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Shared Responsibility in the Framework of the European Union's Common Security Defense Policy Operations

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Shared Responsibility in the Framework of the European Union's Common Security Defence Policy Operations

Frederik Naert[*]

1. Introduction

In 1999, the European Union (EU or Union) decided to develop a Common Security and Defence Policy (CSDP, initially named ESDP). The core of this policy consists of military and civilian crisis management operations (the terms 'operations' and 'missions' are used interchangeably). Since 2003, the EU has launched some 30 such operations.[1]

These operations involve the EU and its member states. Thus the question arises whether responsibility for the conduct of CSDP operations lies with the EU and/or its member states.

In addition, such operations may be authorised by the United Nations (UN) Security Council, in many cases third states (i.e. non-EU member states) participate in these operations, some of the operations are conducted with recourse to North Atlantic Treaty Organization (NATO) assets, they may involve cooperation with host state authorities or personnel, or with other international organisations, and yet other states may be involved (e.g. states accepting the transfer of persons detained by EU-led forces).

Consequently, CSDP operations may give rise to the question who among the actors involved is responsible for any violations of the applicable law.

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[1] See www.eeas.europa.eu/csdp/missions-and-operations; and F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp: Intersentia, 2010), 97.

This contribution will outline the main elements that are relevant for answering this question, with a focus on rules that are specific to the EU and EU practice as regards responsibility. It will first provide an overview of the legal and operational framework, factual scenarios and primary rules (section 2), and will then describe the relevant secondary rules and processes (section 3). It will conclude with some final remarks (section 4).

As there have been very few concrete cases in which issues of (shared) responsibility were actually adjudicated and/or disputed, the focus lies on the relevant rules and arrangements that have been put in place on the basis of which any such adjudication would take place.

2. Legal and operational framework, factual scenarios and primary rules

In order to be able to analyse responsibility questions in relation to EU military operations, it is necessary to first provide a brief overview of the legal framework for these operations and of how these operations are planned, decided on, and conducted (first subsection). The second subsection will indicate what questions of shared responsibility can arise. The third subsection will identify potentially applicable primary rules.

2.1 The legal and operational framework[2]

Under Article 42(1) of the Treaty on European Union (TEU),[3] the EU's CSDP[4] 'shall provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter'. These missions are further defined in Article 43 TEU: they 'shall include joint disarmament operations,

[2] See generally F. Naert, 'Legal Aspects of EU Operations' (2011) 15 JIP 218; and F. Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement', in M. Aznar and M. Costas (eds.), *The Integration of the Human Rights Component and International Humanitarian Law in Peacekeeping Missions Led by the European Union* (Valencia: CEDRI/ATLAS, 2011), 61.
[3] Treaty on European Union, for the consolidated version currently in force, see (2012) OJ C 326/13 (TEU).
[4] See generally Naert, *International Law Aspects of the EU's Security and Defence Policy*, n. 1; and P. Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press, 2013).

humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation', and may 'contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories'. In addition, the TEU now includes a mutual assistance clause in Article 42(7) TEU, but this is not addressed here.

The planning and decision-making process on these operations involves the planners/experts and the politicians/diplomats, with key decisions being taken by the Council itself (i.e. Ministers). Furthermore, the Operation Commanders, once appointed, also play a key role.

The 'crisis management procedures', which describe this process, were revised in 2013.[5] They provide for the development of several progressively more detailed planning documents (usually classified), in parallel with the legal instruments (see this subsection below on the latter). The key documents are submitted to the Council after having been examined by the Political and Security Committee (PSC; see this subsection below) and other relevant preparatory bodies. The final planning document approved at 'Brussels level' is the Operation Plan (OPLAN) (sometimes named Mission Plan). It contains the specifics of the operation, including as regards legal issues and, where relevant, the use of force. In military operations in which the use of force is authorised (beyond self-defence), there are also Rules of Engagement (ROE), requested by the Operation Commander and authorised by the Council,[6] based on the EU's policy on the use of force.[7] The elements of these documents that may be relevant to responsibility issues are discussed below throughout this contribution.

The Council (of Ministers) is the key decision-making body in the CSDP. Its work is prepared by a number of preparatory bodies (composed of member states' representatives) and by the High Representative of the Union for Foreign Affairs and Security Policy, who is assisted by the European External Action Service (EEAS; see Article 27 TEU). The Council preparatory bodies

[5] See EU Council Doc. 7660/2/13 of 18 June 2013, which replaces EU Council Doc. 11127/03 of 3 of July 2003. See also EU Council Doc. 6432/15 of 23 February 2015 (EU Concept for Military Planning at the Political and Strategic Level). Unless stated otherwise, all Council documents referred to are available in the public register of Council documents at www.consilium.europa.eu/register/en/content/int/?typ=ADV. See also generally the EU Concept for EU-led military operations (EU Council Doc. 17107/14 of 19 December 2014).

