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**The Application of Human Rights and International
Humanitarian Law in Drafting EU Missions' Mandates
and Rules of Engagement**

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The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement*

Dr. Frederik Naert**

Introduction

This article examines how international humanitarian law and human rights law are applied in the mandates and rules of engagement of EU crisis management missions and their drafting. It first provides a brief overview of the main elements of the legal framework for these missions (1), subsequently describes the planning process, decision-making and command and control (2) and then addresses how international humanitarian law and human rights law are applied in these processes (3). The focus is on the international humanitarian law and human rights obligations of the missions themselves. The promotion of respect for such obligations by other actors is only briefly touched upon.¹ The terms 'missions' and 'operations' are used interchangeably.

1. The Legal Framework for EU Crisis Management Operations

As part of its Common Security and Defence Policy (CSDP),² the EU has launched some 24 military and civilian crisis management operations.³ This section provides a brief overview of the main elements of the international and EU legal framework for these operations.⁴

*. This contribution draws on Naert, 'Legal Aspects of EU Operations', 15 *Journal of International Peacekeeping* (2011) 218-242 and Naert, 'Challenges in Applying International Humanitarian Law in Crisis Management Operations Conducted by the EU', in A.-S. Millet-Devalle (ed.), *L'Union européenne et le droit international humanitaire* (2010) 139-150. It is forthcoming as F. Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement', in the proceedings of the ATLAS Project International Colloquium on 'Integration of the Human Rights component and International Humanitarian Law in peacekeeping missions led by the European Union' in Castellón (Spain), 25-26 November 2010.

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¹ In this respect, see especially the European Union Guidelines on promoting compliance with international humanitarian law (IHL) (OJ 2005 C 327/4, updated in 2009, see OJ 2009 C 303/12) and various EU human rights guidelines (see generally <http://consilium.europa.eu/showpage.aspx?id=1681&lang=EN>). See also infra notes 60-61 and accompanying text.

² On the CSDP (previously named the European Security and Defence Policy - ESDP), see generally <http://www.consilium.europa.eu/eeas/security-defence.aspx?lang=en> and G. Grevi, D. Helly & D. Keohane (eds.), *European Security and Defence Policy: the First Ten Years (1999-2009)* (2009), http://www.iss.europa.eu/uploads/media/ESDP_10-web.pdf. For a more extensive analysis of the CSDP from a legal perspective, see e.g. F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (2009); S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (2008); M. Trybus & N. White (eds.), *European Security Law* (2007); S. Dietrich, *Europäische Sicherheits- und Verteidigungspolitik (ESVP). Die Entwicklung der rechtlichen und institutionellen Strukturen der sicherheits- und verteidigungspolitischen Zusammenarbeit im Europäischen Integrationsprozess von den Brüsseler Verträgen bis zum Vertrag über eine Verfassung für Europa* (2006); M. Trybus, *European Union Law and Defence Integration* (2005); S. Graf von Kielmansegg, *Die verteidigungspolitik der Europäischen Union* (2005) and N. Ronzitti (ed.), *Le forze di pace dell'Unione Europea* (2005). All webpages were last visited on 6 March 2011.

³ On these missions, see <http://www.consilium.europa.eu/eeas/security-defence/eu-operations.aspx?lang=en>; Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations', in Trybus & White (eds.), supra note 2, 61-101 and Naert, supra note 2, at 97-191. The exact number of missions depends

A. Basis in the EU Treaty

Pursuant to Article 42(1) post-Lisbon EU Treaty, ‘The common security and defence policy ... shall provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter’. These missions are further defined in Article 43 of this Treaty: they ‘shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation’ and may ‘contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories’.

While this wording is different from the pre-Lisbon Article 17 EU Treaty,⁵ it arguably does not really bring about any change in the kind of EU operations which the EU could conduct, namely a wide range of crisis management operations, but merely spells out some of these tasks in greater detail. Furthermore, although the contrary is sometimes argued, ‘tasks of combat forces in crisis management, including peacemaking’ cover peace enforcement and hence potentially high intensity operations involving combat.⁶

EU operations can therefore be tailored to the specific situation and may vary greatly, ranging from consensual rule of law, police, security sector reform, border assistance or monitoring missions, to peacekeeping and potentially even peace enforcement. This wide range of missions and operations has consequences in terms of the applicable law (see below).

B. Council Decisions

The basic legal instrument governing each EU operation is a Council decision, adopted on the basis of Article 43 EU Treaty, in conjunction with Article 28 EU Treaty (and in accordance with the voting rules laid down in Article 31 EU Treaty⁷). These decisions correspond to the joint actions that were adopted pursuant to Article 14 pre-Lisbon EU Treaty. It is important to

to some extent on how one counts them, notably on whether successor missions and supporting/coordinating actions/missions are counted separately.

⁴ Many of the documents relating to EU operations are accessible to the public and this includes almost all of the legal instruments, which are usually published in the *Official Journal*. See also the website supra note 3 and the public register of Council documents at <http://www.consilium.europa.eu/showPage.aspx?id=1279&lang=EN>. On the (international) legal framework for peace operations and military operations generally, see R. Arnold & G.-J. Knoops (eds.), *Practice and Policies of Modern Peace Support Operations under International Law* (2006); U. Häußler, *Ensuring and Enforcing Human Security: The Practice of International Peace Missions* (2007) and T. Gill & D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010).

⁵ This provision provided that ‘The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide. ...’ and added that ‘Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking’ (emphasis added).

⁶ See Naert, supra note 2, at 197-206 and Naert, supra note 3, at 95-96.

⁷ I.e. by unanimity, with the possibility of abstentions. Pursuant to Article 31(1), second subparagraph, a member of the Council may qualify its abstention by making a formal declaration. In that case, ‘it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position’. The members of the Council qualifying their abstention in this way may not represent at least one third of the Member States comprising at least one third of the population of the Union. For operations not having military or defence implications, in some cases where there is a prior European Council decision or request, the voting rule would be qualified majority.

note that these acts are acts of the Union and not merely decisions adopted collectively by the Member States.⁸

Such decisions and joint actions generally inter alia set out the mission and mandate, political (and, where applicable, military) control and direction, designate the commanders and/or head of mission and, where applicable, headquarters, specify the command and control relations and contain provisions on the status of the mission, financial arrangements, participation of third States (i.e. non-EU Member States), relations with other actors, handling of EU classified information and on the launching and termination/duration of the operation.

