of 27 February 2012 on EU priorities at the UN Human Rights Council, para. 13, p. 19, available at: [www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/EN/foraff/128226.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/128226.pdf).

39 See F. Naert, above note 3, pp. 355–357, 435–449, 506–526, and 641–646; and Frederik Naert, 'The international responsibility of the Union in the context of its CSDP operations', in Panos Koutrakos and Malcolm Evans (eds.), *The International Responsibility of the European Union*, Hart, Oxford, 2013, pp. 313–338. See e.g. Treaty on the Functioning of the European Union, Arts. 19(1), 274, 275, 340, and 343 and Protocol No. 7 on the privileges and immunities of the EU as well as relevant SOFAs. The EU will normally conclude a status of forces/mission agreement (SOFA/SOMA) with the host state. See Aurel Sari, 'Status of forces and status of mission agreements under the ESDP: the EU's evolving practice', in *European Journal of International Law*, Vol. 19, 2008, pp. 67–100. These are negotiated on the basis of a model SOFA or SOMA: see, on the one hand, EU Council Documents 12616/07 of 6 September 2007 and 11894/07 of 20 July 2007 and COR 1 of 5 September 2007; and on the other, EU Council Doc. 17141/08 of 15 December 2008.

40 For an exception relating to operation Atalanta, see a judgement of the Cologne administrative court of 11 November 2011, available in German at: [www.justiz.nrw.de/nrwe/ovgs/vg\\_koeln/j2011/25\\_K\\_4280\\_09urteil20111111.html](http://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html) (under appeal).

41 For example, whether the threshold of an armed conflict has been crossed, whether a conflict has an international or non-international character, or whether the EU and/or its member states are a party to the conflict. See, in respect of multinational operations, ICRC, above note 32, pp. 10 and 31. Compare F. Naert, above note 3, p. 535.

operations even though Finland had no obligation to this effect prior to 2012. Such a policy choice may minimise legal discussions. It may be made on an *ad hoc* basis for a given mission or in horizontal policy or conceptual documents.

Second, the combination of a common OPLAN and ROE (see above) with national caveats which member states may issue in relation to their forces also allows for interoperability while ensuring respect for each member state's obligations/positions. Caveats impose further *restrictions* on the use of force or tasks and permit a member state to ensure that its forces can respect any political or legal restrictions particular to it<sup>42</sup> without imposing these restrictions on the other member states. Therefore, while caveats complicate life, they are often the best solution in terms of respecting the different positions of member states.

The OPLAN should clarify as much as possible the applicable law and specify whether IHL and/or human rights law applies. However, this is not always the case, possibly in part to retain some flexibility when the situation may evolve. In this respect, references to 'applicable' rules of IHL or human rights law do not clarify whether, when or which of those rules actually are applicable and may require an Operation Commander to determine the applicable rules, with the assistance of legal advice at his/her level.

## Final remarks

The EU attaches importance to respect for international law, including IHL, in its external relations. This is enshrined in its constitutive treaties and reflected in practice in its military operations.

The EU and its member states accept that if EU-led forces become a party to an armed conflict, IHL will fully apply to them. In that case, the EU is arguably bound by customary IHL, while its member states' forces also remain bound by their IHL treaty obligations. However, this has not been the case so far and will probably remain the exception. EU policy is that IHL does not necessarily apply in all EU military operations nor is it necessarily considered the most appropriate standard as a matter of policy in all EU military operations (when not applicable as a matter of law). Rather, in most operations the EU looks to human rights law as a more appropriate standard.

In EU military operations, the IHL (and human rights) obligations of the EU and those of its member states are largely similar. This limits legal interoperability issues. Where such issues nonetheless arise, the EU has a number of tools to deal with them, which so far have been adequate.

42 The OPLAN and ROE cannot require a member state's forces to act contrary to their national law.