

# Human rights applied to CSDP operations and missions

## SUMMARY

The European Union (EU) must not only promote the observance of human rights by other international actors, but also respect them itself in the course of all its actions abroad. However, the applicability of international human rights instruments to EU Common Security and Defence Policy (CSDP) operations is problematic since the EU itself, as opposed to its Member States, is not party to these instruments. International human rights apply to EU-led missions as part of customary international law.

These human rights obligations are enforced through specific accountability mechanisms. The EU is also responsible for human rights violations committed by private military and security services when fulfilling duties assigned by the EU.

The envisaged accession of the EU to the European Convention on Human Rights raises questions as to the attribution of acts during CSDP operations to the Member States and EU. The European Court of Human Rights' case law on the extra-territorial application of the Convention gives guidance as to its future relevance for EU missions abroad.



*EUFOR mission in Chad.*

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## Background

### Human rights standards in the EU

The Treaties establish that respect for human rights is part of the EU's values, on which the Union is founded ([Article 2 TEU](#)). The human rights standard to be applied when EU institutions act is pieced together by the common constitutional traditions of the Member States (MS), the EU Charter of Fundamental Rights, as well as by international instruments for the protection of human rights ratified by the EU or MS, of which the most significant is the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>1</sup> But human rights not only need to be observed by MS and EU institutions when acting on internal EU affairs. They must also guide EU external action ([Article 21\(1\) TEU](#)) and be promoted outside the EU ([Article 3\(5\) TEU](#)).

### CSDP missions and operations

Since the creation in March 2002 of the EU Police Mission in Bosnia and Herzegovina through a Council Joint Action, some 30 civilian “missions” and military “operations” have been launched under the [CSDP](#). There are [currently](#) 13 civilian and four military operations. Also mixed – civilian-military – missions are possible, such as that in Darfur, Sudan (AMIS). [Civilian operations](#) consist mainly of training and mentoring of local police and other authorities, *inter alia* with regard to strengthening the rule of law. [Military operations](#) can be deployed to undertake humanitarian and rescue tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking, joint disarmament operations, military advice and assistance tasks, and post-conflict stabilisation tasks ([Article 43\(1\) TEU](#)).

#### EU Battlegroups

The [Battlegroup](#) concept, launched in 2004, became a central part of the military [Headline Goal](#) 2010 adopted by the General Affairs and External Relations Council. A Battlegroup is a force of 1 500 personnel, at high readiness to deploy within 10 days after an EU decision, and able to be sustained for up to 30 days (extendible to 120 days with rotation). They are formed by a framework nation or by a multinational coalition of MS. MS committed to the formation of 13 Battlegroups, with the aim of always having two on stand-by. Although the concept reached full operational capacity in 2007, no Battlegroup has yet been deployed.

### EU-led operations and human rights

EU law sets the human rights to be respected during CSDP operations. The EU Charter of Fundamental Rights contains a catalogue of fundamental rights to be observed by the EU institutions in their actions. Moreover, the Charter has also to be observed by MS when implementing Union law, which, according to many, is the case when MS act on a mandate under a Council Decision setting up a CSDP mission.<sup>2</sup> Furthermore, according to [Article 6\(3\) TEU](#), the ECHR is also a source of EU fundamental rights to be observed by the EU and MS.

Conversely, the applicability of international human rights law, which would also bind the EU vis-à-vis third countries and international organisations, is surrounded by uncertainties. These stem from the fact that the EU as such is not a party to the most relevant human rights treaties.<sup>3</sup> Therefore it is questionable whether certain international human rights instruments apply to EU missions abroad, although the EU has not signed them, and if yes, what is their scope of application. An additional challenge comes from the fact that CSDP operations often involve EU institutions, MS forces and possibly also third countries and other international organisations, such as

NATO. Since the different actors involved are subjected to different human rights instruments, it is difficult to establish which of them are applicable. Furthermore, it is often difficult to determine to which of the actors a specific action is attributable.<sup>4</sup>

## International human rights law applied to CSDP missions and operations

### Customary international law

The EU is, since the entry into force of the Lisbon Treaty, an international organisation with legal personality ([Article 47 TEU](#)) and is thus an international law subject with the capacity to bear rights and obligations under international law. In this capacity, the EU recently signed the UN [Convention](#) on the Rights of Persons with Disabilities.