In military operations, the Council usually adopts a further separate decision launching the operation, together with the approval of the Operation Plan and, where applicable, the Rules of Engagement.⁹

C. Political and Security Committee Decisions

The Political and Security Committee (PSC) is usually authorised to take a number of decisions (Article 38 EU Treaty), including decisions to amend the planning documents, including the Operation Plan, the Chain of Command and the Rules of Engagement, and decisions on the appointment of the EU Operation Commander, Force Commander and/or Head of Mission, while the powers of decision with respect to the objectives and termination of the operation remain vested in the Council (see also below).

D. International Agreements

On the basis of Articles 37 EU Treaty and 218 Treaty of the Functioning of the European Union (TFEU) (previously Article 24 EU Treaty), the EU can conclude international agreements relating to its crisis management operations. These agreements are concluded by the EU as a separate legal person¹⁰ and not collectively by the Member States.¹¹ They are binding on the institutions of the Union and on its Member States.¹²

⁸ In the framework of the EU, such collective decisions of the Member States also exist but they are explicitly identified as decisions of the representatives of the Governments of the Member States (meeting within the Council), as opposed to *Council Decisions*. See e.g. Decision 2008/836 of the Representatives of the Governments of the Member States of 29 October 2008 on the treatment of documents of EU civilian crisis management missions and military operations, OJ 2008 L 299/34.

⁹ For examples, see 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), OJ 2008 L 330/19 and Council Decision 2010/197/CFSP of 31 March 2010 on the launch of a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia), OJ 2010 L 87/33.

¹⁰ Prior to the Treaty of Lisbon, it seems that some doubts may still have persisted as regards the *Union's* (as opposed to the European *Community's*) legal personality. Notwithstanding these doubts, in the light of the Union's extensive treaty practice pre-dating the Treaty of Lisbon, it is clear that the Union already possessed international legal personality. In fact, this was acknowledged in the notification to third States relating to the succession of the EC by the EU. The model for this notification inter alia provides that:

... as from that date the European Union will exercise all rights and assume all obligations of the European Community *whilst continuing to exercise existing rights and assume obligations of the European Union*. In particular, as from that date all agreements between (name third state) and the European Community/*European Union*, and all commitments made by the European Community/*European Union* to (name third state) and made by (name third state) to the European Community/*European Union*, will be assumed by the European Union.

(Draft notification to third parties before the entry into force of the Treaty of Lisbon, EU Council Doc. 16654/1/09 of 27 November 2009, emphasis added). In any event, the Treaty of Lisbon has settled the matter: pursuant to Article 47 EU Treaty, '[t]he Union shall have legal personality'.

Such agreements are frequently concluded and include especially agreements on the participation of third States and status of forces/mission agreements.¹³

The EU will normally conclude a Status of Forces/Mission Agreement (SOFA/SOMA) with the host State which will regulate the status and activities of an operation in the host State. A SOFA/SOMA typically contains, amongst others, provisions on the wearing of uniforms and carrying of arms, the exercise of criminal jurisdiction, privileges and immunities of the operation and its personnel, security of the mission and its personnel, handling of claims, implementing arrangements and the settling of disputes.¹⁴ There is a model SOFA and a model SOMA for EU missions.¹⁵ There may also be alternative status arrangements.¹⁶

When a third State participates in an EU military operation, the modalities of its participation are laid down in a participation agreement with the EU. Such agreements may be concluded on an ad hoc basis for a given operation¹⁷ (on the basis of a model agreement) or may take the form of a framework agreement covering the participation in EU operations generally.¹⁸ In participation agreements the participating State normally associates itself with the joint action/Council decision establishing an operation, commits itself to providing a contribution and bears (some of the) the costs thereof. Such agreements also inter alia provide that the personnel of the third State participating in the operation are covered by any SOFA/SOMA concluded by the EU and contain provisions on the (transfer of) command and control, jurisdiction and claims (via declarations on waivers of claims) and EU decision-making autonomy is safeguarded.

There are also likely to be additional agreements, often memoranda of understanding and technical arrangements, between participating States dealing with various aspects of their cooperation within an EU operation.

E. (Other) Rules of International Law

The EU Treaty accords an important role to international law in the EU's external relations, even more so after the Treaty of Lisbon. Article 3(5) EU Treaty now states that in its relations with the wider world, the Union shall contribute to 'the protection of human rights, ..., as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. In addition, pursuant to Article 21 EU Treaty:

¹¹ E.g., Article 2(1) of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ 2006 L 115/50, explicitly defines the EU as distinct from its Member States.

¹² Article 216(2) TFEU.

¹³ See also Sari, 'The Conclusion of International Agreements by the European Union in the Context of the ESDP', 56 *ICLQ* (2007) 53-86 and P. Koutrakos 'International Agreements in the Area of the EU'S Common Security and Defence Policy', forthcoming in E. Cannizzaro, P. Palchetti & R. Wessel, *International Law as Law of the European Union* (2011) 157-187.

¹⁴ See A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: the EU's Evolving Practice', 19 *EJIL* (2008) 67-100.

¹⁵ See on the one hand EU Council Documents 12616/07 of 6 September 2007 and 11894/07 of 20 July 2007 and COR 1 (5 September 2007) and on the other hand EU Council Doc. 17141/08 of 15 December 2008.

¹⁶ See Naert, 'Legal Aspects of EU Operations', 15 *Journal of International Peacekeeping* (2011) 218, at 231.

¹⁷ For a recent example, see the Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), OJ 2009 L 202/84.

¹⁸ See e.g. Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations, 13 June 2005, OJ 2005 L 182/29.

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, ..., and respect for the principles of the United Nations Charter and international law. ...

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

...

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, ...

Thus the EU Treaty requires that the EU respects international law and human rights in the conduct of its external relations. There is no specific mention of international humanitarian law, but this branch of international law is obviously covered by the more general term international law. In this respect, it should be noted that the European Court of Justice has ruled that, at least in the exercise of its powers in the field of external relations, the (then) European Community must respect customary international law.¹⁹ In addition, for the purposes of EU law, at least some rules of international humanitarian law would appear to be covered by EU human rights provisions.²⁰ The application of human rights and international humanitarian law is addressed in more detail below.