[6] Subsequent amendments may be adopted by the PSC within certain limits (see below further down in this section).

[7] That policy is set out in the Concept for the Use of Force in EU-led Military Operations (partially declassified in EU Council Doc. 17168/09 EXT 1 of 2 February 2010).

include the PSC, the EU Military Committee (EUMC), the Political-Military Group (PMG), and the Committee for Civilian Aspects of Crisis Management (CIVCOM). Within the EEAS, key players include the Crisis Management and Planning Directorate, the EU Military Staff (EUMS) and the Civilian Planning and Conduct Capability (CPCC).[8]

The basic legal instrument governing each EU operation is a Council decision, adopted on the basis of Articles 42(4) and 43 TEU (unanimously, but with the possibility of abstentions; previously these acts were Council joint actions). It is an act of the Union as a separate legal person (see this section and section 3.3 below) and not a decision adopted collectively by the member states.[9] Such Council decisions generally inter alia set out the mission and mandate, political and military control and direction, designate the commanders and headquarters, specify the command and control relations, and contain provisions on the status of the mission, financial arrangements, participation of third states (i.e. non-EU member states), relations with other actors, handling of EU classified information and on the launching and termination/duration of the operation. In some cases, they set out the mandate and tasks of a mission in significant detail, e.g. for the counter-piracy operation 'Atalanta'.[10] The planning documents, especially the OPLAN, develop all these elements in greater detail. As indicated below (see section 3.2.2), these Council decisions may contain provisions relevant for responsibility. Council decisions establishing CSDP operations are published in the EU's *Official Journal* (as are nearly all Status of Forces/Mission Agreements (SOFAs/SOMAs) and participation agreements).[11]

In military operations, the Council usually adopts a further separate decision launching the operation, often together with the approval of the Operation Plan and the ROE.[12]

[8] See www.eeas.europa.eu/csdp/structures-instruments-agencies.
[9] See e.g. the draft agreement on the EU accession to the ECHR and notably its Article 1(3), as well as para. 23 of the draft explanatory report thereto (see below n. 65 and section 3.3). By contrast, when collective decisions by the member states are adopted, they are specifically designated as such, typically as a 'Decision of the representatives of the Government of the Member States, meeting within the Council'.
[10] See Article 2 of Council Joint Action 2008/851/CFSP of 10 November 2008, (2008) OJ L 301/33 (*corrigendum* (2009) OJ L 253/18), as amended. See generally http://eunavfor.eu; and Naert, *International Law Aspects of the EU's Security and Defence Policy*, n. 1, 179-191.
[11] Many other documents relating to CSDP operations are also in the public domain, although the planning documents for specific operations are usually not. See the public register, n. 5.
[12] See e.g. Council Decision 2008/918/CFSP of 8 December 2008, (2008) OJ L 330/19.

Furthermore, on the basis of Article 37 TEU and Article 218 Treaty on the Functioning of the European Union (TFEU),[13] the EU (as a separate legal person)[14] concludes international agreements relating to its CSDP operations. They are binding on the institutions of the Union and on its member states (Article 216(2) TFEU) and include especially agreements on the participation of third states and SOFAs/SOMAs (see sections 3.1.1 and 3.1.3 below).[15]

The EU will normally conclude a SOFA/SOMA with the host state, which will regulate the status and activities of an operation in the host state. A SOFA/SOMA typically contains, amongst others, provisions on the wearing of uniforms and carrying of arms, the exercise of criminal jurisdiction, privileges and immunities, security of the mission and its personnel, claims, implementing arrangements and dispute settlement.[16] There is a model SOFA and a model SOMA for EU missions.[17] There may also be alternative status arrangements.[18]

When a third state participates in an EU military operation, the modalities of its participation are usually laid down in a participation agreement with the EU, either on an ad hoc basis for a given operation,[19] or in a framework agreement covering the participation in EU operations generally.[20] In these agreements, the participating state normally associates itself with the Council act establishing an operation, and commits itself to providing a contribution and bearing (some of) the costs thereof. Such agreements also inter alia address the command and control, and jurisdiction and claims, and they safeguard the EU's decision-making autonomy. As indicated below (see section 3.1.3), such agreements usually contain provisions relevant to responsibility.

