



EUI Working Papers

AEL 2009/25

ACADEMY OF EUROPEAN LAW

PRIV-WAR project

Human Rights and International Humanitarian Law in the Common Security and
Defence Policy: Legal Framework and Perspectives for PMSC Regulation

Valentina Falco

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ACADEMY OF EUROPEAN LAW

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The ‘Regulating Privatisation of “War”: The Role of the EU in Assuring the Compliance with International Humanitarian Law and Human Rights’ (PRIV-WAR) project is funded by the European Community’s 7th Framework Programme under grant agreement no. 217405.

This paper was produced as part of the EUI contribution to Work-Package 4 of the PRIV-WAR Project: *Private Military and Security Companies and the Protection of Human Rights*.

www.priv-war.eu

ISSN 1831-4066

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

The actual and potential role of private military and security companies (PMSCs) within the European Union's crisis-management operations make it crucial to clarify the legal framework in which their personnel must operate. This is all the more true with respect to their obligations under human rights law (HRL) and international humanitarian law (IHL), in order to prevent possible violations of these legal regimes by private contractors in the context of EU-led civilian and military missions.

In principle, HRL and IHL may be binding on private companies acting within the framework of the Common Security and Defence Policy (CSDP) not only as a matter of international law, but also as a matter of EU law, to the extent that the Union upholds and incorporates the relevant legal standards.

The present paper thus aims to verify whether and to what extent HRL and IHL rules and principles have been integrated into the EU's legal order, with a particular focus on the CSDP. In view of that aim, the paper surveys existing and potential sources of obligations under HRL and IHL for the personnel engaged in EU crisis-management operations. Finally, by way of conclusion, it endeavours to assess which of these sources may be binding on PMSCs contracted in the framework of the CSDP, and to identify viable regulatory options in order to ensure more effective compliance by such companies with HRL and IHL.

Human Rights and International Humanitarian Law in the Common Security and Defence Policy: Legal Framework and Perspectives for PMSC Regulation

VALENTINA FALCO*

1. Introduction

Concerns about compliance by private military and security companies (PMSCs) with human rights law (HRL) and international humanitarian law (IHL) have been among the main drivers behind the growing calls for regulation of private contractors' activity in the field of crisis-management.

The European Union (EU), in its recently acquired capacity as a security actor, is not immune from these calls. Indeed, as is well known, the definitive integration of the so-called 'Petersberg Tasks'¹ into the Union's constituent instrument² provided an unequivocal legal basis for the EU's direct involvement in a wide range of civilian and military operations,³ thereby laying the ground for resort to private contractors within the framework of the Union's Common Security and Defence Policy (CSDP).⁴

However, when it comes to the employment of PMSCs by the EU, the recent debate on possible legislative and regulatory solutions has (with few notable exceptions)⁵ mainly focused on aspects related to trade in military equipment, export and brokering of arms, defence procurement.⁶

* Ph.D. candidate, European University Institute Florence, Comments are welcome at: valentina.falco@eui.eu.

¹ The 'Petersberg Tasks' were first set out in the 'Petersberg Declaration' adopted at the Ministerial Council of the Western European Union (WEU) in June 1992. They included 'humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking', see Petersberg Declaration of the Western European Union Council of Ministers, para. II.4, June 19, 1992, available at www.weu.int/documents/920619peten.pdf. On the scope of the 'Petersberg Tasks', see, *inter alia*, Fabrizio Pagani, *A New Gear in the CFSP Machinery: Integration of the Petersberg Tasks in the Treaty on European Union*, 9 EJIL 737 (1998); Sebastian G. von Kielmansegg, *The Meaning of Petersberg: Some Considerations on the Legal Scope of ESDP Operations*, 44 COMMON MKT. L. REV. 629 (2007).

² Some authors point to the adoption of the Treaty of Amsterdam in 1997 as 'the moment when the EU became a military actor', since it is under that Treaty the 'Petersberg Tasks' were actually integrated into the Union's constituent instrument, see Adrian Treacher, *From Civilian Power to Military Actor: the EU's Resistable Transformation*, 9 EFA REV. 49, 59. However, it is only with the removal of any reference to the WEU in Article 17 of the Treaty of Nice that the EU itself assumed direct responsibility for the conduct of the Tasks, rather than leaving that to another organization, see R.A. Wessel, *The EU as a Black Widow: Devouring the WEU to give birth to a European Security and Defence Policy*, in *THE EUROPEAN UNION AND THE INTERNATIONAL LEGAL ORDER: DISCORD OR HARMONY?* 405 (Vincent Kronenberger ed., 2001), at 423.

³ Article 43 of the Treaty of Lisbon has further extended the Petersberg Tasks so as to include joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilization, see Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on December 13, 2007, entered into force December 1, 2009, Dec. 17, 2007, O.J. (C 306) 1. In the present Research Paper, the numbering of Treaty on European Union articles as amended by the Treaty of Lisbon refers to the consolidated version of the TEU published by the Council of the EU, see Consolidated Version of the Treaty on European Union, 2008 O.J. (C 115) 13 [hereinafter TEU Lisbon].

⁴ Although the present Paper retains the denomination 'Common Security and Defence Policy' as used in the Treaty of Lisbon, sporadic references will also be made to the former denomination ('European Security and Defence Policy') and its abbreviation (ESDP) when dealing with the pre-Lisbon legal and operational framework.

⁵ See, in particular, G.R. den Dekker, *The Regulatory Context of Private Military and Security Services at the European Union Level*, National Report Series 4/09, Priv-War Project, 2009, at 2-3, 18-21, available at www.priv-war.eu; A. Bailes & C. Holmqvist, *The Increasing Role of Private Military and Security Company*, EP Study, 2007, at 22 *et seq.*; C. Holmqvist, *Private Security Companies: The Case for Regulation*, SIPRI Policy Paper No. 9, 2005, at 57.

⁶ See, *inter alia*, J. Hagmann & Moncef Kartas, *International Organisations and the Governance of Private Security*, in *PRIVATE ACTORS AND SECURITY GOVERNANCE* 292-293 (Alan Bryden & Marina Caparini eds., 2006); E. Krahnmann, *Regulating Military and Security Services in the European Union*, *id.*, at 189-212.

A comprehensive approach - taking into account and preliminarily assessing the sources of HRL and IHL obligations under EU law, as well as the specific legal and operational framework in which private contractors are due to provide their services – is key to developing satisfactory regulatory options at EU level.

The present paper thus aims to verify whether and to what extent HRL and IHL rules and principles have been incorporated into the EU's legal order, with a particular focus on the CSDP. In view of this, it will survey existing and potential sources of obligations under HRL and IHL for the EU personnel engaged in civilian missions and military operations within the context of the CSDP. Finally, by way of conclusion, it will endeavour to assess which of these sources may be binding on PMSCs contracted in the framework of the CSDP, and to identify viable approaches in order to better ensure compliance by the latter with HRL and IHL.

2. The EU's Obligations under International HRL⁷

As is well known, as an international organization, the EU is bound by international law—including international HRL—either by way of general international law or by way of treaty law.

As far as the former is concerned, it is commonly accepted that international organizations (including the EU) are subject to the rules of general international law.⁸

With specific reference to the EU's legal framework, the European Court of Justice (ECJ) has reaffirmed on several occasions the applicability of customary international law to the European Community (EC),⁹ recognizing its binding force as a source of EU law.¹⁰ In the *Racke* case, for instance, the Court found that “[t]he European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law ...”¹¹.

The recent ECJ judgment on the *Intertanko* case has further confirmed the Court's well-established jurisprudence on the matter, by stating that “the powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they

⁷ The analysis provided in this section should be regarded as complementary to the reports by F. Francioni and F. Lenzerini, *The Role of Human Rights in the Regulation of Private Military and Security Companies, General Report – Universal and Regional Systems: Latin-America, Africa and Asia*, EUI Working Paper AEL 2009-16 ; and I. Kalnina and U. Zeltins, *The Role of Human Rights in the Regulation of Private Military and Security Companies, General Report – The European System*, EUI Working Paper AEL 2009/17.

⁸ See Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, at 89-90, para. 37 (Dec. 20) (“[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law ...”). See also, *inter alia*, IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 690 (15th ed. 1998); Eric David, *Le droit international applicable aux organisations internationales*, in 1 MÉLANGES EN HOMMAGE À MICHEL WAELBROECK 3, 22 (1999).

⁹ See, *inter alia*, Joined Cases 21-24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219; Case C-286/90 *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, 1992 E.C.R. I-6019; Case T-115/94, *Opel Austria v. Council*, 1997 E.C.R. II-39; Case C-162/96, *Racke v. Hauptzollamt Mainz*, 1998 E.C.R. I-3655 [hereinafter *Racke* case].

¹⁰ Allan Rosas, *The European Court of Justice and Public International Law*, in THE EUROPEANISATION OF INTERNATIONAL LAW 71, 79-80 (Jan Wouters, André Nollkaemper & Erika de Wet, eds. 2008). See also Pieter Jan Kuijper, *Customary International Law, Decisions of International Organizations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law*, in EUROPEANISATION OF INTERNATIONAL LAW, *id.*, at 87, 87-106; Jan Wouters & Dries Van Eeckhoutte, *Giving Effect to Customary International Law Through European Community Law* 3, 3-49 (K.U. Leuven, Faculty of Law, Institute for International Law, Working Paper No. 25, 2002).

¹¹ *Racke* case, para. 45.

codify customary rules of general international law.”¹² As the customary¹³ (and even *jus cogens*)¹⁴ status of a number of core human rights is uncontroversial, the relevant HRL treaty provisions would appear to fall within the scope of the Court’s *dictum*.

While it has been contended that the ECJ case law “appears to be based on the idea that customary international law ... is directly applicable in the EU legal order”¹⁵ (and *thus also binding on the EU when acting under the framework of the ESDP/CSDP*), one could also argue that the ECJ rulings mentioned above only concerned the relationship between customary international law and the *Community* - which, at the time the judgment was delivered, was still a separate entity from the *Union*, and was based on different treaty foundations.¹⁶ However, the recent merger of the EU and the EC, as provided for in the Treaty of Lisbon, appears to have eliminated the main conceptual obstacle to application of the Court’s ruling to the EU.

Besides general international law, the EU is, in principle, also bound by international HRL treaties to which it is a party.

On 30th March 2007 the EC signed its first human rights treaty (the United Nations Convention on the Rights of Persons with Disabilities).¹⁷ As far as the EU is concerned, it should be recalled that while Article 37 TEU Lisbon (formerly Article 24 of the Treaty of Nice)¹⁸ endows the Union with the necessary competence to conclude international agreements, accession to international treaties (including HRL-related ones) by the EU also depends on the rules and mechanisms provided for in the treaties themselves.¹⁹ The European Convention on Human Rights is a prime example in this respect: Article 6(2) of the Treaty of Lisbon envisages the EU’s accession to the European Convention on Human Rights (ECHR)²⁰ – at the same time, Article 17(1) of Protocol 14 to the ECHR²¹ provides that “The European Union may accede to this Convention”. *This may possibly lead to direct responsibility of the EU under the ECHR system for violations of the Convention by PMSCs personnel when employed by the EU.*²²

¹² Case C-308/06, *The Queen v. Sec’y of State for Transp.*, 2008 E.C.R. , para. 51 [hereinafter *Intertanko* case] (emphasis added).

¹³ Based on the jurisprudence of the International Court of Justice, Ahmed & de Jesús Butler mention, among such “core rights”, the right to self-determination; the prohibition of genocide; freedom from racial discrimination including apartheid, and the prohibition of slavery; freedom from arbitrary detention and the right to physical integrity; protection against denial of justice, Tawhida Ahmed & Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J INT’L L. 771, 779 (2006).

¹⁴ E.g. the right to life; the prohibition on torture; the right to equality before the law and non-discrimination; the prohibition of slavery, *id.*, at 779-80.

¹⁵ See Rosas, *The European Court of Justice and Public International Law*, *op.cit.*, at 80. See also P. CRAIG & G. DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* 191 (4th ed. 2008) (arguing that “a clear separation of the Union legal system from the Community legal system is not possible”).

