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European Crisis Management Missions and Human Rights

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Abstract

The European Union is increasingly undertaking civilian and military crisis missions all over the world in its attempt to become a global security actor. Its ambitions to strengthen its influence on the international scene through comprehensive crisis management missions are closely linked to the promotion of human rights. One of the EU's policy goals and biggest challenges ahead is to mainstream human rights into all phases and aspects of crisis management, including the planning as well as the implementation phase of an operation. The paper will show that the European Union is legally bound by human rights not only from a European perspective but also from the perspective of international law when it is engaged in crisis management operations. In order to visualise the importance for the respect for human rights the paper will also examine the possible responsibility of the European Union for human rights violations committed by EU-led forces by analysing the Behrami and Saramati decisions of the European Court of Human Rights. Lastly, the paper will look at the progress that has been done by the European Union and its various actors in the mainstreaming of human rights in crisis management missions so far.

Introduction

Since the common security and defence policy became operational in 2003, the European Union has been engaged in more than 20 crisis management operations. So far, these operations included police missions¹, rule of law missions², border assistance missions³, missions in support of security sector reforms⁴, monitoring missions⁵ and military missions⁶, for example and visualize the EU's ambition to become a global security actor whose international role mirrors its economic influence. The EU's aspiration has been highlighted and driven forward by the *European Security Strategy* of December 2003⁷ which is the first strategic European document focusing on foreign policy as a whole including trade, aid, diplomacy as well as military dimension.

The *European Security Strategy* itself emphasises the importance of the promotion of the respect for human rights by identifying global challenges and key threats, including terrorism, the proliferation of weapons of mass destruction, regional conflicts, state failure and organized crime, situations that can all be linked to an unstable human rights environment. It states that

“[t]he best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order”.⁸

In transforming this broader concept into practice, some of the EU's crisis management missions directly focus on the promotion of human rights, for example the rule of law

¹ See for example EU Police Mission in Afghanistan, *EUPOL AFGHANISTAN*, Council Joint Action 2008/229/CFSP of 17 March 2008.

² See for example EU rule of law mission in Kosovo, *EULEX KOSOVO*, Council Joint Action 2008/124/CFSP of 4 February 2008.

³ See for example EU Border Assistance Mission at Rafah Crossing Point in the Palestinian Territories *EU BAM Rafah*, Council Joint Action 2007/359/CFSP of 23 May 2007.

⁴ See for example EU mission in support of security sector reform in Guinea-Bissau, *EU SSR Guinea-Bissau*, Council Joint Action 2008/112/CFSP of 12 February 2008.

⁵ See for example Aceh Monitoring Mission (AMM), Council Joint Action 2005/643/CFSP of 9 September 2005.

⁶ See for example operation *EUFOR* in Chad, Council Joint Action 2007/677/CFSP of 15 October 2007.

⁷ A Secure Europe In A Better World: European Security Strategy, Brussels, 12 December 2003 [hereinafter *European Security Strategy*].

⁸ *European Security Strategy*, above n 7, 10.

mission *EULEX* in Kosovo. The rule of law is often identified as one of the most prominent ways to safeguard human rights.⁹ Another example for crisis management operations directly concerned with human rights is the *Aceh* monitoring mission in Indonesia.¹⁰

The mainstreaming of human rights adds a new dimension to the promotion and protection of human rights through the European Union. Internally, the EU is based on the protection of fundamental rights, democracy and the rule of law. Driven forward by dynamic judgements of the European Court of Justice, fundamental rights are recognised as representing general principles of Union law that have to be respected not only by EU institutions but also by the member states. Externally, the EU also has been active in the promotion of human rights through various instruments, including the insertion of human rights clauses in agreements with third states, the linking of human rights standards to the granting of unilateral trade preferences as well as setting up a human rights conditionality for European enlargement.¹¹

Although being part of the EU's external human rights policy, the mainstreaming of human rights into common security and defence policy is not primarily concerned with the solving of critical human rights situations as such. The concept is rather about incorporating human rights considerations in all aspect of crisis management operations in order to ensure that the EU and its various actors respect human rights in the undertaking of an EU mission; thereby contributing to the overall success of an operation. Put differently, with the concept of mainstreaming, the EU reacts to the potential danger of human rights violations either witnessed or committed during an EU operation. For example, EU personnel needs to be educated in order to be able to act appropriately if they get information on human trafficking, witness the discovery of a mass grave¹² or

⁹ A Von Bogdandy, "The European Union As A Human Rights Organization? Human Rights And The Core Of The European Union" (2000) 37 Common Market Law Review 1307, 1312.

¹⁰ Council Joint Action 2005/643/CFSP of 9 September 2005

¹¹ B Brandtner and A Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 European Journal of International Law 468, 473.

