

Old Continent, New Wars: The European Union and International Humanitarian Law¹

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Abstract

Scholarly debate on the development of a military dimension in the European Security and Defence Policy (ESDP) has mainly revolved around its implications from the perspectives of international relations theory and European Union (EU) law.

The present contribution looks at the recent engagement of the EU in a number of military operations from a viewpoint thus far overlooked: namely, that of international humanitarian law (IHL), which is the branch of international law seeking, for humanitarian reasons, to limit the effects of armed conflicts.

The starting point of this analysis is that, despite the relatively limited experience of the EU in the area of crisis management, the progressive framing of a military dimension within the ESDP institutional framework has turned the Union into a fully-fledged military actor on the international scene. The present study contends that this raises, ipso facto, the question of the applicability of IHL to the EU-led troops.

In particular, can the EU be regarded as a new, autonomous subject of IHL distinct from its troop-contributing Member States? Has the EU's increasing military engagement been paralleled by the definition of a clear legal framework for the conduct of its troops on the ground?

The present paper addresses these questions by providing an overview of the relevance of IHL to the EU military operations, while looking ahead to its interaction with the recent and prospective developments in the ESDP institutional architecture, and to its impact on the overall role of the EU in the international legal order.

*“Question: Je voudrais savoir, ma question s'adresse au Général Nash, est-ce que en cas d'attaque de troupes rebelles sur les soldats européens, ceux-ci vont tirer sur les troupes rebelles ?
General Nash: Yes”.*²

1. International humanitarian law: a further viewpoint on the ESDP military operations?

The development of a military dimension in the European Security and Defence Policy (ESDP) can be looked at from different disciplinary angles. On the one hand, over the past few years, international relations theorists have engaged in a lively debate on the extent to which the development of military capabilities has affected the traditional conceptions of the European Union's (EU) international role.³ On the other hand, legal scholars and practitioners have mainly

¹ Paper to be presented at the GARNET conference “The European Union in International Affairs” (Brussels, 24-26 April 2008). Do not quote without the Author's permission. Comments are welcome at: valentina.falco@eui.eu.

² Extract from the edited transcript of the press conference by Lieutenant General Patrick Nash, Operation Commander of the EUFOR/TCHAD-CAR, and Ambassador Torben Brylle, EU Special Representative for Sudan and for EUFOR TCHAD/RCA, Brussels, 29 January 2008, p. 6, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/Edited%20Transcript%20version%20finale.pdf>.

³ Among the most recent contributions, see K.E. Smith, Still “civilian power EU”?, paper presented at the CIDEL Workshop “From Civilian to Military Power: The European Union at a Crossroads?”, Oslo, 22–23 October 2004, available at <http://www.arena.uio.no/cidel/WorkshopOsloSecurity/Smith.pdf>; H. Sjørnsen, What kind of power?, *Journal of European Public Policy*, Vol.13, No. 2, 2006, pp. 169-181; S. Lucarelli and Roberto Menotti, The Use of Force as Coercive Intervention: the Conflicting Values of the Union's External Action, in S. Lucarelli and I. Manners (eds.), *Values and Principles in European Union Foreign Policy*, London: Routledge, 2006, pp. 147-163; S. Rynning, The EU,

focused on the institutional dimension of the ESDP, as well as on the progressive impact of the EU constitutional developments on the ESDP's institutions.⁴

There is, however, a further (and thus far overlooked) viewpoint from which the increasing engagement of the European Union (EU) in a number of military operations should be explored, namely that of IHL.

International humanitarian law (also referred to as “the law of armed conflict”, “*jus in bello*” and – less frequently nowadays - “the law of war”) is a major branch of public international law and is defined by the International Committee of the Red Cross as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict”.⁵ To quote Judge Weeramantry from the International Court of Justice (ICJ), IHL represents “the efforts of the human conscience to mitigate in some measures the brutalities and dreadful sufferings of war. In the language of a notable declaration in this regard (the St. Petersburg Declaration of 1868), IHL is designed to “conciliate the necessities of war with the laws of humanity””.⁶

IHL constitutes one of the oldest bodies of international norms, and it is composed of a complex set of rules relating both to the conduct of hostilities (fixing the rights and duties of the belligerents and limiting their choice of methods and means of injuring the enemy) and to the protection of the victims of war, providing safeguards for disabled combatants as well as civilians not taking part in the hostilities.

This set of rules includes international treaty rules, customary norms and *jus cogens*. As far as the latter are concerned, it is crucial to recall that the International Court of Justice (ICJ) and the two *ad hoc* tribunals for the former Yugoslavia and Rwanda (as well as prominent legal scholarship) have unanimously and consistently acknowledged the customary or even the *jus cogens* nature of most of the humanitarian treaty rules laid down in the Hague Convention of 1907, in the four Geneva Conventions of 1949 and, at least in part, in the two additional Protocols of 1977 to the Geneva Conventions. In particular, in its well-known Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ has expressly stated that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity”” that they are “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”.⁷

For purposes of this paper, concerned as it is with the EU, it is also essential to bear in mind that IHL treaties are only open for signature and ratification by *States*. In fact, it is common knowledge that IHL came into being as a law regulating belligerent inter-State relations. In this respect, it was thus perfectly consistent with State-centric modern international law deriving from the 1648

defence policy, and New Atlanticism, in M. Knodt and S. Princen (eds.), *Understanding the European Union's External Relations*, London: Routledge, 2003, p. 21 (“The principled decision to craft an EU Security and Defence Policy (ESDP) in 1999 raises a number of fundamental questions about the political nature of the Union itself”).

⁴ See, *inter alia*, M. Cremona, A Constitutional Basis for Effective External Action? An assessment of the Provisions on EU External Action in the Constitutional Treaty, EUI Working Papers, Law No. 2006/30; B. Koopmans, Developing the European Foreign Security and Defence Policy Without a Constitution?, *Studia Diplomatica*, 2006, Vol. LIX, No.1, pp. 129-140; A. Missiroli, The impact of the Lisbon Treaty on the ESDP, Briefing Paper, European Parliament, Policy Department External Policies, EXPO/B/SEDE/2007/50, January 2008; D. Nickel and G. Quille, In the Shadow of the Constitution: Common Foreign and Security Policy/European Security and Defence Policy Adapting to a Changing External Environment, Jean Monnet Working Paper 02/07, 2007; G. Quille, The Lisbon Treaty and its implications for CFSP/ESDP, Briefing Paper, European Parliament, Policy Department External Policies, DGExPo/B/PolDep/Note/2008_014, February 2008; M. Trybus, With or Without the EU Constitutional Treaty: towards a Common Security and Defence Policy?, *European Law Review*, 2006, n. 31, pp. 145-166, R. A. Wessel, The State of Affairs in EU Security and Defence Policy: the Breakthrough in the Treaty of Nice, 2005, *Merkourios*, vol. 23, issue 61, pp. 4-27.

⁵ ICRC Advisory Service on International Humanitarian Law, *What is Humanitarian law*, 2004, p. 1.

⁶ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports, 1996, Dissenting Opinion of Judge Weeramantry, pp. 443-444.

⁷ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *op.cit.*, para. 79.

Westphalia Peace, which has been characterized ever since as a system regulating relations between the primary subjects of international law.⁸

However, as Sassoli points out, humanitarian law would *today* lapse into irrelevance “unless understood (...) as a law protecting war victims against States and *all others* who wage war”.⁹ Indeed, within an international society where non-State actors are increasingly enjoying a pivotal position, “States are less and less the sole players on the international scene, and even much less so in armed conflicts”¹⁰. International and regional organizations engaged in the area of military crisis management should beyond doubt be counted among these new players,¹¹ whose emergence in the international system calls into question the traditional State–centric essence of IHL.

The question has therefore arisen whether and to what extent IHL – although not binding *de jure* on international organizations – is nevertheless applicable to the multinational troops engaged in peacekeeping operations led by these organizations.

Some authors have contended that, in fact, the State-centric stance characterizing IHL was definitely abandoned with the adoption of Common Article 3 of the 1949 Geneva Conventions, which states that certain rules apply in armed conflict that is not of an international character, and – consequently – to armed opposition groups active in such conflicts. According to this view, recognition of the applicability of IHL to international organizations would be “less revolutionary” than the application of many other international rules, to the extent that IHL already provides for its direct application to non-State actors.¹² Does the EU have a place among such actors?

2. The European Union as a new military actor

When dealing with the issue of the applicability of IHL to multinational peacekeeping forces, legal scholarship has thus far mainly focused on the United Nations¹³ (and, to a lesser extent, NATO)¹⁴ operations, whilst those led by other organizations have largely remained in the shadows. This is easily understandable in light of the fact that the aforementioned organizations have long dominated the scene in respect of crisis management, and it is likely that they will continue to play a crucial role in the future. However, this choice has also been justified on the ground that “these two organizations have proven military structures, whereas the EU, for example, does not at present”.¹⁵

It is submitted that this argument fails to take into account the crucial developments occurred over the past ten years in the EU legal, political and operational framework, as well as the consequent, increasingly prominent role played by the EU in the maintenance of international peace and security.