¹⁶ Treaty establishing the European Community (consolidated version), 2002 O.J. (C 321) 37 [hereinafter *TEC*].

¹⁷ United Nations Convention on the Rights of Persons with Disabilities, U.N. Doc.A/61/611, adopted on 13 December 2006, New York, entered into force 3 May, 46 I.L.M. 443 (2007).

¹⁸ Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Mar. 10, 2001, O.J. (C 80) 1, *entered into force* February 1, 2003.

¹⁹ Nicholas Tsagourias, *EU Peacekeeping Operations: Legal and Theoretical Issues*, in *EUROPEAN SECURITY LAW* 117, 118 (M. Trybus & N. D.White eds., 2007).

²⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 220 [hereinafter *ECHR*].

²¹ Protocol No. 14 to the European Convention on Human Rights and Fundamental Freedoms, amending the Control System of the Convention, art. 17, (May 13, 2004), 194 E.T.S 247 (providing that the European Union may accede to the Convention) (not yet in force).

²² Cf. Hagmann & Kartas, *op.cit.*, at 293.

3. The Role of Human Rights in the EU's Internal Legal Order: An Overview.²³

As is well known, beyond the reference to freedom of movement and gender equality with respect to equal pay for male and female workers, protection of human rights was not explicitly mentioned in the Treaties establishing the three European Communities in the 1950s. As Defeys has noted, this “stunning omission” can be mainly attributed to the prevailing economic rationale of the new institutions: indeed, the European Communities were regarded by its founders as purely economic organizations with limited competence, and whose primary objective was the attainment of economic integration through the pooling of resources and the establishment of a common market.²⁴

It was mainly through the decisions of the ECJ that human rights protection was introduced in the Community legal order.²⁵ Such a protection was subsequently endorsed by the European Parliament, the Council and the Commission in 1977,²⁶ then mentioned in the preamble of the Single European Act of 1987²⁷ and finally included in the Treaty of Maastricht in 1992.

As Rosas points out, acknowledging that “[t]he European Union is founded on the principles of liberty, democracy, *respect for fundamental rights* and fundamental freedoms” (former Article 6(1) TEU) implies a remarkable extension of the scope of EU human rights/fundamental rights²⁸, as it covers in principle *all* situations relevant for the aforementioned principles.²⁹ Article 6(1) thus seems to go beyond the domain of Community law, and, consequently, to be potentially applicable also to the ESDP.

Former Article 6(2) TEU (as introduced by the Treaty of Maastricht) provided that “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed 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”.

The provision codified for the first time, and conferred the status of primary law to, a well-established concept gradually developed by the ECJ since its *Internationale Handelsgesellschaft*³⁰ judgment of

²³ For a more comprehensive analysis of the issues touched upon in this section, see Francesco Francioni & Federico Lenzerini, *The Role of Human Rights in the Regulation of Private Military and Security Companies – General Report*, Priv-War Project WP 4, paras. 177 *et seq.*

²⁴ Elizabeth F. Defeys, *Human Rights and the European Court of Justice: An Appraisal*, 31 *FORDHAM INT'L L. J.* 1104, 1106-1107 (2008).

²⁵ See Case 29/69, *Erich Stauder v City of Ulm – Sozialamt*, Judgment of 12 November 1969, para. 7.

²⁶ Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1977, 1977 O.J. (C103) 1-2 (“... Whereas, as the Court of Justice has recognized, that law comprises, over and above the rules embodied in the treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based; Whereas, in particular, all the Member States are Contracting Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950; 1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms. 2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights”).

²⁷ Single European Act, 1987 O.J. (L 169) 1, Preamble (“... determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice ...”).

²⁸ On the connotation of the two terms in the EU legal order, and in particular in the case law of the European Court of Justice, see, *inter alia*, E. Defeys, *op.cit.*, at 1111.

²⁹ A. Rosas, *The sources of fundamental rights of the European Union: a structural overview* 719, 728 in *HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØM EIDE* (Morten Bergsmo ed., 2003).

³⁰ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125 [hereinafter *Internationale Handelsgesellschaft*], para. 4.

1970, namely the “general principles of Community law”,³¹ of which “fundamental rights form an integral part”.³²

In the *Internationale Handelsgesellschaft* case, the Court identified a first source of inspiration for the recognition of fundamental rights as “general principles”, i.e. the “constitutional traditions common to the Member States.”³³ Four years later, in the *Nold* case, the Court identified a second source of inspiration in “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.”³⁴ As Jacobs and Tizzano note, among such treaties (which “can supply guidelines which should be followed within the framework of Community law”)³⁵ the ECHR soon acquired “special significance”,³⁶ and the ECJ began to rely more and more frequently not only to the Convention, but also to the ECtHR jurisprudence.³⁷ In 1992, both the concept of ‘general principles of Community law’ and its guiding sources were eventually enshrined in primary EU law, becoming “the cornerstone of a whole corpus of rules on fundamental rights” ever since.³⁸

In its judgment on the *Pupino* case, the ECJ argued that ‘in accordance with Art. 6(2) EU, the *Union* must respect fundamental rights ... as general principles of law’,³⁹ thus appearing to suggest that, although former Article 6(2) only refers to “fundamental rights as general principles of *Community* law”, such rights are equally binding on the *Union*.⁴⁰ Therefore, although the judgment concerned a Third Pillar case, some commentators have inferred from it an EU’s obligation to respect these rights also in its non-EC activities, *including the Common Foreign and Security Policy (CFSP) and the ESDP/CSDP*.⁴¹ This interpretation appears to be confirmed by subsequent practice in the Treaty of Lisbon, whose Article 6(3) currently provides that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the *Union*’s law”.⁴²

³¹ For a comprehensive analysis of the concept *see, inter alia*, T. TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* (2nd ed. 2006).

³² *See* Case 29-69 *Stauder v City of Ulm*, 1969 E.C.R. 419 (the first case in which the ECJ recognized that fundamental rights form part of the Community legal order, without further elaboration, though).

³³ *Internationale Handelsgesellschaft, id.*

³⁴ *Id.*

³⁵ *Nold, op.cit.*, para. 13.

³⁶ Case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes*, and Commission of the European Communities, 2002 E.C.R..9011, para. 23.

³⁷ Francis Jacobs, *Between Luxembourg and Strasbourg: Dialogue between the European Court of Human Rights and the European Court of Justice*, in *DIE HERAUSFORDERUNG VON GRENZEN: FESTSCHRIFT FÜR ROLAND BIEBER* 205, 206 (Astrid Epiney, Marcel Haag & Andrea Heinemann eds. 2007); Antonio Tizzano, *The Role of the ECJ in the Protection of Fundamental Rights*, in *CONTINUITY AND CHANGE IN EU LAW: ESSAYS IN HONOUR OF SIR FRANCIS JACOBS* 125, 128 (Anthony Arnall, Piet Eeckhout & Takis Tridimas eds., 2008).

³⁸ *See* Tizzano, *op. cit.*, at 31.

³⁹ Case C-105/03 *Criminal Proceedings against Maria Pupino*, 2005 E.C.R. I-5285, para. 58 (emphasis added).

⁴⁰ In this sense, *see* Frederik Naert, *Accountability for Violations of HRL by EU Forces*, in *THE EUROPEAN UNION AND CRISIS MANAGEMENT - POLICY AND LEGAL ASPECTS* 375, 388 (Steven Blockmans ed., 2008) (emphasis added). *See also* Johan Callewaert, ‘*Unionisation*’ and ‘*Conventionisation*’ of *Fundamental Rights in Europe: The Interplay Between Union and Convention Law and Its Impact on the Domestic Legal Systems of the Member States*, in *THE EUROPEANISATION OF INTERNATIONAL LAW* 109, 111 (Jan Wouters, André Nollkaemper & Erika de Wet, eds. 2008) (“the general principles of Community law . . . form the legal basis upon which, according to Article 6(2) TEU, compliance with fundamental rights is to be ensured under Union law”).

⁴¹ *See* F. Naert, *Accountability for Violations of HRL by EU Forces, op.cit.*, at 388 (emphasis added).

⁴² Emphasis added.

De lege lata, the view above was further corroborated by former Article 11(1) TEU, which subsumed “respect for human rights and fundamental freedoms” among the objectives of the EU’s Common Foreign and Security Policy. Arloth and Seidensticker have argued that this provision should be interpreted as a twofold commitment: on the one hand, it states a policy objective the EU should aim at in all its external action; on the other hand, it binds the EU itself and its own acts to human rights. According to this view, all EU institutions and bodies should abide by HRL, and the same holds true for Member States, not only through their own human rights obligations but also in cases where they implement a Council mandate. *This commitment would also cover action undertaken within the ESDP/CSDP, as it is a part of the CFSP*⁴³, and would arguably apply to all subjects involved in the implementation of the ESDP, including private contractors, both when hired by the EU and when employed by individual Member States.⁴⁴

More recently, human rights within the framework of the EU were codified⁴⁵ in the Charter of Fundamental Rights of the European Union, which was solemnly promulgated by the European Parliament, the Council and the Commission in Nice on 7 December 2000.⁴⁶ However, as Naert has noted, the issue of the legal nature of the Charter was deliberately left open at the time of its adoption.⁴⁷ While it has long been doubtful whether the Charter could qualify as a legally binding act,⁴⁸ with the entry into force of the Treaty of Lisbon it has now been incorporated into primary EU law,⁴⁹ thus becoming binding on the Union and its Member States.⁵⁰

Finally, the Treaty of Lisbon has now granted human rights an undisputedly pivotal position within the EU’s legal order and external action. While the Preamble of the Treaty emphasizes the Member States’ attachment to the “respect for human rights”, Article 2 TEU Lisbon reaffirms that the Union is founded, *inter alia*, on “respect for human rights”, and includes for the first time the “respect for human dignity” (i.e. the very source of the philosophy of human rights)⁵¹ among the founding values of the EU. The latter is also listed – together with “the universality and indivisibility of human rights” *et alia* - among the principles guiding the Union’s action on the international scene: arguably, *this provision should cover the EU’s action within the framework of the CSDP*. The protection of human rights is also mentioned among the EU’s objectives in its relations with the wider world (Article 3(5) TEU Lisbon). Finally, the explicit provision for the EU’s accession to the ECHR (Article 6(2) TEU Lisbon) constitutes one of the most significant elements of novelty introduced by the Treaty, and

⁴³ Jana Arloth & Frauke Seidensticker, *The ESDP Crisis Management Operations of the European Union and Human Rights*, Berlin : Deutsches Institut für Menschenrechte, 2007, at 15.

⁴⁴ See, e.g., Council Joint Action 2005/190/CFSP of 7 March 2005 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX, 2005 O.J. (L 62) 37, Art.11(3) (emphasis added).

⁴⁵ See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 181 (2006) (“[t]he aim of the Charter has always been to highlight applicable rights rather than generate new obligations”).

⁴⁶ Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1. For an analysis of the Charter, see also Francesco Francioni & Federico Lenzerini, *op.cit.* paras. 162-164.

⁴⁷ Paragraph 2 of the Presidency Conclusions of the European Council of 7-9 December 2000 states that “the question of the Charter’s force will be considered later”.

⁴⁸ See ANNA LUCIA VALVO, L’UNIONE EUROPEA DAL TRATTATO “COSTITUZIONALE” AL TRATTATO DI LISBONA (2008), at 314 (“[...] la Carta ... non ha ancora acquisito uno *status* giuridicamente vincolante: non fa parte dei trattati e né possiede alcun valore giuridico formale”).

⁴⁹ Under Article 6(1) TEU Lisbon.

⁵⁰ See F. Naert, *Accountability for Violations of HRL by EU Forces*, *op. cit.*, at 389.

⁵¹ Emmanuel Decaux, *Les droits de l’homme dans la Constitution européenne* 17, 28 in *COMENTARIOS A LA CONSTITUCIÓN EUROPEA* (Enrique Álvarez Conde & Vicente Garrido Mayol eds., 2004)

potentially paves the way for a further judicial forum for the adjudication of human rights violations committed by the EU.⁵²

How has this extensive, increasing EU's commitment to respect human rights been translated at the level of the CSDP legal and operational framework?