¹² For some examples, see H Hazelzet, "Human Rights Aspects of EU Crisis Management Operations: From Nuisance to Necessity" (2006) 13 (4) International Peacekeeping 564, 564.

find themselves faced with child soldiers.¹³ If the EU would not live up to its own standard of human rights protection, it would not only jeopardise the success of its missions but, it would also weaken its credibility as an international actor, capable of loosing its international legitimacy in the long-run. The implementation of mainstreaming of human rights into crisis management operations is viewed by the Council as one of the EU's biggest foreign policy challenges ahead.¹⁴

Paper Outline

Part one of the paper will offer a definition of EU crisis management and will outline how a military crisis management mission is undertaken in practice. The following part then goes on to examine the concept of mainstreaming and will provide a short overview of the history of mainstreaming of human rights. Part three will examine the human rights obligations of the EU in order to visualise the importance of effective mainstreaming of human rights into crisis management. The possible accountability of the EU for human rights violations conducted by personnel in an EU-led crisis management mission will be assessed in part four by drawing an analogy with the *Behrami and Saramati*¹⁵ decision of the European Court of Human Rights. The last part will provide an overview of the progress that has already been made in the mainstreaming of human rights as one of the best means to avoid the accountability of the EU for possible human rights violations.

Part 1

A comprehensive concept of crisis management

Although no internationally agreed definition on crisis management exists, the statements of the EU and its practice support the view of a comprehensive concept of crisis

¹³ The EU is also promoting the mainstreaming of international humanitarian law throughout its external action. See for example: Council of the European Union, Press Release, *Council conclusions on promoting compliance with international humanitarian law*, 2985th Foreign Affairs Council meeting, Brussels, 8 December 2009; Council of the European Union, *Council Document On The Main Aspects And Basic Choices Of The Common Foreign And Security Policy (CFSP) Presented To The European Parliament In Application Of Point G (Paragraph 43) Of The Interinstitutional Agreement Of 17 May 2006 -2009*, Brussels, 8 June 2010, DOC 10659/10, 47.

¹⁴ Council of the European Union, *Mainstreaming human Rights And Gender Into European Security And Defence Policy: Compilation of Relevant Documents* (European Communities, Brussels 2008) 11.

¹⁵ European Court of Human Rights, No. 71412/01 and No. 78166/01 *Behrami and Saramati*, 2 May 2007.

management.¹⁶ The European approach is comprehensive in two ways. Not only is the European Union prepared and willing to act in the whole life cycle of a conflict, including conflict prevention, peace-making, peace-enforcement, peace-keeping as well as post conflict stabilisation, but it is also willing to use a variety of tools that are at its disposal.

European crisis management missions are covered by the Union's common security and defence policy¹⁷ which forms an integral part of the common foreign and security policy (CFSP). These CSDP missions may be used in general for peace-keeping, conflict prevention and strengthening of international security outside the territory of the European Union.¹⁸ The fulfilment of these tasks can include a variety of missions, including the non-exhaustive list of the so called Petersberg Plus tasks that has been amended by the Treaty of Lisbon and now refers to joint disarmament operations, humanitarian and rescue task, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.¹⁹ Civilian crisis management missions in practice include police missions, rule of law missions, border assistance missions, mission in support of security sector reform and monitoring missions. All military crisis management missions so far have been undertaken with the consent of the host state. Nevertheless, the European Union could undertake a robust military intervention in the future.

In the scholarly debate, economic sanctions usually are not incorporated into the concept of European crisis management.²⁰ However, to address the whole life –cycle of a conflict a variety of tools are not only necessary and available to the European Union but they are

¹⁶ Blockmans, "An introduction to the role of the EU in crisis management" in S Blockmans (ed), *The European Union And Crisis Management: Policy And Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 10.

¹⁷ The Treaty of Lisbon renamed the European security and defence policy (ESDP) into the common security and defence policy.

¹⁸ Article 42 LTEU.

¹⁹ Article 43 LTEU.

²⁰ In favour of the inclusion of sanctions into the EU's comprehensive approach to crisis management: I Anthony, "Sanctions applied by the European Union and the United Nations" SIPRI Yearbook 2002: Armament, Disarmament and International Security, 203.

also used in practice. The *European Security Strategy* itself mentions trade measures, including economic sanctions alongside other tools when it asks the EU to be more active in pursuing its strategic objectives, which

“applies to the full spectrum of instruments for crisis management and conflict prevention at our disposal, including political, diplomatic, military and civilian, trade and development activities. Active policies are needed to counter the new dynamic threats. We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention.”²¹

The Council document *Basic Principles on the Use of Restrictive Measures (Sanctions)* perceives “the effective use of sanctions as an important way to maintain and restore international peace and security” and states that the “Council is committed to using sanctions as part of an integrated, comprehensive policy approach which should include political dialogue, incentives, conditionality and could even involve, as a last resort, the use of coercive measures in accordance with the UN Charter”.²² Furthermore, economic sanctions are not only used separately but they often accompany civilian and military crisis management operations of the EU. As they provide a tool to end a conflict they should be included in the overall concept of crisis management.

In sum, European crisis management is comprised of all types of military and civilian operations, covering the whole life-cycle of a conflict reaching from conflict prevention to post conflict rehabilitation and covering the whole external dimension of security, across the different policy areas of the European Union,²³ as well as a variety of economic, diplomatic and political tools.

How does a crisis management mission work in practice?

²¹ *European Security Strategy*, above n 7, 11.

²² , Council of the European Union, “Basic Principles on the Use of Restrictive Measures (Sanctions)” Brussels, 7 June 2004, 10198/1/04 REV 1, PESC 450, Annex 1, para 1 and 5 [hereinafter *Basic Principles on the Use of Restrictive Measures*].

²³ S Blockmans, “An introduction to the role of the EU in crisis management” in S Blockmans (ed), *The European Union And Crisis Management: Policy And Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 11.