[13] Treaty on the Functioning of the European Union, for the consolidated version currently in force, see (2012) OJ C 326/47 (TFEU).
[14] See Article 47 TEU, n. 3. This includes international legal personality.
[15] A. Sari, 'The Conclusion of International Agreements by the European Union in the Context of the ESDP' (2007) 56 ICLQ 53; and P. Koutrakos 'International Agreements in the Area of the EU's Common Security and Defence Policy', in E. Cannizzaro, P. Palchetti, and R. Wessel (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff, 2011), 157.
[16] A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: the EU's Evolving Practice' (2008) 19 EJIL 67.
[17] See on the one hand EU Council Documents 12616/07 of 6 September 2007, and 11894/07 of 20 July 2007, and COR 1 (5 September 2007); and on the other hand EU Council Doc. 17141/08 of 15 December 2008.
[18] Naert, 'Legal Aspects of EU Operations', n. 2, 231. Furthermore, there may be agreements with transit countries. See e.g. the transit agreement with Cameroon for EUFOR Tchad/RCA ((2008) OJ L 57/31).
[19] See e.g. the Agreement on Croatia's participation in Atalanta, (2009) OJ L 202/84.
[20] See e.g. the framework participation agreements with the United States (17 May 2011, (2011) OJ L 143/2); Moldova (13 December 2012, (2013) OJ L 8/2); and Ukraine (13 June 2005, (2005) OJ L 182/29).

There may also be agreements/arrangements between participating states concerning their cooperation in an operation, which may contain provisions relevant to how responsibility issues are addressed. However, these are usually only available to the states concerned, and are not further addressed here.

By virtue of Article 38 TEU, once an operation has been set up, the PSC exercises, under the responsibility of the Council and of the High Representative, 'political control and strategic direction' of EU operations. The PSC is invariably authorised to take various decisions, including decisions to amend the planning documents, the chain of command and the ROE, and to appoint commanders, while the powers of decision with respect to the objectives and termination of the operation remain vested in the Council. Since the Council and PSC are composed of representatives of all EU member states and decide unanimously on these matters (see above), this is how member states exercise control.[21] However, this relates to *political* control and *strategic direction* and does not constitute interference with the military chain of command (see the next paragraphs below).

The EU has a few small standing military structures/bodies (especially the EUMS and the EUMC), but no standing military headquarters structure for planning and conducting operations. Therefore a distinct chain of command is agreed and generated for each military operation. In addition, member states (and, where applicable, third states) commit forces through a force generation process.[22]

The highest level of military command in EU military operations rests with the Operation Commander. The Operational Headquarters (OHQ) assisting him may be made available by a member state (it is then 'multinationalised'), by NATO under the Berlin plus arrangements,[23] or

[21] The execution of a task may also be entrusted, within the EU framework, to a group of member states (Articles 42(5) and 44 TEU, n. 3). This has not yet been used and is not further discussed here (see EU Council Doc. 5225/15 of 13 January 2015).

[22] See EU Concept for Force Generation, EU Council Doc. 14000/15 of 11 November 2015 (replacing Doc. 10690/08 of 16 June 2008).

[23] These Berlin plus arrangements (which are not in the public domain) set out in particular EU access to NATO planning, NATO European command options, and EU use of NATO assets and capabilities. See the summary entitled 'EU-NATO: The Framework for Permanent Relations and Berlin Plus', available at www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf. On EU-NATO relations, see F. Naert, 'EU Crisis Management Operations and Their Relations with NATO Operations', in Z. Hegedüs, D. Palmer-DeGreve, and S.L. Bumgardner (eds.), *NATO Legal Deskbook*, 2nd edn (2010), 281.

may consist of the EU Operations Centre when activated.[24] The Operation Commander will normally receive operational control over forces put at his disposal via a transfer of authority.[25] The next command level, the highest one in the field, is the Force Commander. By contrast, there is a permanent Civilian Operation Commander, who, as a rule, exercises command and control of all civilian operations at the strategic level, supported by the CPCC, while the Head of Mission exercises command and control at theatre level.[26]

This system merits two remarks. First, while 'full command' is retained by participating states,[27] even after a transfer of operational control to the EU commander, this does not mean that EU Commanders have no command or control. Rather, certain aspects of this command and control are transferred to the EU Operation Commander. Indeed, when participating states want to regain *complete* command and control, they have to reverse the transfer of authority. This has occurred on several occasions in Atalanta. Second, participating states' criminal and disciplinary jurisdiction over their soldiers/staff deployed in an EU operation (see below, sections 3.1.1 and 3.2.2) does not affect this (operational) command and control of the EU Commander.