Traditionally, the main focus of the EU human rights policy has been the promotion of human rights in third countries,⁵³ rather than on the EU's own compliance with international human rights standards. Even the seven EU human rights-related Guidelines⁵⁴ adopted by the Council since 1998 are generally concerned with respect for human rights in non-EU Member States, placing on EU bodies and agents mere reporting obligations, at most.⁵⁵

Some commentators have put forward the assumption that "an organization such as the Community must be bound by the same human rights obligations to which it appeals ... in its external relations."⁵⁶ In particular, they have inferred from the EU's well-established practice of including human rights clauses into its agreements with third countries⁵⁷ that its activities "are based on the presumption that the Universal Declaration [on Human Rights] expresses general principles which have become binding on all subjects of international law, including the Community itself".⁵⁸ Indeed, as noted above, the ECJ has stated that the EC is bound by the general rules of international law in its treaty relations.⁵⁹

⁵² Nevertheless, the Court's reasoning in the *Behrami/Saramati* case that interpreting the Convention "in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions ... to the scrutiny of the Court ... would be to interfere with the fulfilment of the UN's key mission in this field" seems to leave little room for the possibility that the ECHR may (at least in the foreseeable future) serve as a potential judicial forum for human rights and IHL violations possibly committed by multinational troops, including those led by the EU, see Agim Behrami and Bekir Behrami v. France, App. No. 71412/01, and Ruzhdi Saramati v. France, Germany and Norway, App. No. 78166/01, Grand Chamber decision of May 2, 2007, para. 149. On this aspect of the Court's decision, see Stephanie Farrior, *Introductory Note to Behrami and Behrami v. France and Saramati v. France, Germany and Norway, European Court of Human Rights, Grand Chamber*, 46 I.L.M. 743, 744 (2007).

⁵³ See, *inter alia*, Council Conclusions on Human Rights and Democratisation in Third Countries, Brussels, 12 December 2005, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/st14960.en05.pdf>; EU Guidelines on Human Rights Dialogues with Third Countries (2009 update), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf>; Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter EU Guidelines on Torture], available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/8590.en08.pdf>.

⁵⁴ See EU Guidelines on Death Penalty (2008 update), available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf>; EU Guidelines on Torture; EU Guidelines on Human Rights Dialogues with Third Countries; EU Guidelines on Children and Armed Conflict, (2008 update), Council Doc. No. 10019/08 (June 5, 2008); European Union Guidelines on Human Rights Defenders, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/16332-re01.en08.pdf>; EU Guidelines for the Promotion and Protection of the Rights of the Child, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/16031.07.pdf>; EU Guidelines on Violence against Women and Girls and Combating all Forms of Discrimination against them, Council Doc.16173/08 (Nov.24, 2008), available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/16173cor.en08.pdf>.

⁵⁵ See, *e.g.*, European Union Guidelines on Human Rights Defenders, paras. 8-10; EU Guidelines on Torture, at 4 ("In their periodic reports, the EU Heads of Mission will include an analysis of the occurrence of torture and ill-treatment and the measures taken to combat it. The Heads of Mission will also provide periodic evaluation of the effect and impact of the EU actions"); EU Guidelines for the Promotion and Protection of the Rights of the Child, at 23 ("In countries covered by country-strategies on violence against children, EU Heads of mission should include this subject in their regular human rights reporting and should also report ad hoc on relevant developments, as appropriate").

⁵⁶ ANDREW CLAPHAM, *op.cit.*, at 178.

⁵⁷ See, *e.g.*, Agreement amending the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Members States, of the other part, signed in Cotonou on 23 June 2000, 2005 (L 209) 27, Art. 9.

⁵⁸ Barbara Brandtner & Allan Rosas, *Human Rights and the External Relations of the European Community. An analysis of doctrine and practice*, 9 EJIL 469, 489 (1998).

⁵⁹ See *supra*, Section 2.

Therefore, according to Clapham, the human rights obligations entered into by the Community by virtue of bilateral/multilateral treaties build on the presumption that the Community is already bound to respect these rights under customary international law.⁶⁰ While this line of reasoning is tailored on the EC, the same author argues that “there is no reason to believe that the EU is not similarly bound by the same international human rights obligations”⁶¹ – which is even more true now that the Treaty of Lisbon has removed the separation between the EU and the EC.

In any event, in recent years the EU seems to have become increasingly aware of the importance to ensure compliance with human rights standards in *its own* conduct. Such awareness has resulted in major efforts to integrate human rights into the legal framework for the EU’s crisis-management operations conducted within the institutional and operational context of the ESDP.⁶²

Already in June 2001, in its conclusions on the EU’s role in promoting human rights and democratisation in third countries, the Council reaffirmed the EU’s commitment to “‘mainstreaming’ human rights and democratisation in EU policies and actions”⁶³, further adding that “the process of “mainstreaming” human rights ... objectives into *all* aspects of EU external and internal policies should be intensified”.⁶⁴ As Pajuste notes,⁶⁵ it is in the 2002 Annual Human Rights Report that “mainstreaming” was defined for the first time in the EU system as “the process of integrating human rights (respect for universal and indivisible human rights, fundamental freedoms and the rule of law) into all aspects of policy decision-making and implementation.”⁶⁶

The Council also stressed the need to “enhance consistency and coherence of the human rights dimension in CFSP political dialogues and other actions, including in the field of conflict prevention and crisis management”.⁶⁷

Since then, the Council has increasingly and constantly reaffirmed in its conclusions the importance of the systematic consideration of human rights, gender and children affected by armed conflict in the planning and conduct of ESDP missions and operations, including their mandates and staffing, and in the subsequent lessons learned process”.⁶⁸

Nowadays, human rights standards, including those related to children in armed conflict and gender issues,⁶⁹ are taken into account and systematically included in the planning, conduct and evaluation of all ESDP operations and missions.⁷⁰

⁶⁰ CLAPHAM, *op.cit.*, at 179.

⁶¹ *Id.*

⁶² See M. Koskeniemi, *Foreword*, in TINA PAJUSTE, MAINSTREAMING HUMAN RIGHTS IN THE CONTEXT OF THE EUROPEAN SECURITY AND DEFENCE POLICY, The Erik Castreén Institute Research Reports 23/2008, at i (“[T]he Union has embarked upon a declared policy of integrating human rights in its various activities, including its security and defence operations”).

⁶³ Council Conclusions on the European Union’s Role in Promoting Human Rights and Democratisation in Third Countries, 25 June 2001, para. 3. The same commitment was reiterated in the Annual Report on Human Rights 2001, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/HR2001EN.pdf>, at 10.

⁶⁴ *Id.* para. 12 (emphasis added).

⁶⁵ See T. PAJUSTE, *op. cit.*, at 34.

⁶⁶ Council of the European Union, Annual Report on Human Rights 2002, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/HR2002EN.pdf>, at 19.

⁶⁷ *Id.* para. 6 (emphasis added).

⁶⁸ Council Conclusions on ESDP, Doc. 10087/09, Brussels, 18 May 2009, paras. 28-29; Council Presidency Report on ESDP, Doc. 10748/09, Brussels, 15 June 2009, para. 88.

⁶⁹ The present Paper will only briefly touch upon ESDP/CSDP instruments on gender issues and children in armed conflict, as these topics will be specifically dealt with in other Reports envisaged in Work Package 4.

⁷⁰ Council of the European Union, EU Annual Report on Human Rights 2008, 14146/2/08, Brussels, 27 November 2008, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/st14146-re02.en08.pdf>, at 5, 11. Cf. Hadewych Hazelzet,

Reportedly, clear human rights obligations for the EU-led troops are laid down in the concepts of operations (CONOPS), operation plans (OPLANs) and rules of engagement (ROEs).⁷¹ A major obstacle to a comprehensive analysis of these instructions lies in the fact that they are not in the public domain. However, declassified excerpts of some mission-specific planning documents⁷² seem to confirm, *prima facie*, that the EU's operational planning and rules of engagement take into account internationally recognized standards of human rights law⁷³, thus complying with the Council's requirement in this respect.⁷⁴

Specific obligations for the EU troops to abide by HRL may legitimately be expected to be found in the instruments—usually joint actions⁷⁵ and decisions⁷⁶—adopted by the Council of the EU in order to lay down the legal status of ESDP military operations. The analysis of these joint actions would, *prima facie*, appear particularly significant in this respect, since, according to Article 14(3) TEU, “[j]oint actions shall commit the Member States in the positions they adopt and in the conduct of their activity”: this would seem to indicate that they are in fact binding on Member States.⁷⁷

However, no reference to possible human rights obligations of the EU-led troops has thus far been included in the instruments providing the legal basis for the ESDP operations and missions.⁷⁸

The same applies to the Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs) concluded by the EU. This gap is rather unfortunate, as these instruments determine the terms and conditions of the presence of the EU forces in the host/transit states, defining their status, activities, privileges and immunities.⁷⁹ A possible, partial exception may be found in a standard clause

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Human Rights Aspects of EU Crisis Management Operations: From Nuisance to Necessity, 13 INT'L PEACEKEEPING 564, 570 (2006) (“[r]eferences to human rights are by now included in most of the key documents”).

⁷¹ See Frederik Naert, *An EU Perspective*, in INTERNATIONAL PEACE OPERATIONS AND INTERNATIONAL HUMANITARIAN LAW 61 (International Institute of Humanitarian Law, 2008), at 62.

⁷² See Doc No.11359/07 Restreint UE of 29 June 2007 on Mainstreaming Human Rights and Gender into European Security and Defence Policy - Compilation of Relevant Documents (June 29, 2007), 11359/07 EXT 1 (Oct.9, 2007). See also *infra*, Section X.

⁷³ See Frederik Naert, *An EU Perspective, op.cit.*, at 62 (“In practice ... our operational planning and rules of engagement take into account internationally recognised standards of human rights law”).

⁷⁴ Council of the European Union, “Mainstreaming of Human Rights into ESDP”, Doc. 11936/4/06 REV. 4, at 3 (“human rights elements should be incorporated into the full range of planning documents for ESDP missions, including the Concept of Operations (CONOPS), the Operation Plan (OPLAN) and rules of engagement. These documents should incorporate elements related to both respect for human rights *by ESDP missions* and the way in which the mission should promote respect for human rights in the mission area”) (emphasis added).

⁷⁵ See *infra* note 76.

⁷⁶ Council ‘decisions’ are mentioned in Article 13 (3) and 23(2) TEU. However, the Treaty provides no definition of such instrument. Denza takes the view that they are “subordinate instruments ... [whose] purpose is usually to implement details of common positions or of joint actions ... [and which] are also used to amend, extend, or repeal other CFSP instruments”, see EILEEN DENZA, *THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION* 149-50 (2002). As for their normative scope, Eeckhout concludes that “in so far as Council decisions relate to joint actions and common positions ... one should think the legal effects are identical” to those of such instruments, see PIET EECKHOUT, *EXTERNAL RELATIONS OF THE EU* 407-08 (2004). See also Alan Dashwood, *The Law and Practice of CFSP Joint Actions*, in *EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS* 53, 58-60 (Marise Cremona & Bruno De Witte eds., 2008).

⁷⁷ See EECKHOUT, *op.cit.*, at 400. However, the same author also points out that “it is not clear ... whether joint actions can have some type of legislative scope, or whether they can have a normative function”, *id.* Similarly, Dashwood denies joint actions having a normative character, although acknowledging that “they have been used ... for certain legislative purposes,” Dashwood, *op.cit.*, at 54.

⁷⁸ A partial exception to this can be found in Art. 12(2) of the joint action approving EU Navfor Somalia, providing that no one “may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights ...”, see Council Joint Action 2008/851/CFSP of 10 November 2008, 2008 O.J. (L 301) 33.

⁷⁹ See, *inter alia*, Aurel Sari, *Status of Forces and Status of Mission Agreements under the ESDP: the EU's Evolving Practice*,

included in several agreements between the EU and host states, which stipulates that EU personnel “shall respect the laws and regulations of the Host State and shall refrain from any action or activity incompatible with the objectives of the operation”.⁸⁰ Similarly, the EU SOFA (concluded by the EU Member States in order to clarify the status of military and civilian personnel seconded to the EU) refers to “the duty to abstain from any activity inconsistent with the spirit of this Agreement.”⁸¹ While activities constituting a violation of HRL would arguably fall within the scope of the said clauses, such references still appear far too abstract to guide the EU forces on questions of practical application.