The next part will describe how a crisis management operation is conducted in practice. The European Union does not have its own army and therefore depends on the member states to make civilian and military capabilities available for the implementation of its common security and defence policy. The analysis of the command and control structure is essential in order to show that EU led crisis management missions are “European missions” and represent more than just a sum of European member states acting together. The military naval operation *Atlanta* against Somali pirates will serve as an example.

Usually, the EU decides to undertake an EU led crisis management operation after it received a mandate to do so by the UN Security Council, after the conclusion of a peace agreement or after acquiring the consent of the host state.²⁴ In the case of *Atlanta*, the Security Council authorised states to use all necessary means, including the use of military force in Resolutions 1814 (2008),²⁵ 1816 (2008)²⁶ and 1838 (2008)²⁷.

If the member states agree to conduct an operation, the Council adopts a decision defining actions to be undertaken by the Union, the instrument formerly known as a Council joint action.²⁸ Operational decisions are binding on the member states and are constraining them in the conduct of their domestic foreign policy. On the one hand, member states are under the positive obligation to support the operational decisions of the EU²⁹ and on the other hand, they have to refrain from anything that would undermine the success of such an operation.³⁰ *Council joint action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast*³¹ sets out the mandate of the mission to protect vessels of the World Food Programme as well as

²⁴ F Naert, “Accountability For Violations Of Human Rights Law By EU Forces” in S Blockmans (ed), *The European union And Crisis Management: Policy And Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 377.

²⁵ UNSCR 1814 of 15 May 2008.

²⁶ UNSCR 1816 of 2 June 2008.

²⁷ UNSCR 1838 of 7 October 2008.

²⁸ Articles 28, 25 LTEU.

²⁹ Member states are not obliged to make their troops available to the European Union.

³⁰ Article 24 (3) LTEU.

³¹ *Council joint action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast*, OJ 2008 L 301/33.

merchant vessels, through all necessary means, including the use of force and to arrest, detain and transfer persons who have committed acts of piracy or armed robbery.³² The joint action also appoints an EU operation commander³³ and designates an EU operational headquarter³⁴.

Furthermore, it sets out that the Political and Security Committee (PSC) under the responsibility of the Council shall exercise political control and strategic direction of the operation. The Council authorises the PSC to take the relevant decision in accordance with Article 38 LTEU, including “the powers to amend the planning document, including the Operation Plan, the Chain of Command and the Rules of Engagement” and “the powers to take decisions on the appointment of the EU Operation Commander and /or EU Force Commander”.³⁵ The PSC appointed an EU Force Commander through *Political And Security Committee Decision Atlanta/1/2009 of 17 March 2009*. The PSC is put under the obligation to report to the Council at regular intervals.³⁶ In turn, the PSC receives reports from the chairman of the EU Military Committee in respect of the conduct of the military operation.³⁷ With regards to military direction, the joint action provides that it is for the EU Military Committee to monitor the proper execution of the EU military operation under the responsibility of the EU Operation Commander. For that purpose, the latter has to provide the former with reports in regular intervals.³⁸

Apart from these provisions on political control, strategic direction as well as on military direction, the joint action furthermore provides for the authority of the Political and Security Committee to invite third states to participate in the operation.³⁹ The PSC exercises this right by adopting a decision.⁴⁰ Furthermore, the joint action touches upon

³² Council joint action, above n 31, Article 2.

³³ Council joint action, above n 31, Article 3.

³⁴ Council joint action, above n 31, Article 4.

³⁵ Council joint action, above n 31, Article 6 (1).

³⁶ Council joint action, above n 31, Article 6 (2).

³⁷ Council joint action, above n 31, Article 6 (3).

³⁸ Council joint action, above n 31, Article 7.

³⁹ Council joint action, above n 31, Article 10.

⁴⁰ See for example *Political and Security Committee Decision Atlanta/2/2009 of 21 April 2009 on the acceptance of third States' contribution to the European Union military operation to contribute to the*

the status of EU-led forces and their personnel⁴¹ which are negotiated in detail in an SOFA agreement, concluded by the European Union and the host state.⁴² Lastly, the joint action refers to financial arrangements that are to be administered according to ATHENA.⁴³ Additionally to a variety of possible Council decisions and agreements with third states or international organisations, e.g. with NATO, an Operation Plan and rules of engagement will be in place for military operations.⁴⁴ These documents are not publicly available.⁴⁵

Apart from these rules of EU law, CSDP operations may have to respect rules of international law including human rights and humanitarian law. An examination of the question whether the EU is bound by human rights from an international law perspective will be offered below. The respect for the domestic law of the host state will be of importance especially in the status of force agreements. Lastly, the staff and military personnel will remain bound by some domestic law of the troop contributing state.⁴⁶

To conclude, although the military personnel in EU crisis management missions is deployed by the member states that retain some power over their troops, the Political and Security Committee plays the decisive role in crisis management operations. It is this committee that exercises political control and strategic direction and that has the power to appoint the Operation Commander who is responsible for the military direction of the mission. Due to the obligation of the Military Committee to report to the PSC in regular intervals, a chain of command can be established to the Political and Security Committee.

Part 2

The concept of mainstreaming

deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atlanta) (2009/356/CFSP), OJ 2009 L 109/52.

⁴¹ Council joint action, above n 31, Article 11.