Moreover, Title V TEU (provisions on the Common Foreign and Security Policy – CFSP) contains *inter alia* references to the principles of international law and in particular to the respect of human rights to guide the EU external action (Articles 21, 22 TEU). The CJEU has also [confirmed](#) that the EU must observe international law in its entirety, including the rules of customary international law. Moreover, the fact that almost all MS are party to the most relevant human rights treaties has led many academics to conclude that these represent ‘regional customary international law’ for the EU.<sup>5</sup> This is not new on the international stage as other international organisations, e.g. the UN, are also considered to be bound by customary international law.<sup>6</sup>

Customary international law is defined by Article 38(1)b of the [Statute of the International Court of Justice](#) (ICJ) as “evidence of a general practice accepted as law”.

General principles of international law are those “recognised by civilised nations” (Article 38(1)c of the Statute of the ICJ). They may be codified in international treaties or be part of customary international law.

Therefore, and irrespective of the fact that the EU is not party to the majority of international human rights instruments, it has to comply with **customary international law**, including the **general principles of international law**.<sup>7</sup> These are *inter alia* respect for human dignity, including the prohibition of torture and inhuman treatment; security and liberty of persons, prohibiting unlimited arrest or detention and providing for the right to be heard before any condemnation; the prevention and repression of (sexual) violence, exploitation and abuse, as well as the principle of non-discrimination.<sup>8</sup> This obligation of the EU to respect human rights as part of customary international law also applies abroad (extra-territorial application).<sup>9</sup>

### International humanitarian law

International humanitarian law (IHL) is only applicable during armed conflicts (Article 2, Geneva Convention). It aims at protecting persons who are not, or no longer, taking part in the conflict (civilians, prisoners of war, etc.). The EU however is not usually at the forefront of military operations, which are often undertaken by UN troops. It has mainly intervened in post-crisis situations under a UN mandate. Many argue therefore that the operations in which the EU has been involved so far do not qualify as an “armed conflict” in terms of IHL, as the use of force during such missions has been too insignificant. However, should the EU engage in this type of conflict in the future, it should be noted that IHL instruments such as the 1949 Geneva Conventions would not apply directly to the EU as only states may be parties. Despite this, it is widely accepted that IHL would be applicable to EU operations as part of customary international law.<sup>10</sup>

Human rights protected under international humanitarian law during armed conflicts are largely seen as *lex specialis* to other international human rights.

### Integration of human rights aspects into CSDP operations

EU military operations are launched on the basis of a mandate adopted through an EU Council Decision (formerly a Council Joint Action). The Council mandate<sup>11</sup> and/or the planning documents (operational plan, rules of engagement) of an EU mission usually refer to human rights aspects.

Moreover, a number of guidelines refer to the respect of human rights in such operations, in particular the 2005 [Generic Standards of Behaviour](#) for ESDP operations. These require staff to treat the local population with dignity and respect, regardless of sex, age, ethnic origin, religion, sexual orientation, disability, social or economic status or political views. Also worth mentioning are the 2005 and 2009 [Guidelines](#) on promoting Compliance with International Humanitarian Law. According to them, the principle of compliance with IHL is included in the EU values – upon which the EU is founded.

Other guidelines are the 2003 Council [Guidelines on Children in Armed Conflicts](#), and the [Guidelines](#) on the implementation of UN Security Council resolutions on Women, Peace and Security. In 2008, these documents were compiled into the [Council Handbook](#) on Mainstreaming Human Rights and Gender into European Security and Defence Policy. Whilst some academics see these documents as leading to self-commitment on the part of the EU to certain human rights standards, others point to their lack of binding legal character.<sup>12</sup>

In its [resolution](#) on the implementation of the CSDP of November 2013, Parliament called for the inclusion of human rights and gender advisors in all CSDP missions and for the exchange of best practices amongst CSDP missions. In addition to the EP's [Committee on Foreign Affairs](#), its sub-committees on [Security and Defence](#) and on [Human Rights](#) have repeatedly addressed the issue of protection of human rights during CSDP missions and operations.

In July 2012, the Council adopted an [action plan](#) on human rights. It commits to systematically include human rights, child protection, gender equality and, where relevant, IHL in the mandates of EU missions and operations and in their benchmarks, planning and evaluation.