⁸ J. Klabbers, (I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors, in M. Koskenniemi, J. Petman and J. Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*, Leiden: Nijhoff, 2003, p. 355.

⁹ See M. Sassoli, State responsibility for violations of international humanitarian law, *International Review of the Red Cross*, vol. 84, n. 846, 2002, p. 401 (emphasis added).

¹⁰ *Ibidem*, p. 433.

¹¹ Non-state entities contemporary international humanitarian law is increasingly dealing with include insurgents, national liberation movements, guerrillas, unorganized bands and terrorists.

¹² M. Zwanenburg, *Accountability of peace-support operations*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, p. 157. See also L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press, 2002.

¹³ Literature on the issue is overwhelming. A valuable bibliographic overview is provided in G. Porretto and S. Vité, *The application of international humanitarian law and human rights law to international organizations*, CUDH, Research Paper Series, n. 1, 2006.

¹⁴ See, *inter alia*, M. Zwanenburg, *op. cit.*; P. Weckel, *Les droit des conflits armés et les organisations internationales*, in M. Benchikh (ed.), *Les organisations internationales et les conflits armés*, Paris: L’Harmattan, 2001, p. 102.

¹⁵ M. Zwanenburg, *op. cit.*, p. 4.

Since the Treaty of Maastricht, the EU has gradually been developing its own security and defence identity.¹⁶ After the 1998 Franco-British Summit of Saint-Malo and the 1999 Cologne European Council, the EU started to develop a European Security and Defence Policy (ESDP) as part of its intergovernmental Common Foreign and Security Policy, which includes plans for an *autonomous* military capability.

With the entry into force of the Treaty of Nice, the ESDP finally acquired an institutional dimension. Indeed, Article 17 of the Treaty on European Union (TEU), as amended by the Treaty of Nice,¹⁷ provides today the main legal basis for the EU's involvement in military operations. After emphasizing in Article 17(1) that "[t]he 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", the Treaty specifies in Article 17 (2) that "[q]uestions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking", i.e. the so-called "Petersberg Tasks" (as set out in the Petersberg Declaration adopted at the Ministerial Council of the Western European Union in June 1992).

European Councils from Cologne onwards have also provided for the establishment of *permanent military structures* (such as the Political and Military Committee – whose role is now set out in Article 25 TEU - the EU Military Committee and the EU Military Staff) within the EU Council.¹⁸ More recent developments have included the establishment of a European Defence Agency in July 2004¹⁹ and of a new EU Operations Centre as from 1 June 2007,²⁰ which will allow the EU to command from Brussels missions and operations of limited size. Finally, new operational military capabilities have been developed based on the so called "EU Battlegroup concept", a specific form of rapid response including a combined arms battalion sized force package with Combat Support and Combat Service support.²¹ On 1 January 2007 the Concept has reached Full Operational Capability, thus providing the EU with the capacity to undertake two concurrent single Battlegroup-sized rapid response operations, including the ability to launch both such operations nearly simultaneously.²²

While it is generally contended that the ESDP will by no means lay down the foundation of a European army responsible for the defence of the Member States,²³ it is undeniable that the EU is gradually adding military capabilities to its considerable economic power.²⁴

The most prominent achievement resulting from the ESDP's "strikingly dynamic development"²⁵ has been the deployment, since 2003, of more than 10,000 military personnel (contributed by Member States but also, partly, by non-Member States) engaged in five EU-led

¹⁶ For up-to-date accounts of the recent progress of the European security and defence integration see, *inter alia*, P. Koutrakos, *EU International Relations Law*, Oxford/Portland: Hart Publishing, pp. 452-477; M. Trybus, With or Without the EU Constitutional Treaty: towards a Common Security and Defence Policy?, *European Law Review*, 2006, n. 31, pp. 145-166.

¹⁷ Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (which entered into force on 1 February 2003), Official Journal C 80, 10.03.2001.

¹⁸ For more details on the tasks and functions of the different structures, see, *inter alia*, G. J. Van Hegelsom, The relevance of the law of armed conflict for the conduct of Petersberg tasks, in *The Impact of International Humanitarian Law on current security trends. Proceedings of the Bruges Colloquium*, 26th-27th October 2001, in *Collegium*, 2002, issue 25, pp. 110-113.

¹⁹ Council Joint Action 2004/551 on the establishment of the European Defence Agency, 2004, OJ L 245/17.

²⁰ See EU Council Secretariat, The EU Operations Centre, Background Factsheet, available at: http://www.consilium.europa.eu/uedocs/cmsUpload/070228-EU_OpsCentre.pdf.

²¹ Headline Goal 2010, approved by General Affairs and External Relations Council on 17 May 2004 and endorsed by the European Council of 17 and 18 June 2004, para. 4, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/2010%20Headline%20Goal.pdf>.

²² ESDP Newsletter, no. 3, January 2007, p. 15, available at: http://consilium.europa.eu/uedocs/cmsUpload/ESDP_3_final.pdf.

²³ P. Koutrakos, *op. cit.*, p. 459; G.J. Van Hegelsom, *op. cit.*, p. 113.

²⁴ M. Trybus *op. cit.*, 2006, p. 146.

²⁵ B. Koopmans, *op. cit.*, p. 129.

military missions: the *Concordia* operation in the Former Yugoslav Republic of Macedonia (the EU's first-ever military operation); Artemis and EUFOR RD Congo, in the Democratic Republic of Congo; EUFOR Althea, in Bosnia-Herzegovina (still ongoing) and the recently launched²⁶ EUFOR TCHAD/RCA operation, currently deployed in Eastern Chad and North Eastern Central African Republic.²⁷

The potential constitutional developments in the field of defence should also be taken into account. While providing for a Common Security and Defence Policy to succeed the existing ESDP under the Treaty of Nice, the recently signed Treaty of Lisbon²⁸ also extends the existing EU's crisis management policy by expanding both its aims and its tasks. In particular, once the Treaty of Lisbon is ratified, the Petersberg Tasks currently found in Article 17(2) TEU would be extended to include "joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilization", with explicit reference to action outside the Union and to combating terrorism.²⁹

On the one hand, as Cremona has noted, despite these changes, the military dimension of the EU's defence policy would still be implemented via Member States' resources.³⁰ On the other hand, it should be emphasized that the additional tasks provided for in the new Article 28 (1) TEU would explicitly cover not only "blue helmet" operations (undertaken under Chapter VI of the UN Charter) but also humanitarian peace-enforcement missions.³¹ Once the Treaty of Lisbon has entered into force, the EU would thus be even more likely to be involved in operations entailing the use of force. How do the current and perspective developments in the ESDP call into question the applicability of IHL? Why does the EU's recently acquired capacity as a military actor make the need to clarify the status of its troops under IHL all the more pressing?

In order to address these questions, it may be useful to recall that, with reference to the United Nations framework, already in 1971 the Institute of International Law stated that "[l]es règles de caractère humanitaire résultant du droit relatif aux conflits armés sont applicables de plein droit à l'Organisation des Nations Unies et doivent être respectées en toutes circonstances par ses forces dans les hostilités où celles-ci sont engagées".³² More recently, the UN Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law unequivocally reaffirmed *expressis verbis* that "[t]he fundamental principles and rules of international humanitarian law (...) are applicable to the United Nations forces when in situations of armed conflict they are actively engaged therein as combatants".³³ The Bulletin further pointed out that these principles and rules "are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence".³⁴

Some authors have argued that such a statement has resolved every ambiguity as to the capacity of international organizations to be bound by IHL, to the extent that they resort to the use of force.

²⁶ Council Decision 2008/101/CFSP of 28 January 2008 on the launching of the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA), OJ L 34/39, 8.02.2008.

²⁷ For an up-to-date overview of EU's various military missions, see http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=268&lang=it

²⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, 2007/C 306/01, OJ C306, vol. 50, 17 December 2007.

²⁹ Treaty of Lisbon, para. 49. See A. Missiroli, *op. cit.*

³⁰ M. Cremona, *A Constitutional Basis for Effective External Action? An assessment of the Provisions on EU External Action in the Constitutional Treaty*, EUI Working Papers, Law No. 2006/30, p. 25.

³¹ M. Trybus, *op. cit.*, 2006, p. 151.

³² Resolution on the "Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged", *Annuaire, Institut de Droit International*, 1971, n. 54, vol. II, p. 465.

³³ Secretary-General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, ST/SGB/19913, Section 1, para 1.1.

³⁴ *Ibidem*

These commentators have also gone so far as to suggesting that the progressive approach adopted in the Bulletin should apply not only to the United Nations, but also to regional organizations.³⁵

However, it is submitted that this conclusion appears to be particularly at odds with the peculiarities of the EU as an international legal subject and security player. Indeed, several factors pertaining to the *sui generis* nature of the Union as an international organization – as well as to the (still) prevailing intergovernmental character of the ESDP - make it highly inadvisable to apply *sic et simpliciter* to the EU arguments tailored to other subjects of international law. An *ad hoc* assessment of the relevance of IHL to the ESDP military operations will thus be undertaken in the following chapters, with the aim to verify whether and to what extent this legal regime has a role to play in shaping the EU's identity as a credible, fully-fledged security actor.