2.2 Some scenarios

Conduct which could give rise to international responsibility, especially under international humanitarian law (IHL)[28] and/or human rights law (HRL), may include the use of force, detention, treatment and transfer of detainees, searching of houses or vehicles, handling of

[24] The EU Operations Centre was activated for the first time in relation to an operation by Council Decision 2012/173/CFSP of 23 March 2012, (2012) OJ L 89/66 but not in a command role (Article 1(2)).

[25] See EU Concept for Military Command and Control, EU Council Doc. 5008/15 of 5 January 2015, especially at 8-9, 11, 19 and 28-29. In this document, Operational Control (OPCON) is defined as '[t]he authority delegated to a commander to direct forces assigned, so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location; to deploy units concerned and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it of itself, include administrative or logistic responsibility' (p. 28). This is similar to NATO's practice. See also Chapter 25 in this volume, M. Zwanenburg, 'North Atlantic Treaty Organization-led Operations', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.

[26] For the civilian command and control arrangements, see Council Doc. 9919/07 EXT 2 (1 February 2008; partially declassified).

[27] Council Doc. 10688/08 REV 3, 25, states that full command 'covers every aspect of military operations and administration and exists only within national services'.

[28] IHL is used interchangeably with the *jus in bello* or the law of armed conflict.

personal data, etc. Moreover, other conduct may violate different rules of international law, including the law of the sea, the *jus ad bellum*, environmental law, etc. In addition, there may be violations of applicable domestic civil law (e.g. as a result of traffic accidents, torts, contractual liability), as well as violations of administrative or criminal law (e.g. theft, fraud, corruption).

The variety of actors involved in CSDP operations (see above) may give rise to multiple scenarios in which the responsibility of two or more actors may be at issue. Some examples will illustrate this more concretely.

First, if provisions of the Council Decision, an OPLAN or ROE violate international law, the question arises whether this entails the responsibility of the EU and/or of its member states. As indicated above, these acts/documents are adopted by the Council, an EU institution, within which the member states unanimously take all key decisions.

A second scenario is that action taken *in the conduct* of an operation violates rules of international law, as well as the ROE, OPLAN and/or applicable policies. This would give rise to the same question, bearing in mind that member states provide most of the personnel and that in EU military operations, the headquarters are usually provided by a member state as well (albeit augmented by personnel from other member states and put at the disposal of the Union).

Third, when responsibility does not (exclusively) lie with the EU, questions of attribution may arise between member states when forces of more than one member state are involved in an incident. For instance, a boarding team or helicopter from one member state could operate from a warship of another member state. Similarly, a Vessel Protection Detachment from one member state could transfer a suspected pirate which it has arrested to a warship from another member state. Also, units from one member state could act on the basis of directions or intelligence from a higher level command of a multinational nature (e.g. the Force Headquarters or OHQ).

Fourth, similar questions can arise regarding the participation of third states, e.g. where a unit from a third state operates onboard a ship of a member state. Also, some decisions by a third state could engage its responsibility, e.g. failure to investigate allegations of crimes committed by its forces.

Fifth, EU military operations may be conducted with recourse to NATO assets, which is the case for Althea[29] (and in the past for Concordia).[30] However, in such cases the assets are under EU command and control.[31] It therefore seems unlikely that conduct of the operation could be attributed to NATO.[32] Nevertheless, NATO's responsibility could be engaged if NATO knew or should have known that the assets made available would be, or are, used to commit violations of international law. Furthermore, there may be a question as to whether any responsibility on the NATO side lies with the organisation and/or its member states.

Sixth, when EU military operations are/were based on a UN Security Council authorisation (e.g. Althea (Bosnia and Herzegovina) and EUFOR RD Congo (in the Democratic Republic of the Congo)), like in *Behrami* and *Saramati*[33] and *Al-Jedda*,[34] the question could arise whether the UN can (also) be held responsible.

Seventh, many CSDP operations are based on an invitation by the host state and they may involve cooperation with host state authorities, especially in security sector reform and training missions (e.g. EUTM Mali).[35] If the forces or authorities which are trained or advised commit violations of international law, this may give rise to questions of responsibility.[36]

Eighth, in some cases EU operations operate alongside, and in cooperation with, an operation conducted by another international organisation, e.g. the UN, NATO or the African Union (AU).

[29] Established by Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina, (2004) OJ L 252/10. See generally http://eeas.europa.eu/csdp/missions-and-operations/althea-bih/index_en.htm.

[30] Established by Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union Military Operation in the Former Yugoslav Republic of Macedonia, (2003) OJ L 34/26. See generally http://eeas.europa.eu/csdp/missions-and-operations/concordia/index_en.htm.