However, these are not the only fields of international law that may be relevant for EU missions. Other (potentially) relevant rules include those on the legal basis for such missions under international law (usually host government consent and/or a UN Security Council mandate). Another example is the law of the sea in maritime operations such as EUNAVFOR Somalia/Atalanta, the EU's counter-piracy operation off the coast of Somalia.²¹

2. Planning, Decision-making and Command and Control for EU Missions

A. Planning and Decision-making

The key decision-making body in the CSDP is the Council. The work of the Council is prepared by a series of preparatory bodies and by the High Representative of the Union for Foreign Affairs and Security Policy (Baroness Ashton), who is assisted by the European External Action Service.²² The Council preparatory bodies include the Political and Security

¹⁹ See Cases C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, 24 November 1992, § 9 and C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others*, 3 June 2008, § 51.

²⁰ E.g. Council Regulation (EC) No 975/1999 of 29 April 1999 and Council Regulation (EC) No 976/1999 of 29 April 1999, OJ 1999 L 120, respectively at 1 and 8, both 8th consideration of the preamble and the European Union Guidelines on promoting compliance with international humanitarian law (IHL), OJ 2005 C 327/4, updated in 2009, see OJ 2009 C 303/12, § 3 (identical in both versions).

²¹ See articles 1, 2 and 12 of Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301/33 (*corrig.* OJ 2009 L 253/18) (this Joint Action was subsequently amended).

²² See especially Article 27 post-Lisbon EU Treaty. See also *infra* note 27.

Committee,²³ the EU Military Committee (with its Working Group) (EUMC),²⁴ the Political-Military Group (PMG) and the Committee for Civilian Aspects of Crisis Management (CIVCOM).²⁵ Within the General Secretariat of the Council, key players included various Directorates within the Directorate General External Relations (DGE), including the Crisis Management and Planning Directorate (which replaces the former military and civilian (crisis management) directorates), as well as the EU Military Staff (EUMS),²⁶ the Civilian Planning and Conduct Capability (CPCC), the Policy Unit and the Situation Centre. Their functions now largely fall within the mandate of the High Representative and these services have migrated to and are now part of the European External Action Service.²⁷

The Political and Security Committee plays a crucial role. By virtue of Article 38 EU Treaty, it exercises, under the responsibility of the Council and of the High Representative, ‘political control and strategic direction’ of EU operations and can be delegated some decision-making powers (see above).

The planning and decision-making process is a back and forth between the planners/experts and the politicians/diplomats, with key decisions being taken by the Council itself (i.e. Ministers). Furthermore, once an Operation Commander (for military operations) or Head of Mission (for civilian missions) has been appointed, he/she also plays a key role in the planning process. The ‘crisis management procedures’, which describe this process, have been detailed in a document entitled ‘Suggestions for procedures for coherent, comprehensive EU crisis management’.²⁸ However, while these procedures are in practice generally quite closely adhered to, they are flexible and only provide guidelines:

These crisis management procedures (CMP) have been drawn up to include crises of the highest degree of complexity. Although the widest range of activities during the crisis cycle is described and appears sequentially, this is only for ease of reference. Therefore, the CMP do not limit the EU to developing its approach to a crisis in the sequence set down here. On the one hand, many instruments and processes mentioned might be relevant in several or all phases of a crisis, on the other hand, some of the processes mentioned may be skipped altogether. In particular, recommendations concerning the identification and/or the appointment of an Operation Headquarters (OHQ) and an Operation Commander (OpCdr) may be made in the process at any suitable moment, and when appropriate, without prejudice to respective prerogatives and responsibilities.

²³ See generally Council Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee, OJ 2001 L 27/1.

²⁴ See generally Council Decision 2001/79/CFSP of 22 January 2001 setting up the Military Committee of the European Union, OJ 2001 L 27/4 and <http://www.consilium.europa.eu/showPage.aspx?id=1648&lang=EN>.

²⁵ See generally Council Decision 2000/354/CFSP of 22 May 2000 setting up a Committee for Civilian Aspects of Crisis Management, OJ 2000 L 127/1. On the EUMC and CIVCOM, see also M.K. Davis Cross, *Cooperation by Committee* (2010), available online at <http://www.iss.europa.eu>.

²⁶ See generally Council Decision 2001/80/CFSP of 22 January 2001 on the establishment of the Military Staff of the European Union, OJ 2001 L 27/7, as amended by Council Decision 2005/395/CFSP of 10 May 2005, OJ 2005 L/17 and Council Decision 2008/298/CFSP of 7 April 2008, OJ 2008 L 102/25, and <http://www.consilium.europa.eu/showPage.aspx?id=1039&lang=en>.

²⁷ See Council Decision 2010/427/EU of 26 July 2010 Establishing the Organisation and Functioning of the European External Action Service, OJ 2010 L 201/30 (*corrig.* OJ 2010 L 217/12), especially Articles 4(3)a and 7(1) and the Annex. See generally <http://eeas.europa.eu>.

²⁸ Council Doc. 11127/03 of 3 of July 2003. See also the EU Concept for Military Planning at the Political and Strategic Level, Council Doc. 10687/08 of 16 June 2008. For a brief discussion, see Grevi, ‘ESDP Institutions’, in Grevi, Helly & Keohane (eds.), *supra* note 2, 53-59.

Furthermore, many of these processes, such as the development of a crisis management concept (CMC), are iterative in nature.²⁹

In essence,³⁰ these procedures provide for the development of four planning documents (which are normally classified documents), each of which is submitted to PSC and then to the Council,³¹ after having been examined by the relevant preparatory bodies (usually the EUMC, CIVCOM and/or the PMG), which issue advice or recommendations or may amend the documents³²:

- a *Crisis Management Concept*, which is ‘a conceptual framework describing the EU's overall approach to the management of a particular crisis, addressing the full range of activities’; it “is an important tool to ensure the coherence and comprehensiveness of possible EU actions by taking account of the range and scale of the different instruments available to the Union. However, the structure of CMC will need to remain flexible and adaptable, as the actual shape of each CMC will be determined by a number of variables,’ (p. 45, note 13);
- *Military, Police or Civilian Strategic Options*, which should inter alia include an assessment of feasibility and risk, a Command and Control structure and force capability/personnel requirements (see §§ 39-47, pp. 13-15);
- a *Concept of Operations* (CONOPS), normally developed by the Operation Commander (for military missions) or the CPCC (for civilian missions); for military operations this includes guidelines on the use of force; it is accompanied by a Statement of Requirements (detailing the necessary forces/personnel and assets);
- an *Operation Plan* (OPLAN),³³ normally developed by the Operation Commander (for military missions) or the Head of Mission (for civilian missions); the OPLAN contains the specifics of the operation and is often rather long, in part due to many annexes, which normally inter alia address legal issues and the use of force;³⁴
- in military operations in which the use of force is authorized (beyond self-defence³⁵), there are also *Rules of Engagement* (ROE) requested by the Operation Commander

²⁹ Doc. 11127/03, p. iii.