3. Is IHL really relevant to the EU military operations? An appraisal

As recalled above, IHL is the branch of international law aimed at protecting the victims of armed conflicts by regulating the conduct of hostilities. Notoriously, however, neither Common Article 3 nor any other humanitarian law instruments provide a definition of the concept of “armed conflict”.

International criminal jurisprudence has provided valuable interpretative guidelines in this respect. In particular, the Appeals Chamber of the International Tribunal for the former Yugoslavia, in its Decision on jurisdiction in the *Tadić* case, defined an armed conflict as the “resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.³⁶ This conclusion has been corroborated by the Trial Chamber I of the *ad hoc* Tribunal for Rwanda, which – in its judgment in the *Akayesu* case – reaffirmed that “an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict”.³⁷

Accordingly, two fundamental criteria for the *ratione materiae* application of IHL to international organizations have been identified, which will be analysed in the following subchapters.

3.1 The intensity of hostilities: crossing the threshold?

The first criterion pertains to the threshold beyond which the fighting engaged in by international organizations may be legally qualified as an armed conflict. Although consensus on the definition of such a threshold has not yet been reached among legal and military experts,³⁸ Kolb's view on the issue appears to represent a valuable compromise solution:

*“[L'] essential est qu'on se situe au delà d'une légitime défense sporadique et qu'on l'entre dans des “combats” réguliers, même s'ils n'ont lieu que par à-coups ou de manière intermittente”*³⁹.

Irrespective of the mandate or formal qualification of the operation (“peacekeeping”, “robust peacekeeping”, “peace-enforcement”), and of the characterization of the situation by the parties, it is thus the factual situation that triggers the application of *jus in bello*. As Porretto and Vité put it,

³⁵ L.A. Sicilianos, Préfacé, in R. Kolb, *op. cit.*, p. VIII (“On voit mal, en effet, sur la base de quel l'argument le droit applicable serait différent en fonction de l'identité de l'organisation internationale - universelle ou régionale - dont le forces sont mandatées pour recourir aux armes sur le terrain”).

³⁶ International Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-AR72, Appeals Chamber, 2 October 1995, para. 70.

³⁷ International Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, trial Chamber I, 2 September 1998, para. 625 (emphasis added).

³⁸ For a comprehensive survey of the main scholarly trends see R. Kolb, *op. cit.*, pp. 29-50.

³⁹ R. Kolb, *op. cit.*, p. 39.

with specific reference to the UN-led operations, “once the use of armed force is possible and effectively results in confrontation of sufficient intensity, the substantive conditions of application of IHL are satisfied”.⁴⁰

As far as the EU military operations are concerned,⁴¹ on the one hand, it is true that three of these operations (i.e. Concordia, Althea and EUFOR-RD Congo) were deployed in post-conflict contexts, and that no involvement of the EU-led forces in situations entailing the actual use of armed force beyond the required threshold of intensity has been reported.⁴²

On the other hand, this may not be the case for at least two of these operations, namely Artemis and EUFOR TCHAD/RCA, both UN-mandated under Chapter VII of the Charter of the United Nations and thus authorized to “to take all necessary measures” (including the use of armed force beyond self-defence) to fulfil their mandate.⁴³

As far as the former is concerned, some experts took the view that the fighting in Bunia (the capital of the Congolese district of Ituri, where 1200 EU troops were deployed from 12 June until 1 September 2003) did not reach the threshold of armed conflict.⁴⁴ Other authors acknowledged that Artemis was conducted in a dangerous environment, but argued that it “was not confronted with major hostile action against it”.⁴⁵ However, the same commentators recalled that on at least two occasions during the operation the EU forces were attacked and returned fire, and that on one of these occasions two attackers were killed.⁴⁶ It is submitted that these kinds of hostile armed exchanges do indeed cross the threshold of application of *jus in bello* as defined above: resort to armed force by the EU troops in such circumstances should thus be subject to the general principles of necessity and proportionality as laid down in the provisions of IHL regulating the conduct of hostilities.

Interviews conducted by the author with high EU officials serving in the Artemis operation further confirmed that the EU troops were regularly faced with situations challenging their obligations under *jus in bello*, ranging from the treatment to be accorded to child-soldiers⁴⁷

⁴⁰ G. Porretto and S. Vité, *op. cit.*, p. 34.

⁴¹ Due to space constraints, an overall assessment of the factual background of each of the ESDP military operations cannot be provided here. See, however, the relevant documents and factsheets in the ESDP webpages of Council of the EU website: <http://www.consilium.europa.eu/ESDP>. See also G. Grevi, D. Lynch, A. Missiroli, *ESDP Operations*, Paris: Institute for Security Studies, 2005; F. Naert, *ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations*, in M. Trybus and N. White, (eds.), *European Security Law*, Oxford: Oxford University Press, 2007; D. Nickel and G. Quille, *op. cit.*, pp. 13-19; N. Tsagourias, *EU Peacekeeping Operations: Legal and Theoretical Issues*, in M. Trybus and N. White (eds.), *op. cit.*, pp. 107-110.

⁴² See F. Naert, *op. cit.*, p. 97 (“(...) ([a]lmost) all ESDP operations so far did not include active participation in hostilities”).

⁴³ The legal basis of the Artemis operation is provided by Resolution 1484 (2003) adopted by the Security Council on 30 May 2003 at its 4764th meeting, on 30 May 2003, S/Res/1484 (2003), para. 4. For the legal basis of the EUFOR Tchad/RCA operation see Resolution 1778 (2007) adopted by the Security Council at its 5748th meeting, on 25 September 2007, S/Res/1778 (2007), 25 September 2007, para. 6 (a).

⁴⁴ See A. Faite and J. Labbé Grenier (eds.), *Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, Report of the Expert Meeting on Multinational Peace Operations (Geneva, 11-12 December 2003), Geneva: International Committee of the Red Cross, 2004, p. 10. Resolution 1484 (2003), however, expressly referred to the “fighting and atrocities in Ituri, as well as the gravity of the humanitarian situation in the town of Bunia” (paragraph 3 of the Preamble). Paragraph 6 of the resolution also recalled “the deliberate killing of unarmed MONUC personnel and staff of humanitarian organizations in Ituri (...)”. For an overview of the situation in Ituri at the time the Artemis troops were deployed in the region, see B. Neveux (former Artemis Operation Commander), *Vers une Union opérationnelle, Défense Nationale*, 2004, vol. 60, n. 5, pp.12-15; F. Nkundabagenzi, *De la prévention des conflits à la gestion militaire des crises*, in L. Andreacola and X. Zeerbroek (eds.), *Les Humanitaires en guerre: sécurité des travailleurs humanitaires en mission en RDC et au Burundi*, Bruxelles: GRIP/Ed. Complexe, 2004, pp. 169-185; S. Ulriksen, C. Gourlay and C. Mace, *Operation Artemis: The Shape of Things to Come*, *International Peacekeeping*, vol. 11, no. 3, Autumn 2004, pp. 510-511.

⁴⁵ F. Naert, *op. cit.*, pp. 74-75.

⁴⁶ *Ibidem*, p. 75, footnote 103.

⁴⁷ Reportedly, the issue had been raised already in the preparation for the Artemis operation (““if we are threatened by a child soldier, can we shoot back?””), see H. Hazelzet, *Human Rights Aspects of EU Crisis Management Operations:*

recruited by local militias to the duty to bring to justice alleged perpetrators of grave breaches of IHL.⁴⁸

As far as the recently-launched operation in Chad and the Central African Republic is concerned,⁴⁹ EUFOR TCHAD/RCA has indeed been deployed in a strained political and security environment, featuring elements of both international and non-international armed conflicts, and affected by a humanitarian crisis on regional scale as a consequence of the ethnic violence perpetrated in Darfur. Hence, it may be regarded as a telling example of the increasing involvement of multinational forces in the midst of what military theorists refer to as “new wars” – characterized by a complex intermingling of features (pertaining to both the actors and the socio-political drivers of conflict, as well as to the methods of warfare) almost unknown to traditional armed conflicts.⁵⁰ Although such a complexity makes the legal qualification of the situation an uneasy task, no doubt can be raised about the relevance of IHL to the context in which the EU is currently being conducted.

It should also be recalled that the initial deployment of the EU troops in Chad had to be interrupted for a few days at the beginning of February 2008 due to the outburst of violence in the country, following the attacks carried out by the armed opposition groups against the governmental forces in the Chadian capital N’Djamena.⁵¹ Furthermore, although the EU-led troops have been deployed with the consent of the authorities of both Chad and the Central-African Republic,⁵² leaders of the Chadian armed opposition alliance have expressly questioned the impartiality of the operation, urging European countries “to refrain from sending their troops to serve within the framework of the EUFOR”.⁵³

Finally, mention should be made of the fact that it is in the framework of EUFOR TCHAD/RCA that the first casualty ever among the EU-led troops has been reported as a

From Nuisance to Necessity, *International Peacekeeping*, vol. 13, no. 4, December 2006, p. 564 (however, the author seem to describe the question as “human-rights related” only, thus apparently overlooking its implications from the viewpoint of international humanitarian law).