[31] See e.g. Article 13(2) Council Joint Action 2004/570/CFSP, n. 29, 10: 'The entire chain of command of the EU Force shall remain under the political control and strategic direction of the EU throughout the … operation, after consultation between the EU and NATO. … the EU Operation Commander shall report on the conduct of the operation to EU bodies only. NATO shall be informed … by the … PSC and CEUMC.'

[32] The detailed EU-NATO arrangements are not in the public domain, which limits the analysis that can provided here.

[33] *Agim Behrami and Bekir Behrami* v. *France* and *Ruzhdi Saramati* v. *France, Germany and Norway*, App. No. 71412/01 and App. No. 78166/01 (ECtHR, 2 May 2007) (*Behrami* and *Saramati*).

[34] *Al-Jedda* v. *the United Kingdom*, App. No. 27021/08 (ECtHR, 7 July 2011).

[35] Established by Council Decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali), (2013) OJ L 14/19. See generally http://eeas.europa.eu/csdp/missions-and-operations/eutm-mali/index_en.htm.

[36] Compare the UN's Human Rights Due Diligence Policy, described in a speech by the UN Legal Counsel, P. O'Brien, dated 6 February 2013, available at http://legal.un.org/ola/media/info_from_lc/POB%20COJUR.pdf, at 8-11.

In cases in which there is very close cooperation, including coordinated operational responses to a concrete situation, this may give rise to shared responsibility. This might occur in respect of coordinated actions by KFOR (NATO) and EULEX Kosovo (EU) in Kosovo; or by Atalanta (EU) and Ocean Shield (NATO) of the coast of Somalia; or EUTM Somalia (EU) and AMISOM (AU) in Somalia (although the latter example is less likely to arise given that EUTM Somalia is a training mission).

Ninth, still other states may also be involved, e.g. states accepting the transfer of persons detained by EU-led forces.

Finally, there may be combinations of the above situations. For instance, an EU operation with recourse to NATO assets and with participation of third states could operate under a UN Security Council mandate and cooperate with an operation conducted by the AU and/or a host state.

Most of these scenarios can also arise in the framework of operations under the command of other international organisations (see also chapter 25 in this volume on NATO operations). However, the answers and the way in which these issues are addressed will not necessarily be identical. Subsection 2.3 and section 3 will therefore focus on the specificities of EU military operations.

2.3 Primary rules

International responsibility requires two key elements to be in place: a violation of an international obligation in force for an international legal person, and attribution of that violation to this legal person.[37] This subsection focuses on the latter.

States are not all bound by the same treaties and therefore have different international obligations. This gives rise to 'legal interoperability' questions and entails that certain conduct may be lawful

[37] See Articles 1-2 of the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA); and Articles 3-4 of the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO).

for some states but unlawful for others. Some recent treaties explicitly address this issue, for instance the Convention on Cluster Munitions,[38] but most do not.

When international organisations are involved, additional questions arise as to the relationship between the organisation and the states concerned, in addition to that between those states. Moreover, international organisations are rarely a party to international agreements dealing with primary rules of international law, which leads to questions on the primary rules applicable to them. For instance, no international organisation is a party to any multilateral IHL treaty. The same is true for HRL and the law of the sea, with the exception of the EU, which is part to an increasing number of multilateral international agreements (including the UN Convention on the Law of the Sea).[39] By contrast, it is generally considered that in principle international organisations are bound by relevant rules of customary international law (and general principles of law) to the extent that they can be applied to them.[40] Nevertheless, in practice this is not always fully acknowledged and applied.[41]

As regards the EU, the TEU accords an important role to international law in EU external relations (see Articles 3(5) and 21(1) and (2)b-c TEU),[42] and a range of primary rules of international law are relevant to EU military operations. These include IHL and/or HRL, as well as the *jus ad bellum* and the principle of non-intervention, the law of the sea, aspects of air and space law, etc. Furthermore, UN Security Council resolutions and peace agreements may also be relevant. In addition, provisions of the agreements (and other instruments) specifically concluded in the framework of these operations are also relevant (see subsection 2.1 above), but these are not further discussed here as regards primary rules.

[38] Convention on Cluster Munitions, Dublin, 30 May 2008, in force 1 August 2010, 2688 UNTS 39. Article 21(3) specifically addresses joint operations by state parties and non-state parties.
[39] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3.
[40] Since international organisations have only limited 'functional' powers and are not composed in the same way as states, some rules will be irrelevant for some international organisations, whereas others may not be capable of being applied (at least not without modifications) to international organisations because of their different set-up.
[41] See Naert, *International Law Aspects of the EU's Security and Defence Policy*, n. 1, 361-382 and 391-410.
[42] See F. Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in E. Cannizzaro, P. Palchetti, and R. Wessel (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff, 2011), 189; and that book more generally.