Furthermore, it should be noted that EU SOFAs and SOMAs do not apply to ‘commercial contractors or personnel employed locally’.⁸² Therefore, HRL obligations possibly laid down therein would, in principle, not be binding upon PMSCs’ employees.

Finally, when it comes to the in-mission implementation of HRL standards, mention should be made of the inclusion of human rights focal points, gender advisors and experts on children affected by armed conflict⁸³ in most of the recent ESDP operations and missions.

For instance, in the EUFOR Tchad/RCA operation focal points for human rights issues were appointed for each national contingent. Drawing on the information provided by the national focal points, monthly human rights reports were drafted by the EUFOR Tchad/RCA Legal Advisor at the Operations Headquarters.⁸⁴ Furthermore, the Gender Adviser appointed to the Operations Headquarters conducted, *inter alia*, gender training and proposed a comprehensive structure for monitoring and reporting.⁸⁵ Undoubtedly, “the integration of human rights, gender and the protection of children in armed conflicts in the conduct of the operation ... has been an important aspect of its work”.⁸⁶

Reportedly, EULEX Kosovo has a Human Rights and Gender Unit, which not only ensures compliance of EULEX Kosovo policies and decisions with human rights and gender standards, but also constitutes an entry point for all third parties’ complaints related to alleged breaches of the code

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19 EUR. J. INT’L L. 67 (2008) (providing an exhaustive analysis of the EU’s Status of Forces Agreements).

⁸⁰ See, e.g., Agreement between the European Union and the Republic of Chad on the status of the European Union-led forces in the Republic of Chad (Mar. 6, 2008), 2008 O.J. (L 83) 40; Agreement between the European Union and the Central African Republic on the status of the European Union-led forces in the Central African Republic (Apr. 16, 2008), 2008 O.J. (L 136) 46, Article 2 (1).

⁸¹ Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (Nov. 17, 2003) [hereinafter EU SOFA], 2003 O.J. (C 321) 6, Article 3.

⁸² See e.g. See e.g. EUFOR Tchad/RCA SOFA, *op.cit.*, Art. 1(3)(f); Agreement between the European Union and Georgia on the status of the European Union Monitoring Mission in Georgia, 2008 O.J. (L 310) 31, Art. 1(3)(c) [hereinafter EUMM Georgia SOMA]. It is worth noting that the EU’s practice with regard to the definition of the subjective scope of application of SOMAs and SOFAs has evolved over the years. For instance, the Concordia SOFA of 2003 provided that it would not apply to ‘personnel *locally hired, including contractors*’ (Article 1(3)(h)) (emphasis added), thus potentially leaving some room for its application to *international* contractors. The formulation of the clause has been amended in more recent SOMAs and SOFAs, which have expressly excluded from their scope of application ‘commercial contractors or personnel employed locally’ (EUMM Georgia SOMA, Art. 1(3)(c)), or, even more specifically, ‘personnel employed locally *and* personnel employed by international commercial contractors (EUFOR Tchad/RCA SOFA Art. 1(3)(f); Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta, 2009 O.J. (L 10) 29, Jan. 15, 2009, Article 1(3)(g)) (emphasis added).

⁸³ EU Annual Report on Human Rights 2008, at 11.

⁸⁴ Interview with the EUFOR Tchad/RCA Legal Advisor, EUFOR Tchad/RCA Operations Headquarters, Mont Valérien, October 2008.

⁸⁵ EU Annual Report on Human Rights 2008, at 11.

⁸⁶ Council of the EU, ESDP Presidency Report on ESDP, Doc. 10748/09, Brussels, 15 June 2009, ¶ 89.

of conduct.⁸⁷ EUSEC RD Congo and EUPOL RD Congo share a gender advisor, as well as a Human Rights/Children and Armed Conflicts expert, and the Gender Adviser in EUPOL Afghanistan provides advice to the Afghan authorities on gender policy in the Afghan National Police.⁸⁸

However, none of the aforementioned advisory and reporting procedures seems to involve at any level PMSCs personnel.

4. The EU and IHL: An Overview

When exploring the sources of IHL obligations of multinational forces, legal scholars have thus far mainly focused on the United Nations⁸⁹ (and, to a lesser extent, NATO)⁹⁰, whilst other organizations have remained largely in the shadows. While, for instance, the UN Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law⁹¹ has been widely debated and extensively investigated,⁹² comparatively little attention appears to have been paid to self-regulatory solutions adopted by other international and regional organizations, including the EU.⁹³

This choice (while partially understandable in light of the fact that the UN has long dominated the scene in respect of crisis management, and is likely to continue to play a crucial role in the future) appears to rest on two erroneous assumptions.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Literature on the issue is overwhelming. A valuable bibliographic overview is provided in Gabriele Porretto & Sylvain Vité, *The Application of International Humanitarian Law and Human Rights Law to International Organizations* (CUDIH Research Paper Series, No. 1, 2006).

⁹⁰ See *inter alia*, MARTEN ZWANENBURG, ACCOUNTABILITY OF PEACE-SUPPORT OPERATIONS, 157-58 (2005); ROBERT KOLB, GABRIELE PORRETTO, SYLVAIN VITE, L'APPLICATION DU DROIT INTERNATIONAL HUMANITAIRE ET DES DROITS DE L'HOMME AUX ORGANISATIONS INTERNATIONALES (2005); Luigi Condorelli, *Pertinence du Droit international humanitaire pour les organisations internationales et les alliances*, 25 COLLEGIUM 25, 25-36 (2002); Philippe Weckel, *Les droit des conflits armés et les organisations internationales*, in LES ORGANISATIONS INTERNATIONALES ET LES CONFLITS ARMES 95, 109 (MADJID BENCHIKH ed., 2001); Porretto & Vité, *op.cit.*, at 29-31.

⁹¹ The Secretary General, *Secretary General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999).

⁹² See, *inter alia*, Paolo Benvenuti, *Le respect du droit international humanitaire par les forces des Nations Unies: la circulaire du Secrétaire Général*, 105 RGDIP 355, 372 (2001); Luigi Condorelli, *Le azioni dell'ONU e l'applicazione del diritto internazionale umanitario: il bollettino del Segretario Generale del 6 agosto 1999*, RDI, 1049, 1049-1053 (1999); L. Condorelli, *Les progrès du droit international humanitaire et la circulaire du Secrétaire Général des Nations Unies du 6 Août 1999*, in THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY—LIBER AMICORUM GEORGES ABISAAAB 495-505 (Laurence Boisson de Chazournes & V. Gowlland-Debbas eds., 2001); Y. Cacho Sanchez, *Boletín del Secretario General relativo a la observancia del Derecho internacional humanitario por las fuerzas de las Naciones Unidas*, 52 REV. ESP. DER. INT'L. 229, 234 (2000); Anne Ryniker, *Respect du droit international humanitaire par les forces des Nations Unies*, 81 INT'L REV. RED CROSS 795,795-805 (1999); Daphna Shraga, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damages*, 94 AM. J. INT'L L. 406 (2000); Michael Bothe & Thomas Dörschel, *The UN Peacekeeping Experience*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 487 (DIETER FLECK ed., 2001).

⁹³ For notable exceptions see Richard Desgagné, *European Union practice in the field of international humanitarian law: an overview*, in THE EUROPEAN UNION AND THE INTERNATIONAL LEGAL ORDER: DISCORD OR HARMONY? 455 (Vincent Kronenberger ed., 2001); Frederik Naert, *An EU Perspective*, *op.cit.*, at 61; Natalino Ronzitti, *L'applicabilità del diritto internazionale umanitario*, in LE FORZE DI PACE DELL'UNIONE EUROPEA 165 (N. Ronzitti ed. 2005); Marten Zwanenburg, *Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations*, in THE EUROPEAN UNION AND CRISIS MANAGEMENT— POLICY AND LEGAL ASPECTS 395 (Steven Blockmans ed., 2008); Tristán Ferraro, *Le droit international humanitaire dans la politique étrangère et de sécurité commune de l'Union européenne*, 84 INT'L REV. RED CROSS 435 (2002); Gert-Jan Van Hegelsom, *The Relevance of the Law of Armed Conflict for the Conduct of Petersberg Tasks*, 25 COLLEGIUM 109 (2002).

First, several scholars have argued that the solutions suggested with respect to the applicability of *ius in bello* to the UN would automatically apply to regional organizations like the EU, whose position *vis-à-vis* IHL would raise no fundamentally different concerns.⁹⁴ However, this line of reasoning sits uncomfortably with the peculiarities of the EU as an international organization.⁹⁵ Indeed, the widely acknowledged *sui generis* nature of the EU legal order should discourage drawing automatic parallels between the Union and other subjects of international law,⁹⁶ including with respect to issues of applicability of IHL.

Second, the choice to focus on UN and NATO has been justified by some IHL experts on the ground that “these two organizations have proven military structures, whereas the EU ... does not at present.”⁹⁷ This argument fails, nevertheless, to take into account the crucial developments that have occurred over the past ten years in the EU’s legal, political, and operational framework with respect to security and defence issues, as well as the consequent, increasingly prominent role played by the EU in the area of military crisis management.

In particular, as recalled above,⁹⁸ the integration of the ‘Petersberg Tasks’ in the EU’s constituent instrument provided, since 2001, an explicit and unequivocal legal basis for the direct engagement of EU-led troops in military operations. Von Kielmansegg correctly argues for an interpretation of the fifth type of mission mentioned in Article 43(1) TEU Lisbon (formerly Article 17(2) of the Treaty of Nice), i.e. “tasks of combat forces in crisis management, including peacemaking”, as “wide enough to cover large-scale military operations, including genuine warfare against a regular army.”⁹⁹ According to this view, such tasks would comprise the full range of (conventional) military force, including genuine warfare.¹⁰⁰

Furthermore, while it is generally accepted that the CSDP will by no means lay down the foundations of an EU army responsible for the defence of the Member States,¹⁰¹ it is undeniable that the EU is gradually adding military capabilities to its considerable economic power:¹⁰² indeed, “the development

⁹⁴ Porretto & Vité, *op.cit.*, at 19-20. See also Linos-Alexandre Sicilianos, *Preface*, R. KOLB, DROIT HUMANITAIRE ET OPÉRATIONS DE PAIX INTERNATIONALES, vii, viii (2nd ed. 2006) (“On voit mal, en effet, sur la base de quel l’[sic] argument le droit applicable serait différent en fonction de l’identité de l’organisation internationale - universelle ou régionale - dont le forces sont mandatées pour recourir aux armes sur le terrain”).

⁹⁵ As Rosas points out, these peculiarities include being endowed with a concept of citizenship and an own currency, possessing jurisdiction over a given territory and having an own defense policy, prone to lead to a common defense, see Allan Rosas, *The European Court of Justice and Public International Law*, in THE EUROPEANISATION OF INTERNATIONAL LAW, *op.cit.*, at 71.

⁹⁶ For an insightful, thought-provoking analysis of the challenges posed by the EU to the doctrine of subjects of international law, see Bruno De Witte, *The Emergence of a European System of Public International Law: The EU and its Member States as Strange Subjects*, in THE EUROPEANISATION OF INTERNATIONAL LAW, *op.cit.*, at 39-41. The author also highlights further special characteristics of the EU compared to “standard” international organizations, namely the conspicuous treaty-making activity and the *de facto* possession of international legal personality, *id.*

⁹⁷ ZWANENBURG, ACCOUNTABILITY OF PEACE-SUPPORT OPERATIONS, *op.cit.*, at 4.

⁹⁸ See Introduction.

⁹⁹ Sebastian G. von Kielmansegg, *The Meaning of Petersberg: Some Considerations on the Legal Scope of ESDP Operations*, *op.cit.*, at 642. See also Ricardo Gosalbo Bono, *Some Reflections on the CFSP Legal Order*, 43 COMMON MKT. L. REV. 337, 349, n.28 (2006) (arguing that “it follows from the terms ‘including peacekeeping’ in Art. 17(2) TEU, that all types of military and civilian crisis management actions fall within the scope of the TEU”).