⁴² See for example *Agreement between the European Union and the Somali republic on the status of the European union-led naval force in the Somali Republic in the framework of the EU military operation Atlanta*, OJ 2009 L 10/30.

⁴³ Council joint action, above n 31, Article 14.

⁴⁴ Naert, above n 24, 377.

⁴⁵ Naert, above n 24, 377.

⁴⁶ Naert, above n 24, 378.

In the absence of a universally agreed definition of the concept of mainstreaming of human rights, one could start with the ordinary meaning of the term.⁴⁷ “Mainstreaming” in general means that concepts, issues and ideas are brought from the outer edges to the centre; in more specific terms it can also describe the process with which a pre-defined goal is supposed to be achieved.⁴⁸

The mainstreaming of human rights thus can be defined as a

“strategic process of deliberately incorporating human rights considerations into processes or organizations which are not explicitly mandated to deal with human rights. More specifically, mainstreaming is a process of integrating human rights within policies and managerial structures, methodologically supported by a human rights-based approach in programming and operational activities. Thus, in a qualitative sense, it is different from a sum of human related activities undertaken by various actors. Its goals are achieved when human rights provide an important context and methodological framework for the entire work of the organization; when the organization does not only undertake some activities beneficial for human rights but also applies human rights methodology while performing its core task. In other words, the goals of mainstreaming are achieved when human rights standards and methodology become part of the institutional culture of the organization. In practical terms, this means that the organization in question bases its programmes, policies and activities on international and regional human rights law, i.e. the applicable human rights norms, standards and principles; and that it operates in a way which fosters those norms, standards and principles.”⁴⁹

Successful mainstreaming of human right thus should avoid two extremes, namely to treat human rights as the exclusive task of a subdivision of the organisation on the one hand⁵⁰ or to limit its impact by guiding it throughout all divisions of the organization without providing it with sufficient focus on the other hand.⁵¹ Hence, the mainstreaming of human rights asks for a dual approach, combining activities focused on human rights

⁴⁷ Directorate-General For External Policies of the Union, Directorate B, Policy Department, *Human Rights Mainstreaming in EU's External Relations: Study*, September 2009, [hereinafter Human Rights Mainstreaming in EU's External Relations] <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>.

⁴⁸ Human Rights Mainstreaming in EU's External Relations, above n 47, 15.

⁴⁹ Human Rights Mainstreaming in EU's External Relations, above n 47, 15.

⁵⁰ Human Rights Mainstreaming in EU's External Relations, above n 47, 15.

⁵¹ Human Rights Mainstreaming in EU's External Relations, above n 47, 16.

and the creation of an institutional structure to encourage the development and the reinforcement of other actors and subdivisions in the organization to enhance human rights both in and through their own work.⁵² The mainstreaming of human rights is not an ad hoc reaction to a specific human rights situation but rather a long term project, asking for the development of a comprehensive strategy that identifies overarching goals, sets up a time –frame to achieve pre-defined short-, mid- and long-term objectives and that allocates resources as well as operational means for that purpose.⁵³

Mainstreaming of human rights is not without difficulties in practice. Anything that goes beyond a purely rhetorical usage of a human rights terminology creates conceptual and legal questions in general.⁵⁴ One of the biggest challenges is how to incorporate human rights norms into actual policies and programmes.⁵⁵ Some of the obstacles include a lack of knowledge of the implications of human rights as well as doubts regarding the aim of mainstreaming.⁵⁶ Apart from these problems related to a lack of information, practical obstacles include the training of staff, the adaptation of bureaucratic practices and the establishment of a functioning human rights infrastructure, asking for human rights knowledge in implementing, monitoring and evaluating existing programmes and concepts as well as the openness to react to shortcomings.⁵⁷ The next section will assess the EU's history of human rights mainstreaming with a special emphasis on the EU's external relations and in particular the common security and defence policy.⁵⁸

History of human rights mainstreaming in the EU

Human rights are linked to democracy and the rule of law. In turn, a society based on human rights is the best pre-condition for a peaceful environment. The European Union has always been a peace project and human rights, democracy and the rule of law have always played an important role in the process of European integration. The actual

⁵²Human Rights Mainstreaming in EU's External Relations, above n 47, 16.

⁵³Human Rights Mainstreaming in EU's External Relations, above n 47, 16.

⁵⁴Human Rights Mainstreaming in EU's External Relations, above n 47, 18.

⁵⁵Human Rights Mainstreaming in EU's External Relations, above n 47, 18.

⁵⁶Human Rights Mainstreaming in EU's External Relations, above n 47, 18.

⁵⁷Human Rights Mainstreaming in EU's External Relations, above n 47, 18.

⁵⁸ The EU's concept of mainstreaming of human rights draws heavily from experiences of the United Nations. See for example, Human Rights Mainstreaming in EU's External Relations, above n 47,4.

terminology of human rights mainstreaming is rather new, however, its foundation dates further back.