³⁰ The flowchart alone in the document comprises 3 pages and one page of explanations (*id.*, pp. 1-4) and some phases/documents have been omitted here, e.g. the military strategic options directive and the initiating military directive. In addition, as the document dates from 2003, it does not reflect more recent institutional developments, e.g. the setting up of the CPCC. For military operations, see also the ‘planning snake’ at p. 11 of Council Doc. 10687/08, *supra* note 28.

³¹ Via the Committee of Permanent Representatives (COREPER), unless the written procedure is used.

³² On the civilian side, CIVCOM may amend planning documents, whereas on the military side this is rarely done, although Member States’ comments are sought on a draft planning document before it is formally submitted.

³³ In the case of some coordinating actions or training missions, the planning documents may be named differently. See e.g. the ‘Mission Plan’ approved by Article 1 of Council Decision 2010/197/CFSP of 31 March 2010 on the launch of a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia), OJ 2010 L 87/33 and the Council approved ‘implementation plan’ referred to in Article 2(2) of Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO), OJ 2008 L 252/39.

³⁴ For an example of a ‘sanitized’ (main body of an) OPLAN, see EU Council Doc. 7855/03 of 28 March 2003 (on Concordia).

³⁵ In the training mission EUTM Somalia, no ROE have been issued. Hence Article 1 of Council Decision 2010/197/CFSP of 31 March 2010 on the launch of a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia), OJ 2010 L 87/33 does not refer to ROE. It should be pointed out that in EU and NATO practice, (individual – as opposed to inter-State) self-defence broadly speaking

and authorized by the Council, together with the OPLAN and based on the EU's policy and doctrine on the use of force;³⁶ ROE may be described in short as instructions concerning the use of force; Member States may issue caveats applicable to their contingents but these may only impose further *restrictions* on the use of force; the use of caveats permits Member States to ensure that their forces can respect any political or legal restrictions that are particular to a given Member State³⁷ without imposing these restrictions on the other Member States.

These operation-specific planning documents take into account generic CSDP documents, including a series of concepts.³⁸ They are not legal instruments and are developed in parallel with the legal instruments mentioned above.

In addition, for military operations a force generation process takes place.³⁹ For civilian operations, the manning/recruitment process involves a 'call for contributions'.

As a final point, the Treaty of Lisbon has introduced the possibility to entrust the execution of a task, within the Union framework, to a group of Member States which are willing and have the necessary capability for such a task (Articles 42(5) and 44 EU Treaty). This is not further discussed here.

means defence against an actual or imminent attack against oneself or one's colleagues and possibly third persons (the precise scope depends on applicable domestic law). Other instances of the use of force, e.g. to detain suspected criminals or to accomplish certain tasks, are covered by rules of engagement (ROE) that are considered to be distinct from self-defence (although there may be some overlap). For a more elaborate discussion, see Häußler, *supra* note 4, at 94-96 and Boddens-Hosang, 'Force Protection, Unit Self-defence, and Extended Self-defence' and 'Personal Self-defence and Its Relationship to Rules of Engagement', in Gill & Fleck (eds.), *supra* note 4, respectively at 415-427 and 429-443 and Boddens Hosang, 'Self-Defence in Military Operations: The Interaction between the Legal Bases for Military Self-Defence and Rules of Engagement', 47 *Military Law and the Law of War Review* (2008) 25-96. In contrast, in UN language, self-defence in an extended sense may include the use of force for mission accomplishment. See on the use of force in UN operations, T. Findlay, *The Use of Force in UN Peace Operations* (2002); S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (2004), 99-125, especially at 103-106 and Zacklin, 'The Use of Force in Peacekeeping Operations', in N. Blokker & N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality: A Need for Change?* (2005), 91-106.

³⁶ The EU's policy and doctrine in this field is set out in the Concept for the Use of Force in EU-led Military Operations (currently second revision, EU Council Doc. 17168/09 of 4 December 2009, EU RESTREINT, declassified to a very limited extent in EU Council Doc. 17168/09 EXT 1 of 2 February 2010; the previous version (first revision) is EU Council Doc. 6877/06 of 28 February 2006, EU RESTREINT, declassified to a very limited extent in EU Council Doc. 6877/06 EXT 1 of 31 March 2010). Paragraphs 3 and 4 of the 2009 concept (at 6-7) respectively state that 'The purpose of this paper is to define the framework and principles for the use of force by military units and individuals in EU-led military operations. It also aims to serve as a reference document for defining principles of use of force, including ROE, for any EU-led military contribution to other military operations' and that 'This Use of Force concept describes the overall approach to the use of force and its legal framework, sets out the EU procedures for requesting, authorising and implementing ROE, and presents a compendium of ROE in Annex A'. For a useful discussion and examples of ROE more generally, see the International Institute of Humanitarian Law's *Rules of Engagement Handbook* published in 2009 (see <http://www.iihl.org/iihl/Documents/rule%20engagement%20definitive.pdf>). See also Chapters 5.3, 5.4, 6.3, 6.4, 22 and 23 in Gill & Fleck (eds.), *supra* note 4.

³⁷ For instance resulting from a Member State's domestic law (the OPLAN and ROE cannot require a Member State's forces to do something contrary to their national law) or specific treaty obligations (or interpretations thereof).

³⁸ E.g. the EU Concept for Logistic Support for EU-led Military Operations (EU Council Doc. 10963/08 of 19 June 2008); the EU Concept for Reception, Staging, Onward Movement & Integration (RSOM&I) for EU-led Military Operations (EU Council Doc. 10971/08 of 19 June 2008) and the EU Concept for Strategic Movement and Transportation for EU-led Military Operations (EU Council Doc. 10967/08 of 19 June 2008).

³⁹ See EU Concept for Force Generation, EU Council Doc. 10690/08 of 16 June 2008.