⁴⁸ Such an obligation is explicitly provided for in Articles 49, 50, 129, 146 common to the Geneva Conventions, as well as in Article 85 of Additional Protocol I. Boisson de Chazournes and Condorelli, *ex multis*, also construe it as a corollary of the obligation to “ensure respect” for international humanitarian law “in all circumstances” (as laid down in Common Article 1 to the Geneva Conventions), further arguing that “this obligation (...) is applicable wherever a State’s armed forces might be operating, and not merely in that State’s territory”, L. Boisson de Chazournes and L. Condorelli, Common Article 1 of the Geneva Conventions revisited: protecting collective interests, *International Review of the Red Cross*, no. 837, p. 67-87. See also A.-M. La Rosa, *Forces multinationales et instances pénales internationales: obligation de coopération sous l’angle de l’arrestation*, H. Ascensio, E. Décaux and A. Pellet (eds.), *Droit international pénal*, Paris: Éditions Pedone, pp. 681-695.

⁴⁹ After approval by the Council of the EU (Council Joint Action 2007/677/CFSP) of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic, OJ 279/21, 23.10.2007), the operation was officially launched on 28 January 2008 (Council Decision 2008/101/CFSP of 28 January 2008 on the launching of the European Union military operation in the Republic of Chad and the Central African Republic (Operation EUFOR TCHAD/RCA), OJ L 34/39, 8.02.2008). On 15 March 2008 the Initial Operational Capability (IOC) of the operation has been declared, marking the beginning of the one year’s mandate of the operation (pursuant to Security Council Resolution 1778(2007), *op. cit.*, para.6 (a)).

⁵⁰ See, *inter alia*, H. Münkler, *The wars of the 21st century*, *International Review of the Red Cross*, vol. 85, no. 849, 2003, pp. 7-22.

⁵¹ See EU Presidency Statement on the Republic of Chad, Brussels, 3 February 2008, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/cfsp/98543.pdf; press release by Javier Solana, EU High Representative for the CFSP, on the situation in Chad and Operation EUFOR TCHAD/RCA, Brussels, 4 February 2008, S046/08; EUFOR TCHAD/RCA, *Le deployment de l’EUFOR reprend*, Press release, 12.02.2008, available at: http://www.consilium.europa.eu/uedocs/cmsUpload/08_02_12Reprisedeploiement.pdf.

⁵² See Preamble of Resolution 1778 (2007), *op. cit.*, para. 16.

⁵³ See Chadian Rebel Urges EU States to Withdraw from EUFOR, 11.02.2008, available at: <http://en1.chinabroadcast.cn/2947/2008/02/11/1321@322212.htm>; Chad rebels consider Irish troops a hostile force, *The Irish Times*, 12.02.2008, available at <http://www.ireland.com/newspaper/frontpage/2008/02/12/1202509701185.html> See also P. Kirby, *EU force on risky Africa mission*, *BBC News*, 28.01.2008, available at: <http://news.bbc.co.uk/2/hi/europe/7213551.stm>.

consequence of hostile fire.⁵⁴ Regardless of whether IHL may have been applicable in the specific case (a border-crossing incident in Sudanese territory, resulting in the death of the French Sergeant Gilles Polin),⁵⁵ this tragic episode in the history of the ESDP clearly demonstrates that “any deployment involving armed military personnel could lead to violence under certain circumstances”.⁵⁶

This is particularly true in circumstances such as the ones in which EUFOR TCHAD/RCA is being conducted, especially when multinational forces act under Chapter VII (and are thus entrusted with peace-enforcement powers) and are mandated with complex protection and securitization tasks – as is the case of EU-led troops in Chad and the Central African Republic.⁵⁷ Arguably, carrying out such tasks in a hostile environment torn by a multiplicity of deeply intertwined military, ethnic and political tensions inevitably increases the probability that the EU-led troops enter the combat, thus becoming subject *ratione materiae* to IHL.

Hence – despite contentions that “the applicability of international humanitarian law is determined by the facts, not the mandate”⁵⁸ – in such a framework as the one described above, the mandate of the operation appears to be a valuable, preliminary indicator of the possibility that the EU troops become engaged in armed exchanges whose level of intensity triggers the application of *jus in bello*.⁵⁹

Although the launch of EUFOR TCHAD/RCA is relatively recent, it can thus be submitted that several elements peculiar to the mandate and the factual background of the operation already point to the conclusion that the first criterion for the applicability *ratione materiae* of IHL is very likely to be met.

3.2 The “level of organization”: under whose command and control?

The second criterion informing the scope of application *ratione materiae* of IHL to international organizations pertains to their level of organization. Indeed, it is generally recognized that the level of organization of a non-state entity resorting to armed force is an important aspect of the legal standards determining the existence of an armed conflict. The legal definition of the latter – as provided by the International Criminal Tribunals for the former Yugoslavia and Rwanda in the case-law cited above⁶⁰ – places particular emphasis on the degree of organization of the parties to the hostilities. Furthermore, the International Committee of the Red Cross Commentary to Article 1 of Additional Protocol II to the Geneva Conventions (which develops and supplements Article 3 common to the Geneva Conventions in ensuring protection to victims of non international armed

⁵⁴ EUFOR TCHAD/RCA, EUFOR suffers its first fatality, Press Release, 10 March 2008, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/080310EUFORSuffersfirstfatality.pdf>.

⁵⁵ EUFOR TCHAD/RCA, Press Release, 3 March 2008, available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/080303-OHQMontValerien.pdf>; Javier Solana, *Haut Représentant de l'Union Européenne pour la PESC aux obsèques de l'Adjudant Gilles Polin, membre d'EUFOR Tchad/RCA, tué en action*, Press Release, Bruxelles, 12 March 2008, S112/08.

⁵⁶ A.J.K. Bailes, *The EU and “a better world”: what role for the European Security and Defence Policy?*, *International Affairs*, vol. 84, no. 1, 2008, p. 124.

⁵⁷ Security Council Resolution 1778 (2007), para. 6 (a) sets out the following tasks to be fulfilled by the EU operation: “(i) to contribute to protecting civilians in danger, particularly refugees and displaced persons; (ii) to facilitate the delivery of humanitarian aid and the free movement of humanitarian personnel by helping to improve security in the area of operations”; (iii) “to contribute to protecting United Nations personnel, facilities, installations and equipment and to ensuring the security and freedom of movement of its staff and United Nations and associated personnel.

⁵⁸ A. Faite and J. Labbé Grenier (eds.), *op. cit.*, p. 9 (“Indeed, even a traditional peace-keeping operation may *de facto* enter into combat and consequently be bound by international humanitarian law. (...) Conversely, it [is] perfectly possible that an operation entrusted with peace-enforcement power [may] never be engaged in an armed conflict situation and, thus, never be subject to international humanitarian law”).

⁵⁹ For a supporting argument, see G. Porretto and S. Vité, *op. cit.*, p. 39 (“(.) Where [an] operation is mandated to restore peace, thus implying coercive powers, the possibility of armed conflict may be seen as an integral part of the mission. In such cases, there is a much greater chance that international humanitarian law will apply”).

⁶⁰ *Supra*, Chapter 3.

conflicts) establishes a clear nexus between the level of organization and the ability of implementing the substantive rules of the Protocol.⁶¹

In fact, the requirement of a certain level of organization, which is derived from Article 3 common to the Geneva Conventions, serves to establish that the armed group involved in the conflict is able to implement the substantive obligations of that article: in other words, rules of IHL can be declared binding on non-State actors to the extent that they are in a position to implement these rules.

It is now widely acknowledged that being under a responsible command is indeed a characteristic of the United Nations peace-support operations.⁶² Is this also the case for EU military operations launched within the legal and institutional framework of the ESDP?

Just as in the UN framework, the attribution of conduct – and, consequently, of responsibility⁶³ – for ESDP military operations is made particularly problematic by the multiplicity of actors involved in the establishment, deployment and functioning of each operation, namely the EU, the troop-contributing Member States, the non-EU contributing states⁶⁴ and the host States. The traceability of the chain of command becomes all the more arduous when the operations are UN-mandated under Chapter VII of the Charter of the United Nations (such as in the cases of the Artemis, Althea, EUFOR-RD Congo and EUFOR-TCHAD/RCA operations) or when the mission takes over a NATO operation (as, for instance, in the Concordia and Althea operations).

Another reason for the complexity of conduct attribution within the EU-led operations relates to the ultimate intergovernmental nature of the ESDP, as well as to the fact that the EU does not have standing armed forces of its own, and thus has to rely on Member States to contribute troops to the specific operations.⁶⁵ It is a fact that the incremental military capacity-building process at EU level has been constantly accompanied by repeated assurances that any ESDP initiative would not affect national sovereignty in any way, nor it would entail the application of supranational methods.