¹⁰⁰ See Kielmansegg, *op.cit.*, at 648; Naert, *An EU Perspective*, *op.cit.*, at 61.

¹⁰¹ PANOS KOUTRAKOS, EU INTERNATIONAL RELATIONS LAW 459 (2006); Gert-Jan Van Hegelsom, *The Relevance of IHL in the Conduct of the Petersberg Tasks*, in *The Impact of International Humanitarian Law on current security trends. Proceedings of the Bruges Colloquium*, 26th-27th October 2001, 25 COLLEGIUM 109, 113 (2002). Article 42(1) TEU Lisbon explicitly points out that “[t]he performance of these tasks shall be undertaken using capabilities provided by the Member States”.

¹⁰² M. Trybus, *With or Without the EU Constitutional Treaty: towards a Common Security and Defence Policy?* 31 EUR L.

since 1999 of security and military staffs in Brussels ... has been remarkable”.¹⁰³ As the presence of armed military personnel represents the preliminary and most basic condition for the applicability of IHL,¹⁰⁴ the relevance of this body of law to the conduct of the CSDP.

The most prominent achievement of the ESDP/CSDP’s “strikingly dynamic development”¹⁰⁵ has been the deployment since 2003 of more than 10,000 military personnel, contributed by Member States but also partly by non-Member States, engaged in six EU-led military operations:¹⁰⁶ Concordia¹⁰⁷ (the EU’s first-ever military operation), in the Former Yugoslav Republic of Macedonia (FYROM); Artemis¹⁰⁸ and EUFOR RD Congo,¹⁰⁹ in the Democratic Republic of Congo; EUFOR Althea,¹¹⁰ in Bosnia-Herzegovina (still ongoing); EUFOR Tchad/RCA,¹¹¹ deployed in Eastern Chad and North Eastern Central African Republic until March 2009; and the recently launched EU NAVFOR Somalia naval operation.¹¹²

Three of these operations (i.e., Concordia, Althea, and EUFOR RD Congo) were conducted in post-conflict contexts¹¹³ and no involvement of the EU-led forces in situations triggering the application of IHL has been reported.¹¹⁴ Therefore, with respect to such operations, HRL can certainly be identified as the relevant legal regime primarily governing the conduct of the EU troops on the ground.

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REV. 146 (2006).

¹⁰³ William Wallace, *Is there a European Approach to War?*, in *THE PRICE OF PEACE: JUST WAR IN THE TWENTY-FIRST CENTURY* 37, 50 (Charles Reed & David Ryall eds., 2007).

¹⁰⁴ G.J. Van Hegelsom, *International humanitarian law and operations conducted by the European Union*, in *INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND PEACE OPERATIONS* 107 (G. Beruto ed., 2009), at 111.

¹⁰⁵ Bjorn Koopmans, *Developing the European Foreign Security and Defence Policy Without the Constitution?*, 59 *STUDIA DIPLOMATICA* 129, 129 (2006).

¹⁰⁶ Due to space constraints, an overall assessment of the factual background of each of the ESDP military operations cannot be provided here. For an up-to-date overview of the military missions conducted by the EU see the relevant documents and factsheets in the ESDP section of the Council of the EU website: <http://www.consilium.europa.eu/ESDP>. See also Frederik Naert, *ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations*, in *EUROPEAN SECURITY LAW* 61 (M. Trybus & N. D.White eds., 2007) at 61; D. Nickel & G. Quille, *In the Shadow of the Constitution: Common Foreign and Security Policy/European Security and Defence Policy Adapting to a Changing External Environment* (Jean Monnet Working Paper, Feb. 2007), at 13-19; Nicholas Tsagourias, *EU Peacekeeping Operations: Legal and Theoretical Issues*, *op.cit.*, at 107-10.

¹⁰⁷ See Council Joint Action No. 2003/92/CFSP of 27 January 2003 on the European Union Military operation in the Former Yugoslav Republic of Macedonia, 2003 O.J. (L 34) 26.

¹⁰⁸ See Council Joint Action No. 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo, 2003 O.J. (L 143) 50.

¹⁰⁹ See Council Joint Action 2006/319/CFSP of 27 April 2006 on the European Union military operation in support of the United Nations Mission in the Democratic Republic of Congo (MONUC) during the election process, 2006 O.J. (L 116) 98.

¹¹⁰ See Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia Herzegovina, 2004 O.J. (L 252) 10; Council Decision 2004/803/CFSP of 25 November 2004 on the launching of the European Union military operation in Bosnia and Herzegovina, 2004 O.J. (L 353) 21.

¹¹¹ See Council Decision 2008/101/CFSP of 28 January 2008 on the launching of the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA), 2008 O.J. (L 34) 39.

¹¹² See Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, 2008 O.J. (L 301) 33; Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), 2008 O.J. (L 330) 19.

¹¹³ This has led Wessel to qualify such missions as “second-hand” operations in the “low end” of security, see Ramses A. Wessel, *The State of Affairs in EU Security and Defence Policy: the Breakthrough in the Treaty of Nice*, 8 *J. CONFL. & SEC. L.* 265, 285 n.31 (2003).

¹¹⁴ See Naert, *ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations*, *op.cit.*, at 97 (“([a]lmost) all ESDP operations so far did not include active participation in hostilities”).

However, this may not be the case for at least two of these operations, namely Artemis and (in particular) EUFOR TCHAD/RCA, both deployed in volatile, hostile environments and authorized to take all necessary measures (including the use of armed force beyond self-defence) to fulfil their mandate. In light of the above, it appears all the more necessary to verify whether and to what extent the EU—in its recent capacity as a military actor—has integrated IHL into its legal order.

As is well known, a major legal obstacle in the actual applicability of *jus in bello* to the EU as such (i.e., as a military actor distinct from its troop-contributing Member States) lies in the fact that international and regional organizations are not—and cannot—be parties to the relevant treaty instruments of IHL, as (according to the prevailing interpretation) those instruments are only open for signature and ratification by States.¹¹⁵

Nevertheless, as recalled above, it is commonly accepted that international organizations are subject to the rules of general international law.¹¹⁶ In the aforementioned ECJ judgment on the *Intertanko* case, the Court stated that “the powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they *codify customary rules of general international law*.”¹¹⁷ Since the customary nature of a large part of the rules of IHL is now widely acknowledged,¹¹⁸ IHL treaties – like HRL ones - would appear to fall within the scope of the Court’s *dictum*.¹¹⁹

Rooting the obligations incumbent upon the EU under customary IHL within its own legal order would reinforce the initial claim that, as an international organization and a subject of international law, the EU is bound by customary law as a matter of international law.¹²⁰

As Zwanenburg points out, however, international organizations are not bound by the full range of rules of customary international law, but, pursuant to the principle of functionality, they must only adhere to those rules of customary international law that are relevant to their functions.¹²¹ In this respect, it is useful to quote an argument raised by Shrager with specific reference to IHL and its applicability to the UN peacekeeping operations. In particular, she argued that:

¹¹⁵ More precisely, pursuant to the standard accession clause included in the four Geneva Conventions (Articles 60, 59, 139, and 155 respectively), accession to the Conventions shall be open to “any Power.” However, the term “Power” has traditionally been interpreted as encompassing States only. See COMMENTAIRE A LA I CONVENTION DE GENEVE 459 (Jean S. Pictet ed., 1952-1959).

¹¹⁶ See *supra* note 8.

¹¹⁷ *Intertanko* case, para. 51.

¹¹⁸ For specific EU practice in this respect, see Statement by Ms. Anna Sotaniemi, Legal Adviser, Permanent Mission of Finland to the United Nations, on behalf of the European Union, UN 61st Session, VI Committee, Agenda Item 75: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, 18 October 2006, New York (“... the Geneva Conventions enjoy universal acceptance, and most of the provisions of the Conventions and their 1977 additional protocols are generally recognised as customary law”).

¹¹⁹ A similar, though not identical, conclusion could be reached by following Lenaerts and De Smijter’s line of reasoning. These authors go so far as to suggest that, although, in principle, the Community is not bound by the international agreements concluded by its Member States, this rule does not apply when the law enshrined in the international agreement is considered to be a codification of customary law. To the extent that the customary nature of the main IHL treaties has been widely recognized—and the EU Member States are all parties to these treaties—following Lenaerts and De Smijter’s approach may lead to the conclusion that the Community/Union is bound by IHL by virtue of the treaty obligations of its Member States, see Koen Lenaerts & Eddy De Smijter, *The European Union as an Actor under International Law*, 19 Y.B. EUR. L. 95122 (1999-2000).

¹²⁰ This is a settled principle with regard to the United Nations, see, *inter alia*, ZWANENBURG, ACCOUNTABILITY OF PEACE-SUPPORT OPERATIONS, *op.cit.*, at 151-56; Jaime Saura, *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, 58 HASTINGS L.J. 479, 500, 511 (2006-2007).

¹²¹ Zwanenburg, *Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations*, *op.cit.*, at 401. For the clearest articulation of the principle of functionality, see *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 17, at 180 (April 11).

[t]he principle of functionality which circumscribes the international personality of the organization and its legal capacity, also determines the scope of the applicable law to activities carried out by United Nations in the performance of its functions. ... The ever-growing involvement of UN forces in situations of armed conflict warrants that International Humanitarian Law be made applicable to them by analogy and *as appropriate*, when they, like states, are engaged in military operations as combatants.¹²²

In other terms, insofar as an international organization has the power to undertake military actions that could possibly entail resort to armed force, customary IHL would apply *de jure*. The objective capacity of an international organization would thus determine its subjective capacity to be bound by IHL, as well as the precise extent of customary legal obligations incumbent upon it.¹²³ It flows from the above analysis of the nature and scope of the “Petersberg Tasks” that this argument can be easily applied, *mutatis mutandis*, to the EU.

Some authors have maintained that within the varied range of operations subsumed under the general definition of “Petersberg Tasks,” customary IHL would serve as a valuable normative constant, ensuring the uniform application of *jus in bello* to all contributed troops, irrespective of their nationality and of the objective and scope of each operation.¹²⁴

However, it could be argued that customary rules—unwritten by definition as they are—may prove of little value in providing hands-on operational guidance to the troops on the ground. For the purpose of identifying the sources of EU's obligations under *jus in bello*, it may thus be useful to look at the EU's internal legal order, to see whether and to what extent it regulates the conduct of the EU as a military actor. To this end, the following sub-sections will survey the primary and secondary sources of EU legislation which may *prima facie* spell out obligations for the EU-led troops engaged in the CSDP military operations.

A. The EU's Constituent Instrument: An IHL-Oriented Analysis

At first glance, the preliminary outcome an IHL-oriented analysis of the EU treaty foundations may prove rather disappointing, as the TEU does not make any reference whatsoever to *jus in bello*, nor does it explicitly place any constraints on the behaviour of the troops engaged in CSDP military operations. Reportedly, during the negotiations of the Amsterdam Treaty, the ICRC attempted unsuccessfully to persuade the EU Member States to include references to IHL in the sections of the Treaty dealing with foreign and security policy. In particular, in 1996 it proposed to the Council Presidency that the Treaty provision on the common defence policy should read as follows: “[a]ll decisions relating to a common defence policy and actions of the Union which have defence implications shall be in conformity with international humanitarian law and help ensure its respect.”¹²⁵ Nevertheless, despite the efforts made by the ICRC, Member States have not filled this major gap, which has remained unaddressed also in the Treaty of Lisbon.

In principle, the absence of any reference to IHL in the TEU does not rule out the possibility that some of its provisions may be interpreted as paving the way for the recognition of IHL principles as part of the EU legal order. It is submitted that the Union's duty to respect *jus in bello* may be inferred, in the first place, from an expansive reading of the well-established (internal) obligation to respect human

¹²² Daphna Shrager, *The United Nations as an Actor Bound by International Humanitarian Law*, 5 INT. PEACEKEEPING 64, 65 (1998) (emphasis added).

¹²³ R. KOLB, DROIT HUMANITAIRE ET OPÉRATIONS DE PAIX INTERNATIONALES 27 (2nd ed. 2006).