B. Command and Control

In terms of command and control, the highest level of military command in EU military operations rests with the Operation Commander. The Operational Headquarters (OHQ) assisting the Operation Commander may be made available by a Member State, by NATO under the Berlin plus arrangements,⁴⁰ or may consist of the EU Operations Centre, which then has to be activated. The Operation Commander will normally receive operational control over forces put at his disposal by the participating States via a transfer of authority.⁴¹ The next command level, the highest one in the field, is the Force Commander.

On the civilian side, there is a permanent Civilian Operation Commander, who, as a rule, exercises command and control of all civilian operations at the strategic level, supported by the CPCC, while the Head of Mission exercises command and control at theatre level.⁴²

As the issue of command and control is important and sometimes misunderstood, it merits a few remarks here. First, the fact that ‘full command’ is retained by participating States⁴³ does not mean that EU Commanders have no command or control. Rather, through the transfer of authority certain aspects of this command and control are transferred to the EU Operation Commander. Indeed, when participating States want to regain *complete* command and control, they issue a reverse transfer of authority to bring their forces back under their complete command and control. This has for instance occurred on several occasions in the context of operation Atalanta (it is relatively easy to carry out in relation to ships as these are easily separable units). Such reverse transfers of authority would not be necessary if participating States did keep complete command and control. Second, it is sometimes said that in the context of the EU (and NATO), less command and control is transferred to the organisation/operation/Commander than in the case of UN operations. This is not correct.⁴⁴ Third, the issue of command and control must be distinguished from the question of criminal and disciplinary jurisdiction over individual soldiers/staff. The fact that participating States have criminal and disciplinary jurisdiction over their soldiers/staff deployed in EU

⁴⁰ On EU-NATO relations regarding EU missions, see Naert, ‘EU Crisis Management Operations and Their Relations with NATO Operations’, in Z. Hegedüs, D. Palmer-DeGreve & S.L. Bumgardner (eds.), *NATO Legal Deskbook* (2010, 2nd ed.), 281-300.

⁴¹ For the command and control arrangements in military CSDP operations, see Council Doc. 11096/03 EXT 1 (26 July 2006; this is a partially declassified version), especially pp. 6-7 (with definitions of the different kinds of command and control) and pp. 15-16. In this document, Operational Control (OPCON) is defined as ‘The authority granted to a commander to direct forces assigned, so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location; to deploy units concerned and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it of itself, include administrative or logistic responsibility’. The most recent version of the EU Concept for Military Command and Control is not in the public domain.

⁴² For the command and control arrangements in civilian CSDP operations, see Council Doc. 9919/07 EXT 2 (1 February 2008; this is a partially declassified version).

⁴³ Council Doc. 11096/03 EXT 1, p. 7, states that full command ‘covers every aspect of military operations and administration and exists only within national services’.

⁴⁴ Section 7 of the Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to the United Nations Peace-keeping Operation (UN Doc. A/46/185, 23 May 1991, Annex), provides that ‘During the period of their assignment to [the UN operation], the personnel made available by [the Participating State] shall remain in their national service but shall be under the command of the [UN] Accordingly, the [UN Secretary-General] shall have full authority over the deployment, organization, conduct and direction of [UN operation], including the personnel made available by [the Participating State]’. However, in practice States certainly do not cede more than operational command to the UN. See Cammaert & Klappe, ‘Authority, Command, and Control in United Nations-led Peace Operations’, in Gill & Fleck (eds.), *supra* note 4, 159-162.

operations⁴⁵ does not mean in any way that these soldiers/staff are not under the command and control of the Operation Commander.⁴⁶

As mentioned above, the PSC exercises, under the responsibility of the Council and of the High Representative, ‘political control and strategic direction’ of EU operations. Since the Council and PSC are composed of representatives of all EU Member States and decide unanimously on these matters (see above), this is how Member States can exercise control. This is one of the points on which there is a significant difference with the UN, where the Security Council plays the key role but has a more limited membership - hence the discussions in the UN on ways of better involving troop contributing countries. However, it should be stressed that this relates to *political* control and *strategic direction* and does not constitute interference with the chain of command.

3. The Application of International Humanitarian Law and Human Rights Law in the Planning and Decision-making Processes for EU Missions

In this section, I will cover the applicability of international humanitarian law and human rights law to EU missions, albeit only very briefly. I will then describe how the application of these two branches of international law is addressed in the planning for and decision-making on EU missions.

A. The Applicability of International Humanitarian Law

International humanitarian law - or the *ius in bello* or the law of armed conflict⁴⁷ - only applies to situations of armed conflict and occupation. The EU and its Member States accept that if EU-led forces become a party to an armed conflict, international humanitarian law will fully apply to them.⁴⁸ In the context of the EU, this was inter alia reflected in the Salamanca Presidency Declaration, which provided that ‘Respect for International Humanitarian Law is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict to which the forces are party’.⁴⁹ This position corresponds to that reflected in Article 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel⁵⁰ and, to some extent, in the UN Secretary-General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law.⁵¹

⁴⁵ For an articulation in relation to a third State participating in an EU operation, see e.g. Article 3(3)-(4) Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations, OJ 2005 L 182/29. For an example in a civilian EU mission, see Articles 8(6) and 10(2) Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ 2008 L 42/92.

⁴⁶ This is the same in the framework of UN operations.

⁴⁷ I use these terms interchangeably even though they are sometimes distinguished.

⁴⁸ See generally Naert, *supra* note 2, at 463-540; A.-S. Millet-Devalle (ed.), *L’Union européenne et le droit international humanitaire* (2010) and Zwanenburg, ‘Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations’, in Blockmans (ed.), *supra* note 2, 395-416.

⁴⁹ The outcome of the international humanitarian law European seminar of 22-24 April 2002 in Salamanca, Doc. DIH/Rev.01.Corr1 (on file with the author).

⁵⁰ New York, 9 December 1994, 2051 *U.N.T.S.* 391.