As Zwanenburg notes, the existence of a system of responsible command - which in military terms is frequently referred to as “command and control”⁶⁶ - is undoubtedly one of the elements pointing to a certain level of organization.⁶⁷ In fact, “[o]nly an entity that exercises command and control over military forces can order or fail to order compliance with humanitarian law”.⁶⁸

At EU level, the legal status of multinational forces - i.e. the relationship between the different international actors involved in the ESDP operations - is defined both in the Council acts laying down the legal basis for these operations and in the relevant agreements between the EU and third States (either troop-contributing or host states), signed under Article 24 TEU. The relevant provisions set out in such instruments clearly reflect the dual nature of command and control over the EU troops - an element which has generally been acknowledged as peculiar to the UN peacekeeping forces.⁶⁹

⁶¹ C. Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Dordrecht: International Committee of the Red Cross, Nijhoff, 1987, p. 1353.

⁶² M. Zwanenburg, *op. cit.*, p. 158.

⁶³ Due to its complexity, the specific (and highly problematic) issue of the international responsibility of the EU for the conduct of the ESDP military operations will be touched upon very briefly here. For an overview of the problem, see N. Ronzitti (ed.), *L'applicabilità del diritto internazionale umanitario*, in *Le forze di pace dell'Unione Europea*, Soveria Mannelli: Rubbettino, 2005, pp. 190-192; N. Tsagourias, *op. cit.*, p. 121-123.

⁶⁴ Each of the five EU military missions undertaken thus far has involved the participation of several non-EU states.

⁶⁵ See D. Nickel and G. Quille, *op. cit.*, p. 20.

⁶⁶ In NATO terms, for instance, command means the “authority vested in an individual of the armed forces for the direction, coordination, and control of military forces”, NATO Glossary of Terms and Definitions, AAP,-6,(V), 2003, pp. 2-C-7, 2-C-8, 2-F-2and 2-0-2.

⁶⁷ M. Zwanenburg, *op. cit.*, p. 158.

⁶⁸ R. D. Glick, *Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces*, Michigan Journal of International Law, vol. 17, 1995, pp. 97-98.

⁶⁹ See L. Condorelli, *Le statut des forces de l'ONU et le droit international humanitaire*, Rivista di Diritto Internazionale, 1995, vol. 78, issue 4, pp. 885-888.

On the one hand, a standard clause included in the agreements with third countries participating in the ESDP operations expressly stipulates that “[a]ll forces and personnel participating in the EU military crisis management operation shall remain under the full command of their national authorities”.⁷⁰ On the other hand, however, the same clause further provides that “National authorities shall transfer the Operational and Tactical command and/or control of their forces and personnel to the EU Operation Commander”⁷¹ - which seems to point to the conclusion that, for the specific purposes of the operation, the EU (in the person of the Operation Commander) is indeed vested with command and control powers over the troops in the field.

The analysis of Council acts (usually common decisions or joint actions) approving each operation further corroborates this view - the joint action adopted on the EUFOR-TCHAD/RCA⁷² providing the most recent example in this respect. According to Article 6 of the said joint action (reflecting a standard formula used in the ESDP framework), the Political and Security Committee (PSC)⁷³ - which consists of permanent staff, representatives of Member States at ambassadorial level, and representatives of the Commission and the Council - shall exercise the political control and strategic direction of the EU military operation “*under the responsibility of the Council*”.⁷⁴ This will include “the powers to amend the planning documents, including the Operation Plan, the Chain of Command and the Rules of Engagement”, as well as “the powers to take further decisions on the appointment of the EU Operation Commander and/or EU Force Commander”. The Council, assisted by the SG/HR, will remain vested with “the powers of decision with respect to the objectives and termination” of the operation.

Furthermore, under Article 7, the EU Military Committee (which is composed of the Member States’ Chiefs of Defence and whose role is to “provide the PSC with military advice and recommendations on all military matters”)⁷⁵ shall monitor the proper execution of the EU military operation conducted “under the responsibility of the EU Operation Commander”.

Previous practice in the framework of the Althea and Concordia operations is even more telling in this regard. For instance, Article 13 (2) of the Council Joint Action on the Althea operation⁷⁶ provided that “[t]he entire chain of command of the EU force shall remain under the political control and strategic direction of the EU throughout the EU military operation (...)”. Similarly, Article 1 (3) (f) of the Concordia operation SOFA⁷⁷ stated that the EU military commanders would exercise “*the military command and control of the operation*”.⁷⁸

It flows from the analysis above that the EU has consistently been identified by both its own Member States and third countries as the subject ultimately adopting strategic decisions concerning the ESDP operations, thus bearing primary responsibility for the conduct of the latter.⁷⁹ As these elements are generally acknowledged as pointing to the actual exercise of command and control⁸⁰ - and, consequently, to the attainment of the necessary degree of organization - it is submitted that the

⁷⁰ See, for instance, Council Decision concerning the conclusion of the Agreement between the European Union and the Kingdom of Morocco on the participation of the Kingdom of Morocco in the European Union military crisis management operation in Bosnia and Herzegovina, Brussels, 17 January 2005, 5158/05, Article 4 (1) of the attached Agreement.

⁷¹ Ibidem, Article 4 (2).

⁷² *Doc.cit.*

⁷³ See Council Decision of 22 January 2001 setting up the Political and Security Committee (2001/78/CFSP), OJ L-27/1, now reflected in Article 25 TEU.

⁷⁴ Emphasis added.

⁷⁵ Council Decision setting up the Military Committee of the European Union, 19 January 2001, 2001/79/CFSP, 2001, OJ L-27/4.

⁷⁶ Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia Herzegovina.

⁷⁷ Council Decision 2003/222/CFSP of 21 March 2003 concerning the conclusion of the Agreement between the European Union and the FYROM on the status of the European Union-led Forces (EUF) in the FYROM.

⁷⁸ Emphasis added.

⁷⁹ The same view is taken by N. Tsagourias, *op. cit.*, p. 122.

⁸⁰ See, inter alia, L. Condorelli, *op. cit.*, pp. 886-887; R. Kolb, *op. cit.*, p. 24; G. Porretto and S. Vité, *op. cit.*, pp. 27-29.

ESDP operations fulfil also the second criterion informing the definition of armed conflict under IHL.

4. From military “actorness” to IHL “subjectivity”? Assessing the *ratione personae* applicability of IHL to the European Union

Proving the legal relevance of IHL to the conduct of the EU’s military action does not suffice to conclude that this *corpus juris* is applicable to the EU *as such*, i.e. as a distinct legal entity from the troop-contributing Member States. In fact, for the EU to be considered as a *subject* of IHL *stricto sensu*, it is necessary to preliminarily establish whether it has the legal capacity to be bound by this set of rules – thus, in other words, to assess whether the Union has international legal personality.⁸¹

For purposes of the present study, the *vexata quaestio*⁸² - arising from the fact that the EU (unlike the European Community)⁸³ has not yet been formally endowed with legal personality - will only be addressed with specific reference to its implications under IHL. In this respect, it is useful to recall that still in 2002, a leading scholar seemed to suggest that, insofar as its constituent treaty does not expressly confer legal personality upon the Union, not only is it incapable of becoming a party to IHL treaties, it cannot even be regarded as bound by humanitarian law *tout court*.⁸⁴ On this view, therefore, this branch of international law could only be observed in the framework of EU military operations to the sole extent that its rules bind the troop-contributing States.

This assumption may however be challenged relying both on the well-known Advisory Opinion of the International Court of Justice on the *Reparations for Injuries* case⁸⁵ and on authoritative literature,⁸⁶ both pointing to the conclusion that the absence of an explicit treaty provision in this sense does not imply *ipso facto* that the Union lacks legal personality under international law.

In its Advisory Opinion on the *Reparations for Injuries* case, the Court concluded – with reference to the United Nations - that States, “by entrusting certain functions to [the Organization], with the attendant duties and responsibilities, have clothed it with the competence to enable those functions to be effectively discharged”,⁸⁷ further adding that the functions of the United Nations are those which are “specified or implied in its constituent documents and developed in practice”.⁸⁸

Drawing on the Court’s arguments, several authors have maintained that - although the EU Treaty contains no provision comparable to Article 281 of the EC Treaty - application to the Union

⁸¹ The expression “international legal personality” will be used here to identify the capacity to hold rights and obligations under international law. For an in-depth analysis of the different doctrinal interpretations of the concept, see P. M. Dupuy, *L’unité de l’ordre juridique international*, Leiden: Martinus Nijhoff, 2003, pp 106-118.

⁸² The matter was debated during the negotiations of the Treaties of Maastricht and Amsterdam. However, it is only in Article I-7 of the Constitutional Treaty – and now in Article 32 TEU as inserted by the Treaty of Lisbon - that provision is made for the conferral of legal personality on the EU.

⁸³ Article 281 of the Treaty establishing the European Community explicitly provides that “[t]he Community shall have legal personality”.

⁸⁴ See E. David in “Relevance of International Humanitarian Law to Non-State Actors”, Proceedings of the Bruges Colloquium, 25th-26th October 2002, *Collegium*, no. 27, Spring 2003, p. 40 (“[I]t is true that more and more international organizations are engaged in armed conflicts. In the specific case of the EU, however, it is not yet an international organization. Rather it remains, at this stage, an association regrouping several States and deprived of legal personality. At some point in the future, when the EU has a legal personality, one could imagine that perhaps, within the framework of the growing European federalization process, the EU would accede to the instruments of international humanitarian law”).