The process of European integrations, starting in the 1950s with the *Schumann Declaration*⁵⁹ was driven forward by the vision to secure peace and freedom in Europe through the linkage of the key industries of France and Germany, the former enemies in the Second World War. In the early years of the European Communities that later turned into the European Union, the main focus has been put on the internal human rights development, driven forward by decisions of the European Court of Justice.⁶⁰ The external dimension of the promotion for the respect of human rights started in the early 1990s with the codification of the common foreign and security policy in the Treaty of Maastricht and has been encouraged by the development of a moral conviction and the consensus to project the EU's internal principles and values to the outside world.⁶¹ In 1995, the Commission stated that a "commitment to respect, promote and protect human rights and democratic principles is a key element of the European Community's relations with third countries" and recommended to pay respect to human rights in agreements with third countries.⁶² Democratic principles and the respect for human rights started to form part of the dialogue between the contracting parties and conditioned the implementation of positive measures, e.g. the conclusion of trade agreements.⁶³ The term "mainstreaming" however, was first used by the Commission in 2001 with regards to "mainstreaming "the promotion of human rights and democracy in EC assistance programmes".⁶⁴ The Council responded to the Commission communication and

⁵⁹ R Schumann, Declaration of 9 May 1950, available at http://europa.eu/abc/symbols/9-may/decl_en.htm, see also the preamble of the Treaty on European Union.

⁶⁰ See for example, Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide- und Futtermittel* [170] European Court Reports 1125.

⁶¹ Human Rights Mainstreaming in EU's External Relations, above n 47, 28.

⁶² European Commission, *Communication From The Commission On The Inclusion Of Respect For Democratic Principles And Human Rights in Agreements between The Community And Third Countries*, COM (95) 216 final, Brussels 13.05.1995, introduction [hereinafter *Communication From The Commission On The Inclusion Of Respect For Democratic Principles And Human Rights in Agreements between The Community And Third Countries*]

⁶³ *Communication From The Commission On The Inclusion Of Respect For Democratic Principles And Human Rights in Agreements between The Community And Third Countries*, above n 62.

⁶⁴ European Commissions, *Communication from the Commission to the Council and the European Parliament – The European Union's role in promoting human rights and democratisation in third countries*, COM/2001/0252 final, 3.2.

especially to the concept of mainstreaming in the same year and asked the Working Group on Human Rights (COHOM) to develop an implementation strategy.⁶⁵ The Council regarded the mainstreaming of human rights as one of the four key elements that could help the EU to increase the effectiveness of its human rights and democratisation policy. The other factors included coherence between Community and CFSP action; greater openness achievable through a strengthened dialogue with civil society and the European Parliament and lastly the regular identification as well as review of priority tasks. Five years later, COHOM submitted a paper on “Mainstreaming human rights across CFSP and other EU policies”⁶⁶ which was endorsed by the PSC. This paper states that “the EU is committed to mainstreaming human rights and democratization into EU policies and choices, in order to achieve a more informed, credible, coherent, consistent and effective EU human rights policy.”⁶⁷ It asks all actors to make better use of EU tools, for example EU guidelines, CFSP instruments including political dialogue and human rights clauses in bilateral agreements as well as to make better use of available sources of human rights information in order to raise human rights issues with third countries.⁶⁸ Furthermore, it demands the improvement on “the follow-ups to demarches, human rights dialogues and consultations and other political dialogues, as well as EU initiatives in multilateral fora”.⁶⁹ Additionally, all actors are supposed to address accusations of double standards.⁷⁰ The document also refers to CSDP missions and operations and states that the “protection of human rights should be systematically addressed in all phases of ESDP operations, both during the planning and implementation phase, including by measures ensuring that the necessary human rights expertise is available to operations at headquarter level and in theatre; training of staff; and by including human right reporting in the operational duties of ESDP missions”.⁷¹ Based on this document, a paper on “Mainstreaming of human rights into ESDP” has been issued that recommends practical

⁶⁵ Human Rights Mainstreaming in EU’s External Relations, above n 47, 31.

⁶⁶ Council of the European Union, *Mainstreaming human rights across CFSP and other EU policies*, 10076/06, Brussels, 7 June 2006 [hereinafter *Mainstreaming human rights across CFSP and other EU policies*]

⁶⁷ *Mainstreaming human rights across CFSP and other EU policies*, above n 66, ANNEX I, 2.

⁶⁸ *Mainstreaming human rights across CFSP and other EU policies*, above n 66, ANNEX I, 2.

⁶⁹ *Mainstreaming human rights across CFSP and other EU policies*, above n 66, ANNEX I, 2.

⁷⁰ *Mainstreaming human rights across CFSP and other EU policies*, above n 66, ANNEX I, 2.

⁷¹ *Mainstreaming human rights across CFSP and other EU policies*, above n 66, ANNEX I, 7.

and concrete steps in order to ensure the mainstreaming of human rights into CSDP.⁷² These steps include the development of a consolidated list of relevant human rights related documents and concepts in the context of CSDP to assist the planners of CSDP missions; the development of a model for generic key human rights elements that can be incorporated in planning documents as well as reviews of CSDP missions; the development of a standard field manual drawing on manuals from international organisations like the UN; the organisation of a workshop for CSDP planners; the development of standard training guidelines for general CSDP courses as well as for induction training for personnel employed in CSDP missions; the inclusion of human rights aspects into CSDP exercises; to ensure that the necessary expertise is available to missions and operations at all levels; to include human rights expertise in preparatory activities such as fact finding and planning teams; to make human rights advisors available to CSDP operations at all stages; to create mission-specific human rights reporting procedures and finally to ensure that lessons learned are taken into account in future CSDP operations.⁷³

In sum, the mainstreaming of human rights in crisis management operations has created some attention in the last few years and visualises the awareness and commitment of major EU institution. If the EU actually has made good progress in mainstreaming human rights into all phases of CSDP missions will be discussed in part five after examining in more detail why the mainstreaming of human rights is of importance.