⁵¹ UN Doc. ST/SGB/1999/13, 6 August 1999, available online at <http://www.icrc.org/eng/resources/documents/misc/57jq71.htm>. Section 1.1 provides that ‘The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants ...’. However, the bulletin then adds ‘to the extent and for the duration of their engagement. They are accordingly

However, given that only some EU missions might involve the use of armed force *as a party to an armed conflict*, international humanitarian law is likely to be applicable only in few EU missions. EU policy is accordingly that international humanitarian law does not necessarily apply in all EU operations. In fact, so far, EU-led forces have not become engaged in combat as a party to an armed conflict in any of the EU's military operations. While international humanitarian law could have become applicable if the situation would have escalated in some of these operations, especially Artemis and EUFOR Tchad/RCA, this did not happen.⁵²

Nevertheless, even when international humanitarian law does not apply to EU-led forces, it may be relevant for the relations between the parties to the conflict. Moreover, the EU and its Member States remain fully aware of the potential obligations of EU-led forces under international humanitarian law, in particular when the situation escalates (see also below).

The EU legal instruments relating to EU missions have not referred to international humanitarian law so far, except in two cases where status agreements for non-EU missions which did refer to international humanitarian law were made applicable to an EU mission, namely for the AMIS Supporting Mission via the African Union SOMA and for EUFOR DR Congo via the MONUC SOFA.⁵³

B. The Applicability of International Human Rights Law

When international humanitarian law does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct of EU operations (that is not to say that human rights law is not relevant when international humanitarian law does apply).⁵⁴

The applicability of human rights *as a matter of law* remains controversial in some respects, such as the extraterritorial application of the European Convention on Human Rights,⁵⁵ the

applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence'. This is problematic because the mere fact that the use of force in self-defence is *permitted* obviously cannot entail the applicability of international humanitarian law. Moreover, even if force is used in self-defence, international humanitarian law will only apply when the force used crosses the threshold of an armed conflict. E.g., when an EUFOR soldier is attacked by criminals for personal profit and uses force in self-defence, this is clearly not regulated by international humanitarian law.

⁵² See Naert, 'Challenges in Applying International Humanitarian Law in Crisis Management Operations Conducted by the EU', in Millet-Devalle (ed.), *supra* note 48, at 142-143.

⁵³ See respectively section 8a Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur area of Sudan (CFC) (Khartoum, 4 June 2004, <http://www.african-union.org/DARFUR/Agreements/soma.pdf>), made applicable by an exchange of letters between the (EU Council) Secretary-General/High Representative and the President of the African Union Commission (see Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan, OJ 2005 L 188/46, 15th consideration of the preamble and Article 12), and Article 6(a) Agreement between the United Nations and the Democratic Republic of the Congo on the status of the United Nations Mission in the Democratic Republic of the Congo (Kinshasa, 4 May 2000, French version on file with the author), made applicable by UN Security Council Resolution 1671 (25 April 2006), § 12.

⁵⁴ See more extensively Naert, *supra* note 2, at 541-658 and Naert, 'Accountability for Violations of Human Rights Law by EU Forces', in Blockmans (ed.), *supra* note 2, 375-393.

⁵⁵ See European Court of Human Rights, *Soering v. UK*, 7 July 1989; *Drozd and Janousek v. France and Spain*, 26 June 1992; *Loizidou v. Turkey*, 23 February 1995 (preliminary objections) and 18 December 1996 (merits); *Cyprus v. Turkey*, 10 May 2001; *Halima Musa Issa and Others v. Turkey*, 30 May 2000 (admissibility) and 16 November 2004 (merits); *Ilie Ilaşcu and Others v. Moldova and Russia*, 4 July 2001 (admissibility) and 8 July 2004 (merits); *Vlastimir and Borka Bankovic and Others v. Belgium and Others*, 12 December 2001 (admissibility); *Öcalan v. Turkey*, 12 May 2005 (Grand Chamber); *Isaak v. Turkey*, 28 September 2006 (admissibility); *Mansur Pad and Others v. Turkey*, 28 June 2007 (admissibility); *Solomou v. Turkey*, 24 June 2008; *Al-Saadoon and Mufdhi v. UK*, 30 June 2009 (admissibility) and *Al-Jedda v. UK* (Application No. 27021/08) and *Al-Skeini v. UK* (Application No. 55721/07), both 7 July 2011 (the domestic judgments are [2007]

question of derogation in times of emergencies and its applicability to peace operations, the relationship between human rights and international humanitarian law⁵⁶ and the impact of UN Security Council mandates on human rights.⁵⁷

There are also some distinct EU aspects. In particular, pursuant to Article 6 post-Lisbon EU Treaty, the EU ‘recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties’, the EU is bound by human rights as general principles of EU law (as was the case before the Lisbon Treaty) and it shall accede to the European Convention on Human Rights.⁵⁸ The latter would be a milestone

UKHL 26 and [2007] UKHL 58). See also European Court of Human Rights, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Grand Chamber, 31 May 2007 (admissibility). See generally U. Erberich, *Auslandseinsätze der Bundeswehr und Europäische Menschenrechtskonvention* (2004). For an analysis not limited to the ECHR, see M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009); D. Lorenz, *Der territoriale Anwendungsbereich der Grund- und Menschenrechte - zugleich ein Beitrag zum Individualschutz in bewaffneten Konflikten* (2005) and J. Cerone, ‘Human Dignity in the Line of Fire: The Application of International Human Rights Law during Armed Conflict, Occupation, and Peace Operations’, 39 *Vanderbilt JTL* (2006) 1447, at 1447-1510.

⁵⁶ For a partial EU perspective, see paragraph 12 of the (updated) European Union Guidelines on promoting compliance with international humanitarian law (IHL), OJ 2009 C 303/12:

It is important to distinguish between international human rights law and IHL. They are distinct bodies of law and, while both are principally aimed at protecting individuals, there are important differences between them. In particular, IHL is applicable in time of armed conflict and occupation. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them.

See more generally R. Arnold & N. Quéniwet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008); ICJ, Advisory Opinion on the *Legal consequences of the construction of a wall in the occupied Palestinian territory*, 9 July 2004, §§ 105-106; Human Rights Committee, General Comment 31 (21 April 2004, CCPR/C/74/CRP.4/Rev.6), § 11 and European Court of Human Rights, *Varnava and Others v. Turkey*, 18 September 2009, § 185. Compare International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi*, UN Doc. A/CN.4/L.682, 13 April 2006, at 168-181, especially 175-176.