⁸⁵ International Court of Justice, *Reparations for Injuries Suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174-220.

⁸⁶ As noted by Eeckhout, “most recent legal literature accepts that the EU has international legal personality”, P. Eeckhout, *External Relations of the EU*, Oxford: Oxford University Press, Oxford, 2004, p. 155 (footnote 67). See also, *inter alia*, R. Gosalbo Bono, *Some Reflections on the CFSP Legal Order*, *Common Market Law Review*, no. 43, 2006, p. 393 (“The European Union has become an international organization and a global international actor with its own international legal personality”).

⁸⁷ *Reparations for Injuries*, p. 180.

⁸⁸ *Ibidem*, p. 179.

of the “implied powers” or “functional” theory laid down by the ICJ arguably leads to acknowledge that the EU does indeed have legal personality.

Scholarly debate has focused, in particular, on the power to conclude agreements with third States or international organizations,⁸⁹ granted to the Council under Article 24 TEU.⁹⁰ Some agreements signed between the Council and third States within the ESDP legal framework⁹¹ (*inter alia*, the Agreement with the Former Yugoslav Republic of Macedonia on the status of the EU-led forces engaged in the Concordia ESDP mission)⁹² provide some telling examples in this respect. Indeed, to the extent that these agreements have been interpreted as being concluded by the Council on behalf of the Union – and that this capacity to conclude international agreements has been recognized by third countries – their conclusion has been taken as concrete evidence of the EU’s international legal personality⁹³. As a consequence, Article 32 TEU as inserted by the Treaty of Lisbon (explicitly providing that “[t]he Union shall have legal personality”) would “*merely limit itself to describing a situation that already exists.*”⁹⁴

Following the line of reasoning referred to above, it is useful to quote an argument raised by Shraga with specific reference to IHL and its applicability to the UN peacekeeping operations. Drawing on the “functional” theory, she argued that:

“[t]he principle of functionality which circumscribes the international personality of the organization and its legal capacity, also determines the scope of the applicable law to activities carried out by United Nations in the performance of its functions. (...) The ever-growing involvement of UN forces in situations of armed conflict warrants that International Humanitarian Law be made applicable to them by analogy and as appropriate, when they, like states, are engaged in military operations as combatants”.⁹⁵

In other terms, insofar as an international organization has the power to undertake military actions which could possibly entail resort to armed force, IHL would apply *de jure*. The objective capacity of an international organization would thus entail the subjective capacity to be bound by IHL.⁹⁶

Other scholars further contend that this IHL subjectivity does not depend on the actual use of force: it should instead be assessed in the abstract according to the possibility that the troops placed under the organization’s command and control will be engaged in situations of armed conflict. This possibility is obviously more likely to arise whenever armed troops are established for purposes of peace-enforcement operations.⁹⁷

⁸⁹ P. Eeckhout, *op. cit.*, pp. 157-160; D. McGoldrick, *International Relations Law of the European Union*, London: Longman Publishing, 1997, p. 37.

⁹⁰ Article 24 (1) provides that, “[w]hen it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency”.

⁹¹ Within the same framework – which is particularly relevant to the present study - it should be noted that some authors consider the mere objective of asserting the EU identity on the international scene (as laid down in Article 2 TEU) to be “*une indication suffisante pour permettre (...) une reconnaissance explicite de sa personnalité internationale*”, P. M. Dupuy, *op. cit.*, p. 443.

⁹² *Doc. cit. supra*, Chapter 3.2.

⁹³ See L. Gard, *L’Union Européenne, sujet de droit international*, *Revue Générale de Droit International Public*, 2006, vol. 2, pp. 350-354.

⁹⁴ R. Gosalbo Bono, *op. cit.*, p. 357.

⁹⁵ D. Shraga, *The United Nations as an Actor Bound by International Humanitarian Law*, *International Peacekeeping*, n. 5, 1998, p. 65.

⁹⁶ R. Kolb, *op. cit.*, p. 27.

⁹⁷ See Porretto and Vité, *op. cit.*, p. 39.

It could therefore be argued that, whenever an international organization is explicitly or implicitly endowed by its constituent instrument with tasks related to the maintenance of peace and security, it also has, *eo ipso*, the necessary degree of legal personality to be directly bound by IHL.

It is submitted that the same argument could easily be applied *mutatis mutandis* to the European Union. Indeed, the integration of the Petersberg Tasks in Article 17 (2) TEU provides an explicit and unequivocal legal basis for the engagement of EU-led troops in peacekeeping and peace-enforcement operations. To that extent, it may thus also be interpreted as laying the ground for the recognition of the EU's international legal personality in the domain of IHL.

5. Legal interoperability of the ESDP operations under IHL: myth or reality?

Once the actual relevance of IHL to the EU's military action has been proven, due consideration should finally be paid to whether and to what extent the Union has incorporated this *corpus juris* in the legal framework for its military operations.

As emphasized above, a major legal obstacle towards the actual applicability of *jus in bello* to the EU as such (i.e. as a military actor distinct from its troop-contributing Member States) lies in that international and regional organizations are not – and cannot – be parties to the relevant treaty instruments of IHL, as (according to the prevailing interpretation) those instruments are only open for signature and ratification by States.⁹⁸

Claims for a uniform legal framework for the conduct of the EU-led troops on the ground are usually dismissed by recalling that all EU Member States are parties to the main IHL treaties (i.e. the four Geneva Conventions and the two Additional Protocols thereto), and are - as such - already bound to comply with the relevant rules. In fact, while analysts are generally preoccupied with military interoperability of the EU forces,⁹⁹ legal interoperability from the viewpoint of IHL (meaning that the same rules of *jus in bello* would apply to all the troops, regardless of their nationality) tends to be either taken for granted¹⁰⁰ or simply overlooked.

However, a closer and more attentive look into the legal obligations undertaken by States participating in the ESDP reveals that the issue of uniformity of legal standards governing the conduct of the EU-led forces is far from being purely academic. A few examples may be taken as particularly telling in this respect.

Firstly, it should be recalled that in all the five military operations undertaken by the EU thus far, personnel have also been contributed by non-EU member States.¹⁰¹ Some of them (such as Turkey – which participated in the Concordia, Althea and EUFOR RD Congo - and Morocco – who took part in the Althea operation) are not parties to the two Additional Protocols of 1977, whose provisions are key to complementing the protection granted by the Geneva Conventions to victims of both international and non-international conflicts.

⁹⁸ More precisely, pursuant to the standard accession clause included in the four Geneva Conventions (Articles 60, 59, 139, and 155 respectively), accession to the Conventions shall be open to “any Power”. However, the term “Power” has traditionally been interpreted as encompassing States only. See J. Pictet (ed.), *Commentaire à la I Convention de Genève*, Genève: Comité International de la Croix-Rouge, p. 459.

⁹⁹ See, *inter alia*, Y. Boyer and Julian Lindley-French, Euro-Interoperability: The Effective Military Interoperability of European Armed Forces, Study, European Parliament, Policy Department External Policies, EP/EXPO/B/SEDE/FWC/2006-10/Lot 4/11, PE 385.523, November 2007.

¹⁰⁰ See N. Ronzitti, *op. cit.*, pp. 169, 192.

¹⁰¹ The Concordia operation, for instance, included troops from Canada and Turkey; the latter has also participated in EUFOR-RD Congo. Non-EU troop contributing nations to Artemis included Brazil, Canada and South-Africa, while the following third countries have participated in the Althea Operation: Albania, Argentina, Bulgaria, Canada, Chile, Morocco, New Zealand, Norway, Romania, Switzerland, and Turkey. As far as EUFOR-TCHAD/RCA is concerned, a contribution by Albania has recently been accepted (see Political and Security Committee Decision on the acceptance of third States' contributions to the European Union military operation in the Republic of Chad and in the Central African Republic, Brussels, 7 February 2008, 5983/08).

It may be argued that such countries are under obligation to abide by those provisions as a matter of customary law,¹⁰² which is binding on all states irrespective of whether they have ratified the relevant treaties. However, it should be noted that, while the customary nature of a large part of the rules laid down in the Geneva Conventions and Additional Protocol I has been unanimously recognized both in legal literature¹⁰³ and in the case-law of international courts and tribunals,¹⁰⁴ this contention is still controversial with respect to Additional Protocol II. The same applies to several treaty instruments other than those mentioned above (e.g. the Optional Protocol on the Convention on the Rights of the Child on the involvement of children in armed conflict; the Convention on the prohibition of military or any other hostile use of environmental modification techniques; the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict), which have not achieved universal ratification among either EU or non-EU Member States which have thus far participated in the ESDP military operations.