Part 3

EU bound by human rights

The next part will highlight the importance of the mainstreaming of human rights into crisis management operations. If the EU would not respect human rights in and through its CSDP missions, they would on the one hand lose their effectiveness. On the other hand, the credibility of the Union as a global security actor would be weakened. The European Union can only legitimately promote the respect of human rights in its external

⁷² Council of the European Union, *Mainstreaming of Human Rights into ESDP*, 11936/4/06 [hereinafter *Mainstreaming of Human Rights into ESDP*].

⁷³ *Mainstreaming of Human Rights into ESDP*, above n 72.

relations and broadcast its internal moral convictions to the outside world if it lives up to its own standards. From a legal perspective, the European Union is bound to respect human rights under international as well as under European law. Hence, the violation of human rights standards could have serious consequences for the European Union and its member states which enhances the need for a functioning mainstreaming of human rights into CSDP missions. Before the possible accountability of the European Union for human rights violations committed in the context of EU-led crisis management missions will be assessed on the basis of the European Court of Human Rights' *Behrami and Saramati* decision⁷⁴, the next part will examine the human rights obligations of the European Union from a European as well as from an international law perspective. It will be shown that the European Union, its institutions as well as its member states are bound by human rights when they are undertaking EU crisis management operations.

Legal Personality

The question of whether the European Union can be bound by human rights itself raises the problem of its legal personality. Legal personality describes the capacity of an entity to have rights and to be subject to obligations in general. The implicit legal personality of the European Union has been disputed by some in the past despite convincing arguments to the contrary. However, since the entry into force of the Treaty of Lisbon, the Union's legal personality is now explicitly written down in Article 47 TEU. Thus, the European Union is capable of being bound by human rights in general.

Perspective of international law

Nevertheless, the question still has to be answered by which human rights the Union is bound in particular. As an international organisation, the European Union is bound by general international law. International law is comprised of two main sources, namely treaties and customary law. In respect of treaties, it has to be mentioned that the European Union has not signed a human rights treaty yet.⁷⁵ In the context of military crisis management operations, the European Union concludes status of force agreement with

⁷⁴ European Court of Human Rights, No. 71412/01 and No. 78166/01 *Behrami and Saramati*, 2 may 2007.

⁷⁵ Naert, above n 24, 390.

the country the EU forces are stationed in. These SOFAs usually contain provisions on the identification of the mission personnel and provisions on privileges and immunities granted by the host state.⁷⁶ Although the EU could insert human rights obligations of EU personnel, it has never done so in practice.⁷⁷ The European Union is furthermore bound by international customary law and hence by human rights that acquired that status. Most of the rights contained in the ICCPR are captured by this category.

Perspective of EU law

The European Union is not only bound by human rights under international law. It is also bound by human rights from the perspective of EU law itself. Crisis management operations fall under the common security and defence policy which forms an integral part of the common foreign and security policy of the European Union. When examining the legal basis for the inclusion of human rights into crisis management operations, the focus has to be on the human rights commitment of the European Union in general, and on the human rights in the sphere of the common foreign and security policy in particular.

The Treaty of Lisbon now states that “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”.⁷⁸ Its “aim is to promote peace, its values and the well-being of its peoples”.⁷⁹ In its external relations, “the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity, mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”⁸⁰

⁷⁶ See for example Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atlanta, OJ 2009 L 10/29, Article 3 and 5.

⁷⁷ Naert, above n 75, 390.

⁷⁸ Article 2 LTEU.

⁷⁹ Article 3 (1) LTEU.

⁸⁰ Article 3 (5) LTEU.

In respect to the Union's external action, including the common foreign and security policy, Article 21 (1) LTEU provides that "[t]he Union's action on the international scene shall be guided by the principle which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." The EU is called to "define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to consolidate and support democracy, the rule of law, human rights and the principles of international law"⁸¹ and to "preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris"⁸².

The general commitment of the European Union to human rights has been giving teeth internally through the obligation to respect human rights as general principles of EU law. The development of European human rights forming part of general principles has been driven forward by the European Court of Justice. Their content is derived from two sources, namely the constitutional traditions common to the member states and the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁸³ Since the entry into force of the Treaty of Lisbon, the EU is furthermore bound by the Charter of Fundamental Rights of the European Union that has the status of primary EU law⁸⁴, albeit still being codified in a separate document.

The Treaty of Lisbon that de-pillarised the EU and led to the end of the European Community also partly solved the dispute of whether the European Union is bound by human rights as general principles of EU law when it is acting externally. Article 6(3) LTEU now expressly refers to general principles of Union law and hence supports the

⁸¹ Article 21 (2) b LTEU.

⁸² Article 21 (2) c LTEU.

⁸³ Article 6 (3) LTEU

⁸⁴ Article 6 (1) LTEU.

view that the European Union is not only bound by human rights internally but also when acting under the common foreign and security policy as well as the common security and defence policy.⁸⁵ In conclusion, the European Union is bound by human rights in the conduct of crisis management operations from the perspective of international law as well as from the perspective of European law.