### Accountability for human rights violations in CSDP operations & missions

#### Accountability mechanisms

Many see the challenge not so much in determining that human rights are applicable to EU missions abroad but rather in their application in practice. Experts attribute cases of abuse *inter alia* to the lack of knowledge and adequate training, the lack of specific accountability mechanisms as well as the difficulty for individuals affected during EU missions to access justice.<sup>13</sup> It is argued that, if left unpunished, breaches of international law by EU forces could negatively affect their legitimacy and obstruct the EU's efforts to promote human rights and the rule of law abroad.

#### Transfer of pirates: EUNAVFOR Somalia

As a general rule, the flag state of the vessel (MS or third country) that captures suspected pirates has jurisdiction over them. However, due to difficulties in prosecuting piracy (usually procedural problems in using the evidence gathered) in many MS, the EU has concluded agreements with Kenya and the Seychelles to transfer captured pirates for prosecution there. Although these [agreements](#) include clauses on their treatment, prohibiting torture and stipulating procedural rights, human rights organisations claim that the detainees are mistreated and that the EU is circumventing its human rights obligations.<sup>14</sup>

In this context, some criticise the full diplomatic immunity that personnel of EU-led operations sometimes enjoy. These are established in agreements on status of forces (SOFAs) for military operations, and status of missions (SOMAs) for civilian missions. SOFAs and SOMAs are bilateral or multilateral treaties that regulate the exercise of the host state's jurisdiction over the visiting force or mission and its members, in particular exemptions from local criminal jurisdiction.<sup>15</sup>

Some point to the lack of protection of the human rights of individuals affected by such operations when its members have full immunity. However, the majority argues that since diplomatic privileges and immunities of military forces are in general compatible with international human rights law, it is sufficient that private individuals in the host state are able to effectively assert their rights in relation to the mission/operation concerned in one form or another.<sup>16</sup> It should be noted that the exemption from local jurisdiction contained in SOFAs and SOMAs does not necessarily lead to impunity. Rather, SOFAs and SOMAs usually set up specific claim mechanisms. Moreover, in 2010, EULEX-Kosovo introduced a [Human Rights Review Panel](#) which reviews alleged human rights violations by EULEX-Kosovo. It is not a judicial or disciplinary body but merely examines victim's claims and recommends remedies other than monetary compensation.

Moreover, under [Article 340\(2\) TFEU](#), the EU must compensate for any damage caused by its institutions or its servants in the performance of their duties. It should be noted however that there is no central EU court dealing with reparation for damages incurred during EU missions and operations since the CJEU has no jurisdiction over CSDP (Articles [24\(2\) TEU](#), [275 TFEU](#)). Some commentators argue therefore that national courts would be responsible for dealing with claims against the EU for actions in CSDP operations.<sup>17</sup>

## Responsibility of the EU and/or MS?

A further question is whether, in respect of CSDP military operations, only the troop-contributing MS, or the EU too, is responsible for violations of IHL and human rights.<sup>18</sup> Only the parties to the conflict are subject to IHL obligations. The EU could be party to an armed conflict as this is not reserved to states only (rebels, etc.). Some suggest applying the test of "effective control" over the troops to determine whether the MS or the EU is party to the conflict in question.<sup>19</sup> Many argue instead that the responsibility is shared between MS and the EU in the case of CSDP operations.<sup>20</sup>

## Private military and security services

The need urgently to achieve operational capabilities, budgetary constraints and the need for special expertise have led to MS increasingly using private military and security services (PMS) during military and civilian operations. The EU itself has employed PMS in a more restricted way, mainly as security guards or support services for transport and logistics.<sup>21</sup> [Reports](#) of violations of civilians' human rights, particularly by US contractors, have intensified the discussion on the lack of democratic accountability and transparency as well as of parliamentary control over PMS.

On the responsibility for human rights and IHL violations by private contractors, it should first be noted that private legal persons are as a general rule not international law subjects so are usually not the addressees of obligations under international law.<sup>22</sup> The decisive factor for EU responsibility for the actions of private contractors is if they can be attributed to it. Some commentators require the international organisation to exercise "effective" or at least "overall" control over the conduct of the private



contractor. Others regard as sufficient that the contractor acts on the basis of functions conferred on them by the international organisation in question.<sup>23</sup>

In this context, Article 340(2) TFEU stipulates the non-contractual liability for any damage caused by its institutions and servants. Thereby "servants" of the Union include not only civil servants but also private contractors authorised by the Union to fulfil official duties.<sup>24</sup> In this way, the Union cannot circumvent its human rights obligations by contracting PMS for missions and operations abroad.