Finally, legal interoperability of these operations should also be looked at from the viewpoint of criminal accountability for violations of IHL possibly committed by the EU-led forces. Recent studies have highlighted the existing discrepancies among EU Member States with respect to the definition of war crimes and the implementation of the relevant obligations under international criminal law in their domestic legislation.¹⁰⁵

Furthermore, while Czech Republic (which has participated in the Concordia and EUFOR-RD Congo operations) has not yet ratified the Statute of the International Criminal Court (ICC), France (which is one of the main EU troop-contributing states to ESDP operations, also acting as “framework nation” in Concordia and Artemis) has made, upon ratification,¹⁰⁶ seven interpretative declarations to Article 8 concerning the definition of “war crimes”. It also availed itself of the transitional provision laid down in Article 124 of the Statute, which allows an acceding State to declare that “for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory”. The exemption from Court’s jurisdiction will expire on 1 July 2009, and would, needless to say, also apply to war crimes allegedly committed by French soldiers within the framework of an EU-led operation.¹⁰⁷

¹⁰² Article 38 (1) (b) of the Statute of the International Court of Justice, often referred to as a catalogue of the sources of international law, defines international custom “as evidence of a general practice accepted as law”. Within the framework of the European Union, a similar definition is provided in the EU Guidelines on promoting compliance with international humanitarian law of 2005, according to which “[c]ustomary international law is formed by the practice of States which they accept as binding upon them”, OJ C 327/4, 23.12.2005, para 7.

¹⁰³ See, *inter alia*, A. Cassese, The Geneva Protocols of 1977 on the Humanitarian Law of armed Conflict and Customary International Law, *Pacific Basin Law Journal*, n. 3, 1984, pp. 55-118; C. Greenwood, Customary international law and the First Geneva Protocol of 1977 in the Gulf conflict, in P. Rowe (ed.), *The Gulf War 1990-91 in International and English Law*, London: Routledge, 1993, pp. 63-88 T. Meron, The Geneva Conventions as Customary Law, *American Journal of International Law*, 1987, n. 81, pp. 348-370; F. Pocar, Protocol I Additional to the 1949 Geneva Conventions and Customary International Law, *Israel Yearbook on Human Rights*, vol. 31, 2001, pp. 144-159.

¹⁰⁴ See, *inter alia*, *Military and Paramilitary Activities in and Against Nicaragua*, *op. cit.*, para. 177; ICTY, *Prosecutor v. Hadzihasanovic*, Decision on Command Responsibility, No. IT-01-47-AR72, 6 July 2003, para. 13.

¹⁰⁵ See “Fostering a European Approach to Accountability for Genocide, Crimes Against Humanity, War Crimes and Torture – Extraterritorial Jurisdiction and the European Union” (April 2007), final report on a joint project run by Redress and FIDH, available at <http://www.redress.org/publications/Fostering%20an%20EU%20Approach.pdf>.

¹⁰⁶ France has ratified the ICC Statute on 9 June 2000.

¹⁰⁷ Actually, the declaration was explicitly made bearing these kinds of situations in mind - see the extract of the letter addressed by the then French President, Jacques Chirac, to the *Coalition Française pour la Cour pénale internationale* on 15 February 1999 (“*Des plaintes sans fondement et teintées d’arrière-pensées politiques pourraient donc plus aisément être dirigées contre les personnels de pays qui, comme le nôtre, sont engagés sur des théâtres extérieurs, notamment dans le cadre d’opérations de maintien de la paix. L’expérience permettra de vérifier l’efficacité des garanties intégrées au Statut afin d’éviter de tels dysfonctionnements.*”), available at: <http://www.cfcpi.fr/spip.php?article100>.

The examples raised above clearly show that legal interoperability of ESDP military operations under IHL is more a myth than a reality – which may potentially lead to the paradoxical situation where the same conduct by an EU troop may or may not amount to a violation of *jus in bello* (and be criminalized as such) depending on his/her nationality. Recent allegations of war crimes committed by French soldiers during the Artemis operation make the need to identify a clear legal framework for the EU’s military action all the more pressing.¹⁰⁸

6. Searching for a common legal framework for the EU-led forces

In the absence of any formal obligations arising from treaty law, where could alternative EU obligations under IHL potentially flow from?

On the one hand, it is commonly accepted that international organizations are subject to the rules of customary international law. Consistently with this approach, the European Court of Justice has reaffirmed on several occasions the applicability of customary international law to the European Community and the European Union.¹⁰⁹

Since, as recalled above, the customary nature of a large part of the rules of IHL is now widely acknowledged, it is submitted that the EU – in its capacity as a military actor - is bound to respect these rules.¹¹⁰ Some authors have also maintained that, within the varied range of operations subsumed under the general definition of “Petersberg Tasks”, customary IHL would serve as a valuable normative constant, ensuring the uniform application of *jus in bello* to all contributed troops, irrespective of their nationality and of the objective and scope of each operation.¹¹¹

On the other hand, it could be argued that customary rules – unwritten by definition as they are – may prove of little value in providing hands-on operational guidance to the troops on the ground.

For the purpose of identifying alternative sources of legal obligations for the EU-led forces, it may be useful to look at the EU internal legal order, with a view to verifying whether and to what extent it has integrated *jus in bello* rules and principles. The analysis of the EU constituent instrument appears to be particularly significant in this respect, as it is generally maintained that the EU treaty foundations do not only have constitutional nature, but are also international legal acts laying the ground for a new international legal order.¹¹²

The first eye-catching result of this exercise is that the TEU does not make any reference whatsoever to IHL. Reportedly, the International Committee of the Red Cross (ICRC) attempted unsuccessfully to persuade the EU Member States to include references to *jus in bello* in the sections of the Treaty dealing with foreign and security policy. In particular, in 1996 it gave the Council Presidency a proposal of wording suggesting that former Article J.4 (now Article 14)

¹⁰⁸ See AFP, France probes torture claims against its troops in DR Congo, 2 April 2008, available at <http://www.monuc.org/news.aspx?newsID=17006>.

¹⁰⁹ See, *inter alia*, Joined Cases 21-24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219, pp. 1226–1227; Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655, para. 45 (“[t]he European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country”); Case T-115/94, *Opel Austria v. Council*, [1997] ECR II-39.

¹¹⁰ A similar, though not identical, conclusion could be reached by following Lenaerts and de Smijter’s line of reasoning. These authors go so far as to suggest that, although - in principle - the Community is not bound by the international agreements concluded by its Member States, this rule does not apply when the law enshrined in the international agreement is considered to be a codification of customary law. To the extent that the customary nature of the main international humanitarian law treaties has been widely recognized – and the EU Member States are all parties to these treaties – following Lenaerts and de Smijter’s approach may lead to the conclusion that the EU is bound by international humanitarian law by virtue of the treaty obligations of its Member States. However, it is contended that this argument stretches a bit too far, see K. Lenaerts, E. De Smijter, *The European Union as an Actor under International Law*, Yearbook of European Law, no. 19, 1999-2000, p. 122.

¹¹¹ T. Ferraro, *Le droit international humanitaire dans la politique étrangère et de sécurité commune de l’Union européenne*, International Review of the Red Cross, 2002, 2002, pp. 460-461.

¹¹² See, *inter alia*, P.M. Dupuy, *op. cit.*, pp. 439-442.

should read as follows: “All decisions relating to a common defence policy and actions of the Union which have defence implications shall be in conformity with international humanitarian law and help ensure its respect”.¹¹³ Nevertheless, despite the efforts made by the ICRC, Member States have never filled this major gap, which would remain unaddressed in the Treaty of Lisbon, were it to enter into force.

Of course, the new Treaty should be given credit for explicitly upholding (for the first time in the history of the EU) “respect for the principles of the United Nations Charter and *international law*”¹¹⁴ – which may well be interpreted as encompassing *all* branches of this *corpus juris*, thus including IHL. Furthermore, the Union’s duty to respect *jus in bello* may be inferred from an expansive reading of its well-established competencies in the field of human rights,¹¹⁵ further developed over the years by the European Court of Justice and now enshrined in both the TEU and the Treaty of Lisbon. By the same token, the constitutionalisation of “respect for human dignity” among the founding values and guiding principles of the Union’s external action on the international scene¹¹⁶ echoes the very *raison d’être* of IHL.¹¹⁷

Yet, such references may appear all too abstract to guide the EU forces on questions of practical application.

Similarly - and surprisingly enough - Council acts forming the legal basis of the EU military operations, as well as the relevant agreements with host states, are also silent on the legal obligations of the EU-led personnel under *jus in bello*.¹¹⁸ The same applies to the agreements concluded with non-EU troop-contributing nations which are not parties to the same humanitarian law treaties as the EU Member States, such as Turkey and Morocco.¹¹⁹ A standard clause included both in the agreements with host states and in the EU SOFA¹²⁰ limits itself to stipulate that

¹¹³ Quoted in L. Doswald-Beck, *Implementation of international humanitarian law in future wars*, in M. Schmitt (ed.), *The law of armed conflicts: into the next millennium*, International Law Studies, vol. 7, Newport: Naval War College, 1998, pp. 61-62.

¹¹⁴ Treaty of Lisbon, *op. cit.*, Article 10a (1) (emphasis added).

¹¹⁵ As set forth Articles 11 (1) TEU, 177 (2) TEC, 181a TEC, subsuming respect for human rights under the objectives of the EU Common Foreign and Security Policy, development cooperation policy, and economic, financial and technical cooperation with third countries respectively.