The remainder of this subsection addresses some specificities of the EU, including the EU's own obligations under EU and international law, as regards IHL (2.3.1); HRL (2.3.2); and *jus ad bellum* and obligations under the UN Charter (2.3.3).[43]

2.3.1 IHL

The EU is not a party to any treaty in the field of IHL and IHL obligations in EU military operations seem to be primarily conceived as resting on the participating states, at least so far. This is reflected in a 2002 Declaration, which states that '[t]he responsibility for complying with [IHL], in cases where it applies, in a [EU] led-operation, rests primarily with the State to which the troops belong', though adding that '[i]n exercising the strategic direction and political control, the [EU] will ensure that all relevant rules of international law, including humanitarian law as appropriate are duly taken into account.'[44] While the latter indicates that experts also saw a (limited) role for the Union and its institutions, the Presidency Conclusions of the 19-20 June 2003 Thessaloniki European Council only state that '[t]he European Council stresses the importance of national armed forces observing applicable humanitarian law'.[45]

This focus on states is often linked to the obligation under Article 1 common to the 1949 Geneva Conventions to 'respect and to ensure respect for the present Convention in all circumstances'.[46] This obligation, reaffirmed in Article 1(1) of Additional Protocol I,[47] is also widely considered to

[43] Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16 (UN Charter).
[44] See para. 2 of the outcome of the international humanitarian law European seminar of 22-24 April 2002 in Salamanca, Doc. DIH/Rev.01.Corr1 (Salamanca Declaration) (on file with the author). This document only reflects the outcome of a discussion between experts.
[45] Para. 74. These Conclusions are available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/76279.pdf.
[46] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 (together 1949 Geneva Conventions).
[47] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, in force 7 December 1979, 1125 UNTS 3.

be part of customary international law and probably applies in non-international armed conflicts too.[48]

Nevertheless, when international organisations lead operations, they may also have their own IHL obligations, in particular under customary IHL.[49] In fact, the question who the parties are to a conflict involving multinational operations is currently examined by the International Committee of the Red Cross (ICRC).[50]

Furthermore, the EU has started to make commitments in the field of IHL, albeit so far only of a political and not a legal nature. In addition to its guidelines on promoting respect for IHL (by others),[51] it has made pledges at International Conferences of the Red Cross and Red Crescent,[52] and has signed up to the Montreux Document on Private Military and Security Companies.[53]

This situation entails that the EU and its member states, and the latter among them, do not have the same obligations under IHL. Yet divergences are limited because a significant body of IHL

[48] On the customary nature, see e.g. Institute of International Law, Resolution concerning 'The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties', adopted at the 1999 Berlin session, 7th recital of the preamble, inter alia relying on *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, ICJ Reports 1986, 14, para. 220. On the customary extension to non-international armed conflicts, see J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge University Press, 2005), 2 Volumes, at 495.

[49] In relation to the EU, see Naert, *International Law Aspects of the EU's Security and Defence Policy*, n. 1, 515-537; Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', n. 42, 198-205; and M. Zwanenburg, 'Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by Crisis Management Operations', in S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (The Hague: TMC Asser Press, 2008), 395, at 400-406 and 412-415.

[50] See e.g. the ICRC's report *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, October 2011, Doc. 31IC/11/5.1.2, at www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf, at 30-33; as well as issue (2013) 891/892 of the IRRC on 'Multinational Operations and the Law', including T. Ferraro's article therein entitled 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 561.

[51] (2009) OJ C 303/12.

[52] See e.g. Pledge P091 made by the EU member states at the 30th International Conference (containing commitments by the EU and by its member states) and Pledges P1311, 1318 and 1319 made at the 31st International Conference (containing commitments by the EU and by its member states; the EU was an observer at this conference). These pledges are available at www.icrc.org.

[53] Montreux, 17 September 2008, see www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html; and the conclusions of the Foreign Affairs Council meeting of 27 February 2012 on the EU priorities at the UN Human Rights Council, 19, para. 13, at www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/128226.pdf.

rules has become part of customary IHL[54] and there is a large degree of convergence between EU member states' IHL treaty obligations. Furthermore, in practice, policy choices often overcome different legal obligations or interpretations thereof, and the combination of a common OPLAN and ROE with national caveats[55] which member states may issue also allows for interoperability, while ensuring respect for each member state's obligations/position.