⁵⁷ By virtue of Article 103 of the UN Charter, obligations under the UN Charter prevail over other international agreements. Where UN Security Council resolutions authorize the use of all necessary means, States often invoke this as a basis for partially limiting or setting aside some human rights in peace operations. For a leading judgment, see UK House of Lords, *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*, [2007] UKHL 58, 12 December 2007, available online at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm>, which was, however, recently (partially) overruled by the European Court of Human Rights in *Al-Jedda v. UK* (7 July 2011), in which the Court ruled that “*In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law*” (§ 102) and did not accept that that was the case in the case at hand. The European Court of Justice has not shown much deference to the UN Charter in some of its judgments on counter-terrorism measures, see e.g. Case C-402/05 P, *Kadi v. Council and Commission*, judgment of 3 September 2008 (but see General Court, Case T-85/09, *Yassin Abdullah Kadi v. Commission*, 30 September 2010, § 115). Until its *Al-Jedda* judgment cited above, the European Court of Human Rights had essentially shied away from ruling on this question so far: see especially *Behrami and Behrami v. France* (Application No. 71412/01) and *Saramati v. France, Germany and Norway* (Application No. 78166/01), joined admissibility decision of 31 May 2007. On Article 103 UN Charter, see e.g. UN Doc. A/CN.4/L.682, supra note 56, at 168-181, especially 175-176 and Liivoja, ‘The Scope of the Supremacy Clause of the United Nations Charter’, 57 *ICLQ* (2008) 583-612.

⁵⁸ On the latter, see also article 17 of Protocol No. 14 to the European Convention on Human Rights (Strasbourg, 13 May 2004, C.E.T.S. No. 194, entered into force on 1 June 2010), which inserted a new paragraph in article 59 European Convention on Human Rights stipulating that ‘[t]he European Union may accede to this Convention’. The Council of the EU adopted negotiating directives for the EU’s accession to the European Convention on

in international human rights law.⁵⁹ Articles 3(5) and 21 EU Treaty reinforce this: they provide that in its external relations, the Union shall contribute to ‘the protection of human rights, ..., as well as to the strict observance and the development of international law’; that its actions on the international scene shall be guided by ‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, ... and respect for the principles of ... international law’ and that its actions and policies shall aim to ‘consolidate and support democracy, the rule of law, human rights and the principles of international law’.

In any event, at least as a matter of *policy and practice* human rights provide significant guidance in EU operations and in practice, EU operational planning and rules of engagement take into account internationally recognised standards of human rights law.⁶⁰ The EU has inter alia developed a number of documents on mainstreaming human rights (and gender) into the CSDP.⁶¹

This practice has been explicitly reflected in legal instruments relating to some of the more recent EU operations (since the operational planning documents and rules of engagement are not in the public domain, these are the main public sources that support the above analysis). In particular, on the civilian side, EULEX Kosovo is to ‘ensure that all its activities respect international standards concerning human rights and gender mainstreaming’.⁶² On the military side, suspected pirates or armed robbers at sea captured by EUNAVFOR Somalia / Atalanta⁶³ may not be transferred to a third State ‘unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment’.⁶⁴ The latter provision has led to the conclusion of the Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the

Human Rights on 4 June 2010 and the negotiations started on 7 July 2010. See http://www.coe.int/t/der/brusselsoffice/Articles/RestArticles/Jagland_Reding_070710_en.asp.

⁵⁹ The EU has already concluded the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006; see Council Decision 2010/48/EC of 26 November 2009, *O.J. L* 23, 27 January 2010, p. 35) and ratified this Convention on 23 December 2010. However, the EU’s accession to the ECHR will be a more important precedent.

⁶⁰ Compare Hazelzet, ‘Human Rights Aspects of EU Crisis Management Operations: From Nuisance to Necessity’, 13 *International Peacekeeping* (2006) 564-581. For two case-studies, see W. Troszczynska - van Genderen, *Human Rights Challenges in EU Civilian Crisis Management* (2010), available online at <http://www.iss.europa.eu>.

⁶¹ See the compilation available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news144.pdf. See also J. Arloth & F. Seidensticker, *The ESDP Crisis Management Operations of the European Union and Human Rights* (2007). See also supra note 1.

⁶² See Article 3(i) of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ 2008 L 42/92.

⁶³ On this operation, see generally <http://www.consilium.europa.eu/showPage.aspx?id=1518&lang=en> and <http://www.eunavfor.eu> and Naert supra note 2, at 179-191.

⁶⁴ See Article 12 Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301/33 (*corrig.* OJ 2009 L 253/18). On the transfer of detainees more generally, see also Naert, ‘Setting the Scene: Transfers and Humanitarian Concerns - An EU Perspective’ and ‘Ways Forward. How to Operationalise the Legal Obligations?’, in H. Sagon *et al.* (eds.), *Transfers of Persons in Situations of Armed Conflict. 9th Bruges Colloquium, 16-17 October 2008 /...* (2009), respectively 18-26 and 107-112 and other contributions in this publication (*Collegium* No. 39, available at http://www.coleurop.be/template.asp?pagename=pub_collegium).

European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, which contains substantial provisions aiming to ensure respect for human rights.⁶⁵ A similar agreement was also concluded with the Seychelles and Mauritius.⁶⁶ Provisions along the same lines have also been included in participation agreements for this operation.⁶⁷

C. The Application of International Humanitarian Law and Human Rights Law in the Planning for and Decision-making on EU Missions

From the early stages of the planning process described above, legal issues are taken into account and are reflected in the various planning documents. The relevant legal considerations become more detailed and specific as the plans become more detailed and concrete and the planning and decision-making process proceeds towards the establishing and launching of an operation. Thus, while a Crisis Management Concept will only contain brief legal considerations, an OPLAN will contain much more detailed and specific guidance on legal issues. For military operations, an OPLAN usually contains a specific annex dealing with legal issues as well as an annex on the use of force. The latter is closely connected to the Rules of Engagement.

As regards the use of force, the EU's policy explicitly and clearly requires respect for international law and political guidance based on military and legal advice:

1. The authorisation of, and guidance on, the use of force in such operations must be given by the competent political authorities on the basis of military and legal advice. This authorisation and guidance is an essential part of the political guidance and strategic direction over EU-led military operations, which is exercised by the Political and Security Committee (PSC) under the authority of the Council.
2. All use of force in EU-led military operations - in self-defence and under the Rules of Engagement (ROE) - must always be in conformity with international standards, especially international law.⁶⁸

In addition, a number of legal aspects will be dealt with in legal instruments relating to the mission rather than, or in addition to, the planning documents (see the overview above). The Council Working Party of Foreign Relations Counsellors (RELEX) is particularly involved in the scrutiny and drafting of those legal instruments.