### The European Convention on Human Rights and EU external action

Against this background of an extensive number of instruments applied to CSDP operations, the question of the judicial remedies available to enforce respect of the applicable human rights remains controversial. The CJEU has no jurisdiction in the area of the CSDP. The Lisbon Treaty extended its jurisdiction to the former third pillar of Common Foreign Policy only as regards '[targeted sanctions](#)' against natural or legal persons adopted by the Council (e.g. freezing of funds) (Articles 24(2) TEU, 275 TFEU). Therefore, many count on the future accession of the EU to the ECHR and on the jurisdiction of the European Court of Human Rights (ECtHR) in Strasbourg to rule on the compliance of CSDP missions with the Convention.

#### Extra-territorial applicability of the ECHR

According to Article 1 ECHR, the Convention is applicable to all citizens within the jurisdiction of the contracting states (territorial application). The ECtHR has however established exceptions to this rule where the Convention is applied to actions and omissions outside contracting states' territory. The ECHR applies extra-territorially:

- to acts of diplomatic and consular agents abroad,
- when a state exercises public powers which would normally be exercised by the local government,
- when state agents abroad take a person into custody, and
- when a state exercises effective control over another's territory and individuals (e.g. Turkish occupation of northern Cyprus).

In the leading [case Al Skeini](#), the ECtHR confirmed and extended this case law. It ruled against the UK for not having adequately investigated the deaths of Iraqi civilians during British security operations. It held that the UK had jurisdiction since it had assumed in Iraq the exercise, through its soldiers, of some of the public powers normally exercised by a sovereign government.

#### Attribution of actions during CSDP operations and missions

The ECtHR has several times had to decide whether an act of MS' authorities based on an EU Council Decision or on the EU Treaties should be attributed to the MS or to the EU. In the latter case the ECtHR would have had no jurisdiction since the EU is not a contracting party to the ECHR. The ECtHR established in the [Bosphorus case](#) that the contracting states may not circumvent their obligations under the Convention by entering into cooperation with other states. However, as long as the international organisation in question grants protection of human rights equivalent to the Convention, the Court would not rule on this type of act. The Court has accepted that the EU grants equivalent protection of human rights.

Since most EU-led operations abroad are based on a UN mandate, it is therefore queried whether violations of Convention rights should be attributed to the UN rather

than to the EU or the MS. The ECtHR held in the [Behrami and Seramati case](#) concerning KFOR soldiers in Kosovo that their actions were attributable to the UN. Conversely, in the [Al Jedda case](#), the Court concluded that the UN Security Council had no effective control over the acts of troops in Iraq and that the indefinite detention of Iraqi nationals by UK forces was therefore a violation of the ECHR attributable to the UK itself.

## Consequences of EU accession to the ECHR

According to [Article 6\(2\) TEU](#) the EU shall accede to the ECHR. Once the EU has acceded to the ECHR, the ECtHR would have jurisdiction regardless of whether the action in question is attributable to an MS or to the EU. However, [commentators](#) point out that measures in the framework of CSDP, which might violate Convention rights, will be taken by MS rather than by the EU institutions. The attribution of responsibility to the MS or to the EU in this context was one of the most controversial issues in the negotiations on the accession of the EU to the ECHR that concluded with a [draft accession agreement](#) in April 2013.

The Draft explanatory report to the [draft agreement](#) states that "Under EU law, the acts of one or more MS or of persons acting on their behalf implementing EU law, including decisions taken by the EU institutions under the TEU and the TFEU, are attributed to the MS concerned." The report stipulates moreover that the attribution of an act to an MS does not preclude shared responsibility with the EU. Conversely, acts of EU institutions, bodies, offices or agencies, or persons acting on their behalf, will be attributed to the EU.

It has been widely discussed in the course of the negotiations on EU accession to the ECHR whether measures adopted in the framework of the CFSP should be exempted from the jurisdiction of the ECtHR. One of the main arguments was the lack of full jurisdiction of the CJEU in this area. However, the draft accession agreement explicitly refers to the area of CFSP, stating that the above-mentioned rules for attribution of acts to the MS and the EU also apply to matters relating to EU CFSP. Accordingly, the CFSP will not be exempted from the scope of ECHR application.