¹²⁴ Ferraro, *op. cit.*, at 460-61.

¹²⁵ Quoted in Louise Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 39, 61-62 (Michael Schmitt ed., 1998).

rights mentioned above,¹²⁶ further developed over the years by the ECJ¹²⁷ and now enshrined in the EU's constituent instrument. Within this framework, due consideration should be paid to the concept of general principles of Union law, as well as to the influence of the judgments of the ECtHR on the EU legal order, as they may both serve as a bridge for the integration of IHL principles the EU legal order.

Former Article 6(1) TEU already laid some legal ground for the incorporation of IHL into the EU legal order.¹²⁸ In fact, it would have been difficult to maintain that principles “so fundamental to the respect of the human person”¹²⁹ such as those informing IHL should not be subsumed under the formula stated in the said provision, and thus guide the EU and its multinational troops. This guidance would thus have been by virtue of both international and EU law.

The suggested IHL-oriented interpretation of former Article 6(1) TEU would also indirectly concern former preambular paragraph 3 TEU,¹³⁰ as well as former Article 11(1) TEU (which, as recalled above, includes the development and consolidation of “democracy and the rule of law, and respect for human rights and fundamental freedoms” among the objectives of the CFSP).¹³¹

Subsequent practice (within the meaning of Article 31 of the Vienna Convention on the law of the treaties) appears to corroborate the dynamic interpretation of former Article 6(1) TEU suggested above. Significantly, the Treaty of Lisbon expressly upholds (for the first time in the history of the EU)¹³² “respect for the principles of the United Nations Charter and *international law*”¹³³—a formula that appears to encompass *all* branches of this *corpus juris*, thus including IHL. By the same token, the constitutionalization of “respect for human dignity” among the founding values and guiding principles of the Union's external action on the international scene¹³⁴ echoes the very *raison d'être* of IHL.¹³⁵ Reference to international law is also made in the new Article 3(5) TEU Lisbon, which

¹²⁶ See Sections 2 and 3.

¹²⁷ See, *inter alia*, Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491 [hereinafter *Nold* case]; Opinion 2/94, 1996 E.C.R. I-01759, para. 33; Case C-94/00, *Roquette Frères SA v. Directeur general de la concurrence, de la consommation et de la repression des frauds*, and *Commission of the European Communities*, 2002 E.C.R. I-09011, para. 23; *Kadi* case, para. 304 (reaffirming that the protection of fundamental rights forms “part of the very foundations of the Community legal order”). For a valuable, up-to-date overview of the ECJ jurisprudence in the field of human rights, see Johan Callewaert, ‘Unionisation’ and ‘Conventionisation’ of Fundamental Rights in Europe: The Interplay Between Union and Convention Law and Its Impact on the Domestic Legal Systems of the Member States, in *THE EUROPEANISATION OF INTERNATIONAL LAW*, *op.cit.*, at 110-16; Elizabeth Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 *FORDHAM INT'L L. J.* 1104, 1104-17.

¹²⁸ In this sense, see Frederik Naert, *ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations*, *op.cit.*, at 97; Nicolas Tsagourias, *EU Peacekeeping Operations: Legal and Theoretical Issues*, in *id.* 102, 117.

¹²⁹ *Nuclear Weapons* case, para. 78.

¹³⁰ Confirming the EU Member States’ “attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.”

¹³¹ Cf. F.Naert, *An EU Perspective*, *op. cit.*, at 62 (“[a]rticles 6 and 11 of the EU Treaty clearly entail international law obligations for the EU and its institutions, including with regard to human rights and arguably also international humanitarian law”).

¹³² Neither the TEU nor the TEC, in their present form, contain any provision on the relationship between the EU/EC and international law, see Kuijper, *op.cit.*, at 87-88.

¹³³ TEU Lisbon, Article 21(1) (emphasis added).

¹³⁴ *Id.*

¹³⁵ *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić And Esad Landžo (“Čelebići Case”)*, Case No. IT-96-21, Judgment, Appeals Chamber, para.143 (Feb. 20, 2001)

[The fundamental humanitarian principles which underlie international humanitarian law], the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles.

provides for the EU's commitment to "contribute ... to the strict observance and the development of international law" in its relations with the wider world, and in Article 21(2) TEU Lisbon, reaffirming that "the Union shall define and pursue common policies and actions ... in order to consolidate support for democracy, the rule of law, human rights and the principles of international law."

Finally, basic principles of IHL (i.e., impartiality, neutrality, and non-discrimination)¹³⁶ have now been integrated in the new Article 214(2) of the Treaty on the Functioning of the European Union,¹³⁷ which will govern the EU's humanitarian aid policy. According to this provision, the Union's operations in the field of humanitarian aid will have to comply with the principles mentioned above as well as, more generally, with "the principles of international law." The groundbreaking impact of such provisions on the relationship between IHL and the EU legal order is indisputable.

A further argument in support of the IHL-oriented reading of the TEU's human rights provisions suggested above is drawn from a soft law instrument, namely the EU Guidelines on Promoting Compliance with International Humanitarian Law.¹³⁸ Despite their non-binding character, the Guidelines represent the most complete and comprehensive EU act in the domain of IHL so far, providing a useful overview of the EU's approach to *jus in bello*.

After reaffirming that "[t]he European Union is founded on the principles of liberty, democracy, respect for fundamental rights and fundamental freedoms" (i.e., using precisely the same wording as former Article 6(1) TEU), Paragraph 3 of the Guidelines acknowledges for the first time that "the goal of promoting compliance with IHL" is included among those principles, thus providing a progressive interpretation of the EU foundations explicitly encompassing IHL.

Such an interpretation seems to corroborate at a general level the approach already taken by the Council in two regulations (i.e., in legally binding instruments)¹³⁹ of 1999¹⁴⁰ (now repealed). In particular, Recital 8 of the Regulation's preamble stated that:

¹³⁶ Cf. *inter alia*, common Article 3 and Article 13, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, signed at Geneva, August 12, 1949, *entered into force*, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950 (proscribing 'any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'); Article 70(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, *entered into force* Dec. 7, 1978, 1125 U.N.T.S. 3 (referring to 'relief actions which are humanitarian and impartial in character and conducted without any adverse distinction'); Article 18(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, *entered into force* Dec. 7, 1978, 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978. (mentioning "relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction"). See also ICJ, *Nicaragua v. United States*, para. 243 ("if the provision of humanitarian assistance is to escape condemnation as an intervention in the internal affairs of [another State], not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely to prevent and alleviate human suffering, and to protect life and health and to ensure respect for the human being it must also, and above all, be given without discrimination to all in need") [emphasis added].

¹³⁷ Article 11 of the Treaty of Lisbon provides that the TEC "shall become the Treaty on the Functioning of the European Union" [hereinafter TFEU]. In the present report, the numbering of TFEU articles refers to the consolidated version of the TFEU published by the Council of the EU, see Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47.

¹³⁸ EU Guidelines on Promoting Compliance with International Humanitarian Law, 2005/C327/04, 2005 O.J. (C 327) 4 [hereinafter *EU Guidelines on IHL*]. See also the recent technical update of the Guidelines, 2009 O.J. (C 303) 06. For an in-depth analysis of the Guidelines see *infra*, Section 4.3.

¹³⁹ See Article 249, recital 2 TEU ("[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States").

¹⁴⁰ See Council Regulation (EC) No. 975/1999 of 29 April 1999 laying down the requirements for the implementation of development co-operation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, 1999 O.J. (L 120) 1; Council Regulation (EC) No. 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy,

human rights within the meaning of this Regulation should be considered to encompass respect for international humanitarian law, also taking into account *the 1949 Geneva Conventions and the 1977 Additional Protocol thereto*, the 1951 Geneva Convention relating to the Status of Refugees, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and other acts of international treaty or customary law.¹⁴¹

Although for the specific purposes of the Guidelines (aimed as they are at promoting compliance with IHL among non-Member States),¹⁴² “measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct, including by their own forces” are not covered by their provisions,¹⁴³ arguably it would be, to say the least, paradoxical if such an expansive, far-reaching reading of the EU foundational document were contradicted by the behaviour of the EU’s own troops in the field.

As far as Article 6(3) TEU Lisbon (formerly Article 6(2) TEU) is concerned, its potential significance for purposes of mainstreaming IHL into the EU legal order appears twofold. First, although Article 6(3) TEU Lisbon mentions the ECHR but no other international human rights treaties, ECJ case law consistently refers to “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories” as sources of inspiration and guidance.¹⁴⁴ It could be argued by analogy that, since *all* EU Member States are parties to the Geneva Conventions and their Additional Protocols, these treaties may well serve as particularly authoritative sources of inspiration in the formation of general principles of Union’s law. It follows from the above that, if the relevant treaty provisions of IHL were to achieve the status of “general principles of the Union’s law,” they would impose legal obligations upon the EU institutions not only by way of general international law, but also as a matter of EU law.

Second, it is suggested that the dynamic, symbiotic relationship¹⁴⁵ between the EU and the system of the ECHR described above may have potentially far-reaching consequences also on the relationship between the former and IHL. *De lege ferenda*, the EU accession to the ECHR, as envisaged in both Article 6(2) TEU Lisbon and in Article 17 of Protocol No. 14 to the ECHR,¹⁴⁶ may (were the latter to enter into force) mark a defining moment in the cross-fertilization between IHL and EU law. Indeed, IHL could be formally mainstreamed into the EU legal order by way of HRL, as possibly interpreted by the ECtHR—whose recent jurisprudence has increasingly relied (albeit only incidentally, and often *sub silentio*) on rules and principles of IHL.¹⁴⁷

(Contd.) _____

contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, 1999 O.J. (L 120) 8.

¹⁴¹ Emphasis added.

¹⁴² See *infra*, Section IX.

¹⁴³ EU Guidelines on IHL, para. 2.

¹⁴⁴ For recent examples, see *Kadi*, para. 283; Case C-349/07, *Sopropé—Organizações de Calçado Lda v. Fazenda Pública*, Dec. 18, 2008.

¹⁴⁵ See Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 COMMON MKT. L. REV. 629, 631 (2006).

¹⁴⁶ Protocol No. 14 to the European Convention on Human Rights and Fundamental Freedoms, *op.cit.*

¹⁴⁷ See, *inter alia*, *Isayeva v. Russia*, 41 Eur. Ct. H. R. 38 (2005); *Isayeva, Yusupova & Basayeva v. Russia*, 41 Eur. Ct. H. R. 39 (2005); *Kononov v. Latvia*, App. No. 36376/04; *Korbely v. Hungary*, App. 9174/02, Sept. 19, 2008, paras. 74-94; *Varnava and others v. Turkey*, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 & 16073/90, Jan. 10 2008, para. 130 (all available at <http://www.echr.coe.int/eng>). See also Giulia Pinzauti, *The European Court of Human Rights’ Incidental Application of International Criminal Law and Humanitarian Law*, 6 J. INT’L CRIM. JUSTICE 1043, Philip Leach, *The Chechen Conflict; Analysing the Oversight of the European Court of Human Rights*, 6 EUR. HUM. RTS. L. REV. 732, 734, 760 (2008).

B. The Legal Status of the CSDP Military Operations and IHL

As noted above with regard to HRL, Council acts forming the legal basis of EU military operations,¹⁴⁸ as well as the relevant agreements with host states, are generally silent on the legal obligations of EU-led personnel under *jus in bello*.¹⁴⁹ The same is true of the agreements concluded with non-EU troop-contributing nations that are not parties to the same humanitarian law treaties as the EU Member States, such as Turkey and Morocco.¹⁵⁰ A partial exception can be found in two provisions included in the *Concordia* SOFA¹⁵¹ between the EU and the Former Yugoslav Republic of Macedonia (FYROM), which may be interpreted as an implicit commitment to abide by principles of HRL and IHL. Article 2(1) of the Agreement stipulates, *inter alia*, that the EU-led forces (EUF) “shall refrain from any action or activity incompatible with the impartial and international nature of the operation.” Furthermore, Article 9 states that “[t]he EUF will ... respect international conventions ... regarding the protection of the environment”¹⁵² and “of cultural heritages and cultural values.”¹⁵³ Arguably, international provisions binding on the EU troops deployed in the FYROM should thus have included also the relevant IHL treaties, namely 1954 Hague Convention on the Protection of Cultural Property in the event of armed conflict and a number of rules laid down in the 1977 Protocols to the Geneva Conventions.¹⁵⁴

However, as noted above,¹⁵⁵ it should be recalled that locally and internationally hired contractors are generally not regarded as EU personnel for purposes of the application of SOMAs and SOFAs: therefore, PMSCs staff are, in principle, not bound by possible IHL obligations laid down therein.