Moreover, IHL only applies to situations of armed conflict and occupation. On this basis, the EU and its member states accept that if EU-led forces become a party to an armed conflict, IHL will fully apply to them. This could happen as the CSDP tasks include peace enforcement.[56] Thus the Salamanca Declaration provides that: 'Respect for [IHL] is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict to which the forces are party.'[57]

However, most CSDP operations do not involve combat (or occupation), and therefore IHL will be applicable only in few CSDP operations. EU policy is therefore that IHL does not necessarily apply in all EU military operations as a matter of law, nor is it necessarily the most appropriate standard as a matter of policy in all these operations.[58] In fact, so far, EU-led forces have not become engaged in combat as a party to an armed conflict in any EU military operation.[59]

[54] Henckaerts and Doswald-Beck (eds.), *Customary International Humanitarian Law*, n. 48; and www.icrc.org/customary-ihl/eng/docs/home, as well as the reactions to this study.
[55] Such caveats may only impose further *restrictions* on authorised ROE or tasks included in the OPLAN.
[56] See Naert, *International Law Aspects of the EU's Security and Defence Policy*, n. 1, 197-206.
[57] Salamanca Declaration, n. 44, para. 1.
[58] See more extensively F. Naert, 'Observance of International Humanitarian Law by Forces under the Command of the European Union', in S. Horvat and M. Benatar (eds.), *Recueil of the XIXth International Congress of the International Society for Military Law and the Law of War, 19th Congress (Québec City, 1-5 May 2012), Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments* (Brussels, International Society for Military Law and the Law of War, 2013), 389.
[59] See F. Naert, 'Challenges in Applying International Humanitarian Law in Crisis Management Operations Conducted by the EU', in A.-S. Millet-Devalle (ed.), *L'Union européenne et le droit international humanitaire* (Paris: Pedone, 2010), 142.

2.3.2 HRL[60]

In addition to all EU member states being bound by their human rights obligations, including the ECHR,[61] some human rights obligations in the framework of the EU are relevant for our purposes. In particular, as opposed to most international organisations, the EU itself has extensive treaty-based human rights obligations. These are especially laid down in Article 6 TEU and in the EU's Charter of Fundamental Rights.[62]

Pursuant to Article 6(1) TEU, the EU 'recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties', and pursuant to Article 6(3) TEU, '[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

In addition, Article 6(2) TEU provides for the EU's accession to the ECHR.[63] This accession has also been provided for in the ECHR[64] but has not yet taken place.[65] As the EU is already bound to the ECHR in substance (via Article 6 TEU, see above), this accession will mainly impact on remedies.[66] This is addressed below in section 3.3.

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[60] This section draws on F. Naert, 'Applicability/Application of Human Rights Law to International Organisations Involved in Peace Operations – a European/EU Perspective', in S. Kolanowski et al. (eds.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12th Bruges Colloquium, 20-21 October 2011* (Bruges: ICRC & College of Europe, 2012), 45, available at www.coleurope.eu/sites/default/files/uploads/page/collegium_42_0.pdf; and F. Naert, 'Legal Framework Governing the Protection and Promotion of Human Rights in EU Missions – Application of EU Law Principles and Instruments', in A. Sari and R. Wessel (eds.), 'Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?', Centre for the Law of EU External Relations (CLEER), Working Paper 2012/6, 2012, 39, available at www.asser.nl/upload/documents/20121221T112600-CLEER%20Working%20Paper.pdf.

[61] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221, as subsequently amended (European Convention on Human Rights or ECHR).

[62] Charter of Fundamental Rights of the European Union, (2012) OJ C 326/391 (Charter of Fundamental Rights).

[63] See also Protocol No. 8 to the TEU and TFEU, relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, available in the consolidated version of the TEU, n. 3, 273.

[64] See Article 17 of Protocol No. 14 to the ECHR (Strasbourg, 13 May 2004, in force 1 June 2010, CETS No. 194), which amended Article 59 ECHR to this effect.

[65] In April 2013, the negotiators agreed a draft accession agreement and explanatory report (both are contained in the report of the Council of Europe, Doc. 47+1(2013)008rev2 of 10 June 2013, see www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf (draft accession agreement). However, the process has run into difficulties – see section 3.3 below.

[66] Furthermore, the EU will be bound by the ECHR itself under international law, in addition to being indirectly bound to the ECHR via the TEU.

Articles 3(5) and 21 TEU reinforce these human rights obligations in relation to the EU's external relations (see also above, section 3.1). Moreover, the European Court of Justice (ECJ or Court) had elevated EU human rights rules to the highest norms of primary EU law,[67] but this no longer appears to be the case after its recent *Opinion 2/13*.[68]

These EU human rights rules bind not only the EU, but also its member states when they implement Union law (Article 51(5) of the Charter of Fundamental Rights). This includes situations in which member states implement Council acts setting up EU military operations, as such decisions are legal (albeit not legislative) acts under EU law. This means that irrespective of whether the conduct of such operations is attributed to the Union or to one or more member states, the same primary EU human rights obligations will apply to that conduct.