In consequence of the extra-territorial applicability of the ECHR in certain cases, it could also be applicable to EU missions abroad. This would be the case particularly when the EU mission is in charge of security in a certain region or when soldiers in EU-led operations take persons into their custody, e.g. capture pirates.<sup>25</sup>

## Main references

[Human rights in EU crisis management operations: a duty to respect and to protect?](#) / A Sari, R A Wessel, Centre for the Law of EU External Relations (CLEER), working papers 2012/6

[International law aspects of the EU's Security and Defence Policy, with a particular focus on the law of armed conflict and human rights](#), F Naert, 2010

## Endnotes

<sup>1</sup> See e.g. Judgment of the CJEU in the [case C-402/05 P and C-415/05 P](#), Kadi and Al Barakat International Foundation v. Council and Commission, para. 283.

<sup>2</sup> Legal framework governing the protection and promotion of human rights in EU missions – application of EU law principles and instruments / F Naert, in [Human rights in EU crisis management operations: a duty to respect and to protect?](#), A Sari, R A Wessel, Centre for the Law of EU External Relations (CLEER), working papers 2012/6, p. 42.

<sup>3</sup> These are *inter alia* the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, and the International Convention on the Rights of the Child.

<sup>4</sup> Human rights in EU crisis management operations / A Sari, R A Wessel, p. 8, op. cit.

- <sup>5</sup> [The emergence of international and regional value systems as a manifestation of the emerging international constitutional order](#) / E de Wet, Journal of International Law 2006, Vol. 19, pp. 631, 632.
- <sup>6</sup> From military intervention to occupation of territory / H P Gasser, Crisis management and humanitarian protection, 2004, p. 145.
- <sup>7</sup> The promotion and protection of human rights during common security and defence policy operations. In-between a spreading state of mind and an unsolved concern / M L Sánchez Barrueco, in [The EU as a "Global Player" in human rights?](#), J E Wetzel (edit.), 2011, pp. 158-160.
- <sup>8</sup> The applicability of general principles and instruments of international law to peace missions of the European Union / G Zyberi, Human rights in EU crisis management operations, op. cit., p. 32.
- <sup>9</sup> [International law aspects of the EU's Security and Defence Policy with a particular focus on the law of armed conflicts](#) / F Naert, 2010, pp. 564-566. The extraterritorial application of human rights instruments and customary international law is largely uncontroversial in the case of international organisations as they by definition have no state territory.
- <sup>10</sup> Ibidem, pp. 66-68.
- <sup>11</sup> See e.g. [Council Joint Action 2008/124/CFSP](#) on the European Union Rule of Law Mission in Kosovo, Article 3.
- <sup>12</sup> International law aspects of the EU's Security and Defence Policy, op. cit., pp. 525-526.
- <sup>13</sup> The applicability of general principles and instruments of international law to peace missions of the European Union, op. cit., p. 35.
- <sup>14</sup> The promotion and protection of human rights during common security and defence policy operations, op. cit., pp. 163, 164.
- <sup>15</sup> See e.g. [Agreement](#) between the European Union and the Republic of Chad on the status of the EU-led forces in the Republic of Chad, Article 8.
- <sup>16</sup> [Status of forces and status of mission agreements under the ESDP: The EU's evolving practice](#) / A Sari, European Journal of International Law 2008, Vol. 19, num. 1, pp. 81, 83.
- <sup>17</sup> Responsibility of the EU regarding its CSDP operations / F Naert, in [The international responsibility of the European Union](#), 2013, p. 331.
- <sup>18</sup> The duty to respect international humanitarian law during Union-led operations / M Zwanenburg, in Human rights in EU crisis management operations, op. cit., p. 64.
- <sup>19</sup> Ibidem, pp. 72-75.
- <sup>20</sup> International law aspects of the EU's Security and Defence Policy, op. cit., pp. 525-526.
- <sup>21</sup> [The role of private security companies \(PSCs\) in CSDP missions and operation](#) / E Krahmann, C Friesendorf, European Parliament Directorate-General for External Policies, Policy Department, 2011, pp. 6, 7.
- <sup>22</sup> [EU operations and private military contractors: issues of corporate and institutional responsibility](#) / N D White, S MacLeod, The European Journal of International Law Vol. 19 no. 5 (2008), pp. 967, 968.
- <sup>23</sup> Ibidem, pp. 975, 976
- <sup>24</sup> Judgment of the CJEU in the [case C-9/56](#), Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community, p. 42-47; [case C 33/82](#), Murri Frères v Commission of the European Communities, paras. 34 et seq.
- <sup>25</sup> EU missions and the European Convention: recent cases / H Krieger, in Human rights in EU crisis management operations, op. cit., p. 53.

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