Part 4

Behrami and Saramati

The next part will examine the *Behrami* and *Saramati* decision⁸⁶ of the European Court of Human Rights (ECtHR) and its possible implications for the European Union and its member states. Before the facts of the case will be outlined, it has to be noted that the decision does not deal with an EU-led crisis management mission. Furthermore, although all European member states are members of the European Convention on Human Rights, the European Union has not acceded to the convention yet.⁸⁷ Nevertheless, the ECtHR has ruled on alleged human rights violations committed through member states that were implementing compulsory EU legislation in the past.⁸⁸ The decision of the court has been harshly criticised for a variety of different reasons which will not be discussed in this contribution.⁸⁹ Nevertheless, the ECtHR has already used its *Behrami and Saramati* decision in other cases as a precedent. Its reasoning can be transferred to the European Union and might have implications for the attribution of human rights violations committed by member states in the conduct of an EU-led mission. Thus, the ECtHR decision might help to answer who is accountable for human rights violations in the

⁸⁵ Naert, above n 75, 388. Before, the Treaty on European Union only referred to general principles of Community law.

⁸⁶ European Court of Human Rights, No. 71412/01 and No. 78166/01 *Behrami and Saramati*, 2 may 2007 [hereinafter *Behrami and Saramati*].

⁸⁷ According to Article 6 (2) LTEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁸⁸ G De Burca, "The European Court of Justice and the International Legal Order after *Kadi*", Jean Monnet Working Paper 01/09, <http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.pdf>.

⁸⁹ See for example H Krieger, "A Credibility Gap: The *Behrami* and *Saramati* Decision of the European Court of Human Rights" (2009) 13 *Journal of International Peacekeeping* 159; A Sari, "Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases" (2008) 8 *Human Rights Law Review* 151; M Milanovic and T Papic, "As Bad As It Gets: The European Court Of Human Rights' *Behrami And Saramati* Decision And General International Law" (2009) 58 *International and Comparative Law Quarterly* 267.

conduct of European crisis management operations, the EU, its member states or maybe both.

Facts of the case

The *Behrami and Saramati* decision is linked to the conflict between Serbian and Kosovar Albanian forces and the NATO air strikes in 1999 on the territory of the Former Federal Republic of Yugoslavia (FRY). After FRY agreed to withdraw from Kosovo, the air strikes ended. UN Security Council resolution 1244 of 10 June 1999 authorised the creation of the security presence KFOR by member states as well as international institutions under UN auspices with substantial NATO participation but under unified control and command. The KFOR contingent responsible for the sector in which Behrami's accident occurred was led by France and Germany. Under UNSCR 1244 KFOR was asked to supervise mine clearing operations until UNMIK could take over. UNMIK was set up by UNSCR 1244 as an interim administration for Kosovo under UN auspices. It was supposed to coordinate closely with KFOR.

In March 2000 two of Mr Behrami's sons found a number of undetonated cluster bomb units. Gadaf Behrami was killed by the explosion and his brother Bekim Behrami was disfigured and is now blind. French KFOR officers stated that KFOR had knowledge of unexploded bombs. In April 2001 Ruzhdi Saramati was arrested by UNMIK police by order of the Commander of KFOR, a Norwegian officer at that time, on suspicion of attempted murder and illegal possession of a weapon. KFOR claimed to have the authority to detain under UNSCR 1244 as it was necessary to maintain a safe and secure environment as well as to protect KFOR.

The court's assessment

In both cases the relevant responsible organisation, namely KFOR, UNMIK or the UN was in question. One of the issues raised was whether the court was competent to review the national contribution to KFOR or UNMIK. Only when the court could establish a jurisdictional link with one member state and if the conduct in question could be attributed to one of the member states of the convention, the applicants could have been

successful. Neither the UN nor NATO are signatories of the convention and thus do not fall under the jurisdiction of the ECtHR. However, the court did not really address the problem of a jurisdictional link and stated that “the question raised by the present case is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States’ contribution to the civil and security presences which did exercise the relevant control of Kosovo”.⁹⁰ It mainly focused on the question of attribution of conduct.

The court held that the challenged actions could not be attributed to KFOR. It stated that the key question was whether the UN Security Council retained “ultimate authority and control” so that only operational control would have been delegated from the UN Security Council to KFOR.⁹¹ It argued that UNSCR 1244 provided for the following chain of command from the UN to NATO to KFOR. NATO fulfilled its command mission via a chain of command to COMKFOR, the commander of KFOR.⁹² Officers from a lead troop contributing nation were under direct command of COMKFOR.⁹³ The court argued that although the troop contributing nations retained some authority over their military personnel, for example regarding uniforms etc, NATO’s command might not have been exclusive but “effective” which would be decisive.⁹⁴ National command over own troops was under the direct operational authority of COMKFOR.⁹⁵ Hence, the court concluded that KFOR had been exercising lawfully delegated Chapter VII powers of the UN Security Council and therefore the challenged acts were in principle “attributable” to the UN.⁹⁶ With regards to UNMIK, the court ruled that in contrast to KFOR, UNMIK would represent a subsidiary organ of the United Nations created under Chapter VII and would therefore be directly answerable to the UN.⁹⁷ Thus, its action was in principle “attributable” to the UN.⁹⁸

⁹⁰ *Behrami and Saramati*, , para. 71.

⁹¹ *Behrami and Saramati*, para. 133.