¹¹⁶ *Ibidem*

¹¹⁷ Prosecutor V. Zejnil Delalić, Zdravko Mucić, Hazim Delić And Esad Landžo (“Čelebići Case”), Case No. It-96-21, Judgment, International Tribunal for the Former Yugoslavia, Appeals Chamber, 20 February 2001, para. 143 (“[The fundamental humanitarian principles which underlie international humanitarian law], the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognized humanitarian principles”).

¹¹⁸ A partial exception is found in two provisions included in the Status-of-Forces-Agreement between the European Union and the Former Yugoslav Republic of Macedonia which may be interpreted as an implicit commitment to abide by principles of *jus in bello*. Article 2 (1) of the Agreement stipulates, *inter alia*, that the European Union-Led Forces (EUF) “shall refrain from any action or activity incompatible with the impartial and international nature of the operation”. Article 9 states that “[t]he EUF will (...) respect international conventions (...) regarding the protection of the environment” (Paragraph 1) and “of cultural heritages and cultural values” (Paragraph 2). Relevant treaty provisions (now also crystallized into customary law) implicitly reaffirmed in the Agreement would arguably include the 1954 Hague Convention on Protection of Cultural Property in the event of armed conflict as well as a number of rules laid down in the 1977 Protocols to the Geneva Conventions, such as Article 53 of Protocol I and Article 16 of Protocol II (on the protection of cultural objects and places of worship) and the prohibition of the use of methods or means of warfare that are intended, or may be expected to cause widespread, long term and severe damage to the natural environment (Article 55).

¹¹⁹ See, for instance, Council Decision concerning the conclusion of the Agreement between the European Union and the Republic of Turkey on the participation of the Republic of Turkey in the European Union-led Forces in the Former Yugoslav Republic of Macedonia, Brussels, 21 May 2003, 9137/03; Council Decision concerning the conclusion of the Agreement between the European Union and the Kingdom of Morocco on the participation of the Kingdom of Morocco in the European Union military crisis management operation in Bosnia and Herzegovina, *doc. cit.*

¹²⁰ Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on

“EUFOR and EUFOR personnel shall respect the laws and regulations of the Host State and shall refrain from any action or activity incompatible with the objectives of the operation”¹²¹. Reference is sometimes also made to “the duty to abstain from any activity inconsistent with the spirit of this Agreement”¹²².

Concepts of operations (CONOPS), Operation Plans (OPLAN) and rules of engagement (ROE) of the ESDP military operations are a further, potentially valuable source of legal obligations, as they delineate, *inter alia*, the circumstances under which the EU forces may resort to armed force. The main obstacle towards a comprehensive analysis of these instructions lays (not only at the EU level) in that they are not in the public domain. However, the recent, partial declassification of brief extracts of the said documents¹²³ has finally shed (a little) light on their actual content, as well as on the extent to which they embody IHL rules and principles.

The OPLAN of the EUPOL Afghanistan police mission appears to be particularly significant in that it explicitly stipulates that the EU personnel “will respect local authorities, the law of the land of the host country, their local culture, traditions, customs and practices unless they contradict with *International Humanitarian Law* (IHL) or Human Rights”,¹²⁴ thus setting an obligation *a contrario* to abide by these bodies of law.¹²⁵ Furthermore, emphasis is frequently placed on the need that both induction and in-mission training of ESDP personnel include IHL.¹²⁶

It should be noted, however, that recent Council conclusions only reaffirmed the importance of systematic inclusion of human rights and gender issues into the planning and in the execution of all ESDP operations,¹²⁷ making no mention of expertise in IHL even when referring to the EUFOR/TCHAD-RCA operation.¹²⁸

Furthermore, it remains rather obscure whom the responsibility for the ESDP-troop training on IHL is placed upon - whether the EU or the troop-contributing states. A document developed by the Council Secretariat and laying down “Generic Standards of Behaviour for the ESDP Operations” states that pre-deployment training of personnel should be carried out “nationally as well as by the EU”, further pointing out that “particular attention” should be given, *inter alia*, to IHL.¹²⁹

However, it is worth recalling that (with the exception of the Council acts approving the EU operations, and the relevant agreements with third countries) none of the EU instruments mentioned above is legally binding in nature: indeed, such instruments are either political statements¹³⁰ or internal instructions aimed at setting disciplinary and professional standards. As such - although they *de facto* incorporate (at least to a certain extent) principles of *jus in bello* - they cannot lay the ground for EU obligations *stricto sensu* under IHL.

European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), 2003/C 321/02, 31.12.2003.

¹²¹ *Ibidem*, Article 3.

¹²² Attached to Council Decision concerning the conclusion of the Agreement between the European Union and the Central African Republic on the status of the European Union-led forces in the Central African Republic, 5472/08, Brussels, 13 March 2008, Article 2 (1).

¹²³ Partial declassification of document 11359/07 RESTREINT UE of 29 June 2007 on Mainstreaming Human Rights and Gender into European Security and Defence Policy - Compilation of Relevant Documents, Brussels, 9 October 2007, 11359/07 EXT 1.

¹²⁴ OPLAN for the EUPOL Afghanistan Police Mission, doc. 10132/07, p. 185.

¹²⁵ It should be noted that the acknowledgment of such an obligation with regard to a *police* mission may strengthen a *fortiori* the claim that international humanitarian law should be respected in the context of the EU *military* operations, which are even more likely to trigger the applicability of *jus in bello*.

¹²⁶ See, *inter alia*, OPLAN for the ESDP SSR Police Mission in the Democratic Republic of Congo, doc. 9770/07, para. 61; CONOPS for the EUPOL Afghanistan Police Mission, doc. 8199/07, para 145; OPLAN for the EUPOL Afghanistan Police Mission, *doc. cit.*, p. 291; Memorandum of Understanding for the Aceh Monitoring Mission.

¹²⁷ Council Conclusions on ESDP, 2831st External Relations Council Meeting, Brussels, 19-20 November 2007, para. 46.

¹²⁸ Council Conclusions on Sudan/Chad/Central African republic, 2845th/2846th General Affairs and External Relations Council Meetings, Brussels, 28 January 2008, para. 11.

¹²⁹ Generic Standards of Behaviour for the ESDP Operations, Brussels, 18 May, 8373/3/05 REV 3 Annex, 2005.

¹³⁰ Further relevant statements can be found in N. Ronzitti, *op. cit.*, 178-181.

By the same token, a note of caution should be sounded here with respect to another soft-law instrument, namely the EU Guidelines on promoting compliance with international humanitarian law, adopted by the Council in 2005.¹³¹ Undoubtedly, the Guidelines represent the most complete and comprehensive document developed by the EU in the domain of *jus in bello* thus far, and provide a valuable overview of the EU's approach to IHL. They are also particularly remarkable in that they expressly state that “*the goal of promoting compliance with IHL*” is included among the founding principles of the EU as listed in Article 6 (1) TEU, thus providing a progressive, expansive reading of this key provision.¹³²

However, while the Guidelines are sometimes presented as upholding “existing international humanitarian law in the EU's crisis management”,¹³³ it should be emphasized that their aim - as declared in Paragraph 2 - is “to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States”. Hence, as pointed out in the same paragraph, “measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct, including by *their own forces*”¹³⁴ fall outside the scope of the Guidelines.

7. Conclusions

The increasing engagement of the EU in situations actually or potentially crossing the threshold of armed conflict clearly demonstrates the inherent relevance of IHL to the Union's capacity as a security actor. However, as the analysis above shows, the political, institutional, and military developments occurred in the ESDP over the past few years (as well as those facing the EU in the near future) have not yet been paralleled by the definition of uniform legal standards for the conduct of the EU troops under the *jus in bello*.

Indeed, the legal framework for the EU's military action is still a rudimentary one, mostly made up of soft-law instruments, and characterized by a certain degree of juxtaposition of heterogeneous (and sometimes contradictory) legal obligations binding on the different actors concerned. The present study has submitted that, despite the obstacles raised by its *sui generis* nature, the EU does indeed have the capacity to undertake legal obligations under IHL: hence, it is suggested that the Union, although not formally bound by the relevant treaties, should nevertheless move beyond sporadic and generic references to *jus in bello* and concretely lay down a *corpus* of detailed rules of IHL. This core of common standards should be legally binding on all the troop-contributing states, and formal agreement to abide by it should constitute a necessary precondition for participation in the ESDP military operations.

Recently reported incidents involving EU military personnel make an even stronger case for the EU to rapidly address the many legal challenges posed by its military engagement, thus reducing the risk of conducting sensitive operations in a dangerously fragmented legal framework. It is maintained that the way the EU addresses these challenges - and the extent to which it upholds *de jure*, in its military action, principles and rules which are crucial to protection of human dignity - is bound to have a profound impact on the way the presence of its troops is perceived on the ground (and, ultimately, on the overall success of its operations), as well as on its credibility as a military actor and fully-fledged subject of international law.

¹³¹ *Doc. cit. supra*, Chapter 5.

¹³² *Ibidem*, Paragraph 3.

¹³³ See R. Gosalbo Bono, *op. cit.*, p. 390.

¹³⁴ Emphasis added.