C. EU Soft Law and IHL

The EU has been sometimes criticised for considering IHL “as a subset of human rights law” rather than as a field standing on its own, and for not giving *jus in bello* “the prominent place which it deserves.”¹⁵⁶ The adoption in recent years of a number of soft law instruments expressly concerned with IHL shows, however, that this *corpus juris* is not considered as irrelevant to the EU’s external

¹⁴⁸ For an overview of the pool of instruments at the Council’s disposal in the domain of Common Foreign and Security Policy see PIET ECKHOUT, *EXTERNAL RELATIONS OF THE EU* 398-408 (2004).

¹⁴⁹ As Naert notes, “[i]t is remarkable that respect for international humanitarian law is never mentioned, except in the case of the AMIS Supporting Mission via the AU SOMA”, Naert, *ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations*, *op. cit.*, at 97.

¹⁵⁰ See *i.e.*, Agreement between the European Union and the Republic of Turkey on the participation of the Republic of Turkey in the European Union-led Forces in the Former Yugoslav Republic of Macedonia (Sept. 4, 2003), 2003 O.J. (L 234) 23; Agreement between the European Union and the Kingdom of Morocco on the participation of the Kingdom of Morocco in the European Union military crisis management operation in Bosnia and Herzegovina, *op.cit.*. It should be recalled that in all the military operations undertaken by the EU, personnel have also been contributed by non-EU Member States. Among them, Turkey—which participated in the *Concordia*, *Althea* and *EUFOR RD Congo*—and Morocco—which took part in the *Althea* operation—are not parties to the two Additional Protocols of 1977.

¹⁵¹ Council Decision No. 2003/222/CFSP of 21 March 2003 concerning the conclusion of the Agreement between the European Union and the FYROM on the status of the European Union-led Forces (EUF) in the FYROM, *op.cit.* See also Aurel Sari, *Status of Forces and Status of Mission Agreements under the ESDP: the EU’s Evolving Practice*, 19 EUR. J. INT’L L. 67 (2008) (providing an exhaustive analysis of the EU’s Status of Forces Agreements).

¹⁵² *Concordia* SOFA, Art. 9 para. 1.

¹⁵³ *Id.* art. 9 para. 2.

¹⁵⁴ See, *e.g.*, Article 53 of Protocol I and Article 16 of Protocol II (on the protection of cultural objects and places of worship); Article 55 of Protocol I (laying down the prohibition to use of methods or means of warfare that are intended or may be expected to cause widespread, long-term and severe damage to the natural environment).

¹⁵⁵ See *supra*, Section 3, fn. 82.

¹⁵⁶ See Richard Desgagné, *op.cit.*, at 455.

action; on the contrary, these instruments reflect growing recognition under the EU legal order of IHL as a discrete field of international law. Therefore—although not legally binding—they deserve careful consideration, since they may prove a useful interpretative tool to clarify the EU’s approach to IHL issues.

Among these instruments, the abovementioned EU Guidelines on Promoting Compliance with IHL¹⁵⁷ hold a pivotal position, to the extent that—as a commentator has noted—they “represent the common legal understanding of EU Member States on this field of law.”¹⁵⁸

Reportedly,¹⁵⁹ the Guidelines were elaborated by COJUR (the Council working group dealing with questions of general international law) upon an initiative by Sweden, and were later adopted by the Council. The aim of the Guidelines is to set out operational tools for the EU and its institutions and bodies to promote compliance with IHL.¹⁶⁰ To this end, the first part of the Guidelines provides a restatement of the present state of the law (with respect to e.g., the sources of IHL, its scope of application, its relationship with HRL and to the principles of individual responsibility), while the second part sets forth operational guidelines (aimed at EU representatives in the world) on reporting on and assessing “compliance with IHL by third states and, as appropriate, non-State actors operating in third States.”¹⁶¹

On the one hand, the Guidelines should be intended as a political reference paper¹⁶² mainly concerned with the promotion of *jus in bello* among third countries,¹⁶³ and limiting themselves to placing reporting, monitoring¹⁶⁴ and dissemination¹⁶⁵ obligations¹⁶⁶ on the relevant EU bodies and actors. Once again, it should be recalled that paragraph 2 of the Guidelines—while reaffirming the “commitment of the EU and its Member States to IHL” and stressing that “the same commitment extends to measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct”¹⁶⁷—excludes such measures from the scope of application of the Guidelines. However, despite this exclusion, the provision is not without significance, as it consistently acknowledges the EU as an autonomous military actor endowed with the capacity to undertake autonomous obligations under IHL. The increasing emphasis placed by the Guidelines on the EU’s commitment to “promote compliance” with IHL should not be underestimated either, as it may be interpreted as *de facto* upholding the general principle of IHL aiming “to ensure respect” for the Geneva Conventions “in all circumstances.”¹⁶⁸ The ICRC’s hailing of the Guidelines as an “important initiative” marking the

¹⁵⁷ *Supra* note 137.

¹⁵⁸ Frank Hoffmeister, *The Contribution of EU Practice to International Law*, in DEVELOPMENTS IN EU EXTERNAL RELATIONS LAW, 37, 100 (Marise Cremona ed., 2008).

¹⁵⁹ *Id.* at 51.

¹⁶⁰ EU Guidelines on IHL, para. 1.

¹⁶¹ *Id.* para. 2.

¹⁶² Hoffmeister, *op.cit.*, at 37.

¹⁶³ See EU Guidelines on IHL, para. 2 (“[t]hese Guidelines ... aim to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States”).

¹⁶⁴ *Id.* para. 15.

¹⁶⁵ *Id.* para. 16 (h).

¹⁶⁶ *Id.* (emphasis added). Arguably, the term sits uncomfortably with the soft-law nature of the Guidelines.

¹⁶⁷ Emphases added.

¹⁶⁸ As is well-known, the principle has found explicit recognition by the ICJ in *Nicaragua v. United States*

[T]he Court considers that there’s an obligation on the United States Government, in terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.

See *Nicaragua v. United States*, para. 220.

“renewed commitment of the European Union and its Member States toward the protection and assistance of victims of armed conflict worldwide”¹⁶⁹ would appear to confirm this interpretation.

Turning to regulatory efforts *aimed at the EU troops* in the field, three ESDP/CSDP instruments appear to be particularly significant with respect to IHL, i.e. the EU Draft Guidelines on Protection of Civilians in EU-led Crisis Management Operations,¹⁷⁰ the Generic Standards of Behaviour for the ESDP Operations¹⁷¹ and the aforementioned EU Guidelines on Children in Armed Conflict in their updated version of June 2008.¹⁷²

The Draft Guidelines were agreed in November 2003 by a working party of the Council of the EU,¹⁷³ and lay down, for the first time, a potential legal framework specifically aimed at ensuring the protection of civilians where EU operations are conducted. In this respect, they appear to uphold the European Council conclusions of July 2003, which had reaffirmed “the endeavours made by the EU to ensure that special protection, rights and assistance needs of civilians are fully addressed in all EU-led crisis management, in full compliance with the applicable obligations of Member States under relevant international law and under relevant UN Security Council resolutions.”

In particular, Article 2 of the Draft Guidelines stipulates that “the EU will, in co-ordination with the UN and other relevant international organisations, take all appropriate measures to facilitate, including through co-ordinated support and assistance, *respect of international norms for the protection of civilians*,”¹⁷⁴ while Article 7 provides that “[b]earing in mind their obligations under national and *international law*, States contributing personnel deployed in EU-led crisis management operations should in particular ensure monitoring and reporting of alleged violations of human rights, *international humanitarian* or international criminal law.”¹⁷⁵ Finally, Article 8 states that “[s]uitable training in the areas mentioned above should be provided to personnel deployed in EU-led crisis management operations ... In the preparation of relevant training curricula, guidelines and materials, particular emphasis will be placed [inter alia] (a) on human rights, *international humanitarian*, refugee and international criminal law.” However, the normative value of the Draft Guidelines remains uncertain, because unlike other non-binding instruments, they have not even been adopted by the EU Council, but—as mentioned above—have simply been agreed upon by the CIVCOM, a Council working party endowed with mere advisory functions.

The Generic Standards of Behaviour have been elaborated by the Council Secretariat¹⁷⁶ in May 2005, pursuant to a request by the Political and Security Committee “to develop a generic document on standards of behaviour to be used when planning for future ESDP operations.”¹⁷⁷ Their complementary nature with respect to legal obligations of international law (including IHL) is

¹⁶⁹ See ICRC Opinion Paper, Support of the ICRC to the Implementation of the EU Guidelines on Promoting Compliance with International Humanitarian Law, at 1 (Nov. 23, 2006) (on file with author).

¹⁷⁰ See Draft Guidelines on Protection of Civilians in EU-Led Crisis Management Operations, Council Doc. No.14805/03 (Nov. 14, 2003).

¹⁷¹ See Generic Standards of Behaviour for the ESDP Operations, Council Secretariat Doc. No. 8373/3/05 REV 3 Annex, (May 18, 2005).

¹⁷² See EU Guidelines on Children and Armed Conflict, Council Doc. No. 10019/08 (June 5, 2008).

¹⁷³ Council Decision No. 2000/354/CFSP of 22 May 2000 setting up a Committee for civilian aspects of crisis management, 2000 O.J. (L 127) 1.

¹⁷⁴ Emphasis added.

¹⁷⁵ Emphasis added.

¹⁷⁶ According to art. 240(2) TFEU: “[t]he Council shall be assisted by a General Secretariat, under the responsibility of a Secretary General appointed by the Council”.

¹⁷⁷ See Generic Standards of Behaviour, at 2.

explicitly indicated in their text.¹⁷⁸ The Standards are particularly useful in that they reaffirm, clarify and develop at EU level fundamental principles of *jus in bello* concerning, *inter alia*, the dissemination of IHL among the ESDP personnel¹⁷⁹ and the obligation to prosecute alleged violations of IHL committed by such personnel.¹⁸⁰ For purposes of this Research Paper, it is also important to recall that Generic Standards should be adhered to by “*all personnel*” (para. 3), and that, unlike the usual practice within the EU SOFAs, within the meaning of the Standards, the term “personnel” also includes *internationally contracted civilian personnel and locally contracted civilian personnel*.

However, as with the Draft Guidelines on Protection of Civilians (which they aim at complementing),¹⁸¹ there is a considerable degree of uncertainty as to the legal value of the Standards. They appear (as their title suggests) to be intended as a mere disciplinary instrument,¹⁸² and thus do not appear to be legally binding. Nevertheless, a subsequent interpretation provided by the EU Portuguese Presidency in 2007 suggests a different conclusion.¹⁸³

The 2008 EU Guidelines on Children in Armed Conflict are part of a broader effort of the EU aimed at ensuring protection to particularly vulnerable categories, such as women¹⁸⁴ and human rights defenders.¹⁸⁵ The Guidelines explicitly mention IHL among the normative sources guiding the EU in its activity to ensure protection of children affected by armed conflict—also providing a list of relevant IHL treaty instruments. Furthermore, as recalled above, a specific section devoted to crisis management operations requires that the specific needs of children are taken into account and adequately addressed during the operational planning. The section’s wording seems to suggest that this duty is placed entirely upon the EU—nevertheless, it should be borne in mind that in the ESDP framework, while some forms of EU-led training in HRL are envisaged, IHL training is the responsibility of Member States only.¹⁸⁶ Which is paradoxical, considering the EU’s acknowledgment

178 *Id.* para. 4 (“[t]he standards of behaviour are complementary to the legal obligations of personnel. Personnel must apply the provisions of international law, including, when applicable, the law of armed conflict, and the laws of the contributing state”).