⁹² *Behrami and Saramati*, para. 135.

⁹³ *Behrami and Saramati*, para. 135.

⁹⁴ *Behrami and Saramati*, para. 138.

⁹⁵ *Behrami and Saramati*, para. 139.

⁹⁶ *Behrami and Saramati*, para. 141.

⁹⁷ *Behrami and Saramati*, para. 142.

⁹⁸ *Behrami and Saramati*, para. 142.

Behrami, Saramati and EU crisis management missions

When the reasoning of the ECtHR is transferred to EU crisis management operations, it can be concluded that the EU could be accountable for human rights violation committed by member states' personnel in an EU-led CSDP operation, because of the command and control structure in place. As outlined in part two, the Political and Security Committee exercises political control and strategic direction in EU crisis management operations. With regards to military direction, the EU Military Committee monitors the proper execution of the EU military operation under the responsibility of the EU Operation Commander. Thus, the conduct of military personnel of the member states that is put at the disposal of the EU is in principle not attributable to their sending states. Due to a transfer of authority to the EU mission their conduct is attributable to the EU instead.⁹⁹ Overall, the command and control arrangements in crisis management operations allow concluding that these missions are de facto organs of the EU over which the Union has effective control.¹⁰⁰ In respect to civilian crisis management operations, it can be added that its personnel is usually appointed or hired by the Union and /or seconded by the member states and is in consequence acting on behalf of the EU.¹⁰¹

Part 4

Progress in the mainstreaming of human rights in EU crisis management missions

Although a variety of documents already refer to the mainstreaming of human rights in all phases and aspects of crisis management missions, as indicated above in part two, the progress made in practice still needs to be assessed. To evaluate the success of human rights mainstreaming in CSDP missions can prove difficult due to the secrecy surrounding some documents, for example the operation plan, rules of engagement and internal reports of EU actors.¹⁰²

⁹⁹ Naert, above n 24, 380.

¹⁰⁰ Naert, above n 24, 379.

¹⁰¹ Naert, above n 24, 380.

¹⁰² Human Rights Mainstreaming in EU's External Relations, above n 47, 51.

With regards to the structural implications of human rights mainstreaming, some CSDP actors like COHOM are explicitly asked to focus on human rights topics in their work.¹⁰³ Furthermore, attempts have been made to invite human rights experts in structures whose tasks do not explicitly include human rights issues, for example the European Union Military Committee and the European Union Military Staff.¹⁰⁴ The Civilian Headline Goal 2010 also demands the incorporation of human rights and gender issues into the system of civilian operations as well as the enhancement of coherence through the better exploitation of synergies between civilian and military CSDP action and other Union action.¹⁰⁵

When focusing on the operational implications of mainstreaming of human rights, it can be concluded that most crisis management missions do not make an explicit reference to human rights in their mandate,¹⁰⁶ although some do it implicitly, for example operation EUFOR in Chad¹⁰⁷ that aims to support humanitarian action as well as to protect civilians, including refugees and displaced persons.¹⁰⁸ Apart from the mission mandate that might have an explicit or implicit reference to human rights, some missions now include human rights experts as a point of contact¹⁰⁹ or include the systematic monitoring of human rights, like the *Aceh* monitoring mission.¹¹⁰

Conclusion

Although a variety of tools are already available to mainstream human rights into crisis management operations and to address specific human rights challenges in an ad hoc fashion, there is still a great need for a more coherent and structural approach.¹¹¹ One of the specific difficulties and obstacles in crisis management missions is the different understanding of human rights in military and civilian units who are used to their own

¹⁰³ Human Rights Mainstreaming in EU's External Relations, above n 47, 52.

¹⁰⁴ Human Rights Mainstreaming in EU's External Relations, above n 47, 52.

¹⁰⁵ Civilian Headline Goal 2010, <http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.pdf>.

¹⁰⁶ See for example EU rule of law mission in Kosovo, *EULEX KOSOVO*, Council Joint Action 2008/124/CFSP of 4 February 2008.

¹⁰⁷ Operation *EUFOR* in Chad, Council Joint Action 2007/677/CFSP of 15 October 2007.

¹⁰⁸ Human Rights Mainstreaming in EU's External Relations, above n 47, 52.

¹⁰⁹ Human Rights Mainstreaming in EU's External Relations, above n 47, 53.

¹¹⁰ Aceh Monitoring Mission (AMM), Council Joint Action 2005/643/CFSP of 9 September 2005.

¹¹¹ Human Rights Mainstreaming in EU's External Relations, above n 47, 54.

human rights cultures. In order to overcome these differences and to create a common culture of human rights, the training of staff still needs to be improved and human rights elements need to be incorporated more into the planning, reporting as well as into the lessons learned processes.¹¹²

Nevertheless, the European Union has created awareness for the importance of mainstreaming of human rights in a variety of documents and slowly but steadily appears to be introducing its proposed tasks into practice. Without a coherent and consistent human rights policy in EU crisis management missions, the European Union would otherwise weaken its credibility and legitimacy as an international security actor who could be accused of not living up to its own standards. Furthermore, mainstreaming of human rights might provide one of the best tools to avoid accountability of the European Union for human rights violations conducted during the course of an EU-led crisis management mission.

¹¹² Human Rights Mainstreaming in EU's External Relations, above n 47, 54 and 55.