Once an operation is launched, legal considerations may furthermore be reflected in implementing documents, such as standard operating procedures (e.g. in relation to detention or the handling of evidence in case of arrest of suspected criminals, including pirates). As

⁶⁵ OJ 2009 L 79/49.

⁶⁶ Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, OJ 2009 L 315/37 and Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, OJ 2011 L 254/3.

⁶⁷ See Article 3 of and the Annex to the Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), OJ 2009 L 202/84 and Article 3 of and the Annex to the Agreement between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), OJ 2010 L 88/3.

⁶⁸ EU Council Doc. 17168/09 EXT 1 of 2 February 2010, supra note 36, at 6, §§ 1-2.

regards the ROE, the Operation Commander decides to what extent he implements the authorised ROE, i.e. which ROE (from among those authorised) he passes down to his subordinate commanders. He may retain certain ROE at his level.

At the level of the Union, legal expertise in this field is available within the Council's General Secretariat, in particular in the Council Legal Service, as well as in the European External Action Service, including the CPCC and EUMS.⁶⁹ In addition, when Member States consider the approval or adoption of the relevant documents, presumably their staffing process involves their legal services.⁷⁰

In addition, depending on their scale and nature, the EU missions may have their own legal advisors/experts. E.g., in executive EU military operations, there are usually two legal advisors in the Operational Headquarters as well as one or more legal advisors at the level of the Force Headquarters and below. Due to the importance of legal issues in operation Atalanta, there are even three legal advisors in the Operational Headquarters.

Specifically with regard to international humanitarian law and human rights law, an assessment must be made for each operation whether or not either or both branches of international law are, or may become, applicable to the mission as a matter of law and/or should be applied as a matter of policy. In addition, it may be relevant to determine the obligations of the parties in theatre, e.g. in order to report on violations of international law.

In some cases, this analysis is relatively simple. E.g., it is clear that none of the EU civilian missions launched so far amounted to an occupation or participation in an armed conflict. Similarly, international humanitarian law clearly does not apply to the EU's counter-piracy activities in its operation EUNAVFOR Somalia/Atalanta.⁷¹

However, in some cases the assessment is more complex. For instance, in the case of a military mission in a theatre where an armed conflict is ongoing a robust mandate may lead to the EU forces becoming engaged in combat and becoming a party to the conflict, even if this is not intended. This risk was for instance present in EUFOR Tchad/RCA. In such a case, the planning documents and especially the ROE should be flexible enough to address the scenario of such an escalation. There are various ways to achieve this flexibility, including defining the circumstances that will trigger more offensive/robust ROE combined with retaining such ROE at the level of the Operation Commander. Alternatively (or in addition), the Operation Commander may request additional or amended ROE as a matter of urgency. The PSC, which is usually delegated the power to amend the ROE within certain limits (see above), and if necessary the Council,⁷² should be able to decide on such a request quickly.

Difficulties may arise when Member States have different views on the qualification of a situation/mission and/or the applicable law. Fortunately, there are a number of factors that limit such disagreements, or at least their impact.⁷³ First, both the international humanitarian law and human rights treaty obligations of Member States converge very strongly, thus

⁶⁹ Until recently, the legal advisor to the Director General of the EUMS was a member of the Council Legal Service: see the footnote in the EUMS organigramme annexed to the EUMS decision (supra note 26).

⁷⁰ E.g., during my time as a legal advisor in the Belgian Ministry of Defence/Defence Staff, this was certainly the case for any OPLAN and ROE for military operations.

⁷¹ Admittedly, UN Security Council Resolution 1851 (16 December 2008) provides in its § 6 that any measures undertaken pursuant to the authority of that paragraph 'shall be undertaken consistent with applicable international humanitarian and human rights law'. However, as is explained below, the word 'applicable' leaves open whether international humanitarian law does in fact apply.

⁷² Through a written procedure or, if need be, at a specially convened Council meeting.

⁷³ See also Naert, supra note 52, at 147-149.

limiting legal interoperability issues.⁷⁴ In addition, a significant body of international humanitarian law rules constitutes customary international humanitarian law.⁷⁵ Second, policy choices may overcome different legal obligations or interpretations of obligations. For instance, Finland has accepted that its forces will not use anti-personnel mines in CSDP operations even though Finland has no international humanitarian law treaty obligation to this effect. Such a policy choice may minimize legal discussions. E.g., if it is decided to apply human rights standards without specifying whether this is a legal obligation or a policy choice, those taking the view these standards apply as a matter of law may be satisfied because they will effectively be applied and those who may not be willing to accept that they apply as a matter of law may be willing to accept that they are applied as a matter of policy without necessarily reflecting a recognition of a legal obligation. Such policy choices may be made on an ad hoc basis for a given mission or may be reflected in horizontal policy or conceptual documents.

Ideally, the OPLAN should clarify as much as possible the applicable law, including by specifying whether international humanitarian law or human rights law apply. However, this is not always the case, possibly in part to retain some flexibility when the situation may evolve. The absence of such a determination may be reflected in references to ‘applicable’ rules of international humanitarian law or human rights law, which does not clarify whether/when/which of those rules actually are applicable and means that an Operation Commander may have to determine the applicable rules to some extent, with the assistance of legal advice at his/her level.

In conclusion, legal expertise on international humanitarian law and human rights law is available in the EU and its operations and legal considerations in this field are taken into account throughout the planning and decision-making process for EU missions, and subsequently in the implementation of the mission. The mandate, OPLAN and ROE reflect the applicable law, even though the latter may not always be identified in great detail, e.g. to accommodate possible evolutions in the situation, and may require further assessment at the level of the operation.

⁷⁴ Article 21(3) of the Convention on Cluster Munitions (adopted in Dublin on 30 May 2008 and signed on 3 December 2008) specifically addresses the matter of joint operations by State parties and non State parties. However, this is an exception and most treaties do not (clearly) address this.

⁷⁵ For a good starting point, see J.-M. Henckaerts & L. Doswald-Beck (Eds.), *Customary International Humanitarian Law* (2005). See also E. Wilmschurst & S. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) and P. Tavernier & J.-M. Henckaerts (eds.), *Droit international humanitaire coutumier: enjeux et défis contemporains* (2008). For a critical response, see the initial US response to the study, in 89 No. 866 *IRRC* (2007) 443-471.