179 Generic Standards of Behaviour, at 4-5 (“Pre-deployment training of personnel, carried out nationally as well as by the EU, should include training and education on prescribed standards of behaviour. Particular attention should be given to international law, including international humanitarian law and human rights issues, gender issues and child rights issues”). *Cf.*, *inter alia*, Fourth Geneva Convention, art. 144.

180 Generic Standards of Behaviour, para. 6 (“Personnel should report any alleged violations by personnel of human rights and international humanitarian or international criminal law. An investigation of each complaint and where relevant subsequent prosecution should be ensured by the competent authority”). *Cf.* Articles 49, 50, 129, 146 common to the Geneva Conventions, as well as in Article 85 of Additional Protocol I. Boisson de Chazournes and Condorelli, *ex multis*, also construe such a duty as a corollary of the obligation to “ensure respect” for international humanitarian law “in all circumstances” (as laid down in Common Article 1 to the Geneva Conventions), further arguing that “this obligation ... is applicable wherever a State’s armed forces might be operating, and not merely in that State’s territory,” see Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 837 INT’L REV. RED CROSS 67, 67-87.

181 Generic Standards of Behaviour for the ESDP Operations, at 1.

182 *Id.*, at 3 (“[n]ot adhering to the required standards of behaviour is misconduct and may result in disciplinary measures”).

183 *See* Statement by H.E. Ambassador João Salgueiro, Permanent Representative of Portugal to the United Nations, on behalf of the European Union, United Nations 62nd Session of the General Assembly—Security Council Open Debate on Women, Peace and Security, New York (Oct.23, 2007) (“In the EU context this includes the development of rules of conduct as the Generic Standards of Behaviour, *which are binding on ESDP staff ...*” (emphasis added), *available at* http://www.europa-eu-un.org/articles/en/article_7443_en.htm).

184 *See* EU Guidelines on Violence against Women and Girls and Combating all Forms of Discrimination against them, Council Doc.16173/08 (Nov.24, 2008); Implementation of UNSCR 1325 as reinforced by UNSCR 1820 in the context of ESDP, Council Secretariat Doc. No. 15782/08 (Dec.3, 2008).

185 EU Guidelines on Human Rights Defenders, Council Doc. No. 10056/1/04 REV 1 (June 14-15, 2004).

186 *See* F. Naert, *The European Union Perspective*, in INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS AND PEACE OPERATIONS 348 (G. Beruto ed., 2009), at 348.

that “[w]ithout proper training of armed forces ... the norms of IHL remain without practical relevance”.¹⁸⁷

Finally, as far as the planning documents for the EU military operations are concerned, the declassified OPLAN of the EUPOL Afghanistan police mission¹⁸⁸—although not relating to an ESDP *military* operation— explicitly stipulates that the EU personnel “will respect local authorities, the law of the land of the host country, their local culture, traditions, customs and practices unless they contradict with International Humanitarian Law (IHL) or Human Rights,”¹⁸⁹ thus setting an indirect obligation to respect these bodies of law.¹⁹⁰ In the declassified OPLANs, emphasis is frequently placed on the need for both the induction and the in-mission training of ESDP personnel to include IHL.¹⁹¹ The acknowledgment of such an obligation with regard to a *police* mission may strengthen *a fortiori* the claim that IHL should be respected in the context of the EU *military* operations, as the latter appear to be even more likely to trigger the applicability of *jus in bello*.

It should be emphasized, however, that none of the instruments mentioned above is legally binding: indeed, they are generally regarded as internal directives aimed at setting disciplinary and professional standards for the EU-led military troops.¹⁹² As such, although they incorporate (at least to a certain extent) principles of *jus in bello*, they cannot lay the ground for EU obligations *stricto sensu* under IHL,¹⁹³ especially since (unlike HRL) they are not supported by explicit references in EU primary law.

Finally, it should be noted that, unlike with human rights and gender advisors, there is no specific IHL expert attached to the EU-led operations. IHL expertise is provided by the legal advisors present at the Council’s General Secretariat, in the Member States, in the Operation Headquarters and in the Force Headquarters.¹⁹⁴

5. Conclusions

The expanding role and functions of PMSCs within the EU’s crisis-management operations¹⁹⁵ make it crucial to clarify the legal framework in which their personnel are due to operate. This is all the more true with respect to their obligations under HRL and IHL, in order to prevent possible violations of

¹⁸⁷ Statement by Ms. Anna Sotaniemi, Legal Adviser, Permanent Mission of Finland to the United Nations, on behalf of the European Union, *op.cit.*

¹⁸⁸ Council Joint Action No. 2007/369/CFSP of 30 May 2007 on establishment of the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN), 2007 O.J. (L 139) 33.

¹⁸⁹ OPLAN for the EUPOL Afghanistan Police Mission, Council Doc. No. 10132/07, at 185.

¹⁹⁰ The acknowledgment of such an obligation with regard to a *police* mission may strengthen *a fortiori* the claim that IHL should be respected in the context of the EU *military* operations, which are even more likely to trigger the applicability of *jus in bello*.

¹⁹¹ See, *inter alia*, OPLAN for the ESDP SSR Police Mission in the Democratic Republic of Congo, Council Doc. No. 9770/07, para. 61; CONOPS for the EUPOL Afghanistan Police Mission, Council Doc. No. 8199/07, para. 145; OPLAN for the EUPOL Afghanistan Police Mission, *op.cit.*, at 291.

¹⁹² See, *inter alia*, Christian Gossiaux, *Les règles d’engagement norme juridique nouvelle?*, 40 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 159, 172-173 (2001) (“[I]es règles d’engagement sont des directives générales émanant de l’autorité compétente, destinées à indiquer aux forces armées, qui sont sous l’ordre de cette autorité, le plus précisément possible, dans quelles conditions elles peuvent, dans un conflit, employer toutes formes de violence lors de l’exécution de leur mission”).

¹⁹³ Despite their non-binding character, however, the role of soft law instruments in the EU legal order should not be underestimated. See, *inter alia*, Fiona Beveridge & Sue Nott, *A Hard Look at Soft Law*, in *LAWMAKING IN THE EUROPEAN UNION* 285-309 (P. Craig & C. Harlow eds., 1998); Francis Snyder, *Soft Law and Institutional Practice in the European Community*, in *THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL*, 197-225 (Stephen Martin ed., 1994).

¹⁹⁴ See F. Naert, *Accountability for Violations of HRL by EU Forces*, *op.cit.*, at 350.

¹⁹⁵ The ‘increasing cooperation’ between the EU and PMSCs has been acknowledged, *inter alia*, by the European Defence Agency, see European Defence Agency, *Future Trends from the Capability Development Plan* (2008), at 53.

these bodies of norms from being committed by private contractors in the context of EU-led civilian and military missions. In principle, HRL and IHL may be binding on private companies acting within the framework of the CSDP not only as a matter of international law, but also as a matter of *EU law*, to the extent that the Union incorporates the relevant legal standards into its internal legal order.

The present paper has shown that, HRL (and, to a lesser extent, IHL) principles have indeed been increasingly mainstreamed into the CSDP legal and operational framework. Over the past few years the EU has made significant self-regulatory efforts in this direction, and concerns about ensuring respect of HRL and *jus in bello* by the EU-led troops now permeate large parts of the CSDP legal architecture.

Nevertheless, such efforts have thus far resulted mainly in a number of soft law, non-binding instruments (e.g. guidelines and generic standards of behaviour), whose legal effects and normative scope are often rather ambiguous. Such uncertainty appears to reflect the general lack of clarity surrounding the CSDP legal framework, characterized as it is by a variety of actors and a range of “ill-defined”¹⁹⁶ legal tools. Furthermore, as emphasized by a recent study, there is a well-founded risk that such documents ‘remain just that, and that they have a somewhat limited impact on policy and operational decisions on the ground.’¹⁹⁷

Beyond rare exceptions, no mention of HRL or IHL obligations of EU-led troops is made in the Council acts approving or launching the operations, nor in the agreements with host, transit or non-EU troop-contributing States. This also applies to civilian missions with respect to which the possibility to resort to security contractors was envisaged already in the relevant joint actions.¹⁹⁸ Reportedly, references to HRL and IHL are included in the operational planning documents and rules of engagement, but such instruments are not in the public domain.

As for the relevance of the aforementioned legal standards for PMSCs personnel, it is debatable whether possible obligations placed by the EU on its civilian and military personnel under HRL and IHL would also bind private contractors, as they are expressly excluded from the scope of application of SOFAs,¹⁹⁹ SOMAs²⁰⁰ and ROEs. Reportedly,²⁰¹ PMSCs staff are not included in the command and control structure, their relationship with the Operations Commander (in military operations)²⁰² or the Head of Mission (in civilian operations) being contractual in nature.²⁰³ At present, the only ESDP self-regulatory act concerned with HRL and IHL explicitly applying also to internationally and locally contracted civilian personnel are the “Generic Standards of Behaviour in ESDP Operations” of 2005. As recalled above, however, such instrument only has disciplinary value.

Some commentators have advocated the subordination of contracted security personnel to the military chain of command, arguing that “[w]hen serving with the armed forces, contractors would be subject to service regulations and discipline to ensure that they conformed to the norms of military behavior

¹⁹⁶ EECKHOUT, *op.cit.* at 420.

¹⁹⁷ See A RESPONSIBILITY TO ASSIST 107 (Tom Hadden ed., 2009).

¹⁹⁸ See e.g. Council Joint Action 2005/190/CFSP of 7 March 2005 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX, 2005 O.J. (L 62) 37, Art.11(3)

¹⁹⁹ See *supra*, Sections 3 (in particular fn. 82) and 4.3.

²⁰⁰ *Ibid.*

²⁰¹ Author’s interviews with a military officer from the European Union Military Staff (March 2009) and an administrator from the Legal Service of the General Secretariat of the Council (April 2009).

²⁰² It should be recalled that, according to Council’s sources, private security companies have thus far only been employed within the framework of civilian missions, see Reply by the Council to Written Question by Glynn Ford (PSE) to the Council, E-3061, 14 July 2008.

²⁰³ Further details on the command and control structure of the EU’s crisis-management operations will be provided in a separate Research Paper by the same author.

and the laws of war”. It has also been maintained that “[i]ncorporating contractors into a state’s armed forces would ... permit oversight and accountability, as well as ensuring that troops from a provider firm obeyed military commands.”²⁰⁴

Indeed, such a solution may possibly ensure greater uniformity of HRL and IHL standards applicable to CSDP missions and operations, creating a common legal, training and reporting²⁰⁵ regime for all the personnel engaged in such operations. However, given the EU’s concerns for the “integrity of the military chain of command” even *vis-à-vis* EU civilian actors,²⁰⁶ the feasibility of such a proposal is dubious.

To the contrary, the contract concluded between the Operation Commander/Head of Mission and PMSCs may prove a key tool in order to guarantee compliance by private contractors with HRL and IHL.²⁰⁷ Standard clauses could be drafted e.g. reiterating the obligations binding on PMSCs staff under HRL and IHL, requiring that contractor personnel are trained in HRL and IHL; imposing a duty to periodically report to the Operations Commander and to the Human Rights Advisor.

²⁰⁴ J. K. Wither, *European Security and Private Military Companies: The Prospects for Privatized “Battlegroups”*, THE QUARTERLY JOURNAL, Summer 2005, at 122.

²⁰⁵ According to para. 36(b) of the EU Military C2 Concept (Council of the EU, Doc. 11096/03, 3 July 2003, partially declassified), “[t]he reporting by the OpCdr, drawing on information compiled *within the military chain of command* (...) may include suspected crimes against international humanitarian law and crimes against humanity”.

²⁰⁶ *Id.*, paras 50-51.

²⁰⁷ See, e.g. Article 8(3) Council Joint Action 2008/736/CFSP of 15 September 2008 on the European Union Monitoring Mission in Georgia, EUMM Georgia, 2008 O.J. (L 248) 26 (“[t]he conditions of employment and the rights and obligations of international and local civilian staff shall be laid down in the contracts between the Head of Mission and the members of staff”).