Consequently, the EU has extensive treaty based human rights obligations and to a great extent these are the same as those of its member states, and include notably the ECHR and the EU's Charter of Fundamental Rights. This limits interoperability challenges and also means that in terms of substantive obligations, it is of relatively little importance whether conduct is attributable to the Union and/or to one or more member states. In relation to remedies, the attribution question remains important, at least until the EU will have acceded to the ECHR.

These largely identical obligations also mean that the controversies over the applicability of HRL in peace operations are also relevant for the application of HRL in EU military operations.[69] These controversies concern the extraterritorial scope of application of international human rights obligations; the impact of UN Security Council Resolutions;[70] the question of the possible

[67] See especially *Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461 (3 September 2008), paras. 301-309 (*Kadi*).

[68] *Opinion 2/13*, European Court of Justice, 18 December 2014, available at http://curia.europa.eu, see especially paras. 167-172 and 188-194, which seem to indicate that human rights may not always prevail over other rules of EU law. See e.g. S. Peers, 'The CJEU and the EU's Accession to the ECHR: a Clear and Present Danger to Human Rights Protection', EU Law Analysis Blog, 18 December 2014, available at http://eulawanalysis.blogspot.no/2014/12/the-cjeu-and-eus-accession-to-echr.html. See also section 3.3 below.

[69] See e.g. para. 29 of the draft explanatory report to the draft agreement on the accession of the EU to the ECHR**,** n. 65. On the question whether human rights obligations under EU law (may) have a distinct scope of application, see Naert, *International Law Aspects of the EU's Security and Defence Policy*, n. 1, 405-406 and 649-651.

[70] See Article 103 UN Charter, n. 43; and UN Doc. A/CN.4/L.682 (13 April 2006), 168-181. See also *Al-Jedda*, n. 34, para. 102. After *Al-Jedda* it seems unlikely that the ECtHR would attribute the conduct of an EU operation to the UN, with the possible exception of EULEX Kosovo in respect of which the ECtHR might find it difficult to

recourse to 'extraterritorial derogations' in this context;[71] and the relationship between IHL and human rights when both apply.[72]

In any event, especially when IHL does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct for EU military operations (that is not to say that human rights law is not relevant when IHL does apply), and at least as a matter of *policy* HRL provides significant guidance in EU military operations. In practice, EU operational planning and ROE respect internationally recognised human rights standards.[73]

This is explicitly reflected in legal instruments relating to some CSDP operations. E.g., EULEX Kosovo is to 'ensure that all its activities respect international standards concerning human rights and gender mainstreaming'.[74] Also, suspected pirates or armed robbers at sea captured by Atalanta may not be transferred to a third state 'unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment'.[75] The latter provision has led to the conclusion of transfer agreements between the EU and third states

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distinguish from *Behrami* and *Saramati*, n. 33 to the extent that EULEX Kosovo operates under UN Security Council Resolution 1244 (1999).

[71] This has become more pressing in the wake of the *Al-Jedda* judgment, ibid. See F. Naert, 'The European Court of Human Rights' *Al-Jedda* and *Al-Skeini* Judgments: an Introduction and Some Reflections' (2011) 50 MLLWR 317; and F. Naert, 'The Application of Human Rights Law in Peace Operations – Comments on the Presentation and Paper by Kjetil Mujezinović Larsen', in S. Horvat and M. Benatar (eds.), *Recueil of the XIXth International Congress of the International Society for Military Law and the Law of War, 19th Congress (Québec City, 1-5 May 2012), Legal Interoperability and Ensuring Observance of the Law Applicable in Multinational Deployments* (Brussels: International Society for Military Law and the Law of War, 2013), 336.

[72] See generally Naert, *International Law Aspects of the EU's Security and Defence Policy*, n. 1, 544-567; M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2009); K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press, 2012); and M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011). For the most recent leading ECHR cases, see *Al-Jedda*, n. 34 and *Al-Skeini and others* v. *the United Kingdom*, App. No. 55721/07 (ECtHR, 7 July 2011); and the agora in (2011) 50 MLLWR 315-445; as well as *Hassan* v. *the United Kingdom*, App. No. 29750 (ECtHR, 16 September 2014), paras. 100-111.

[73] Compare generally Sari and Wessel (eds.), 'Human Rights in EU Crisis Management Operations', n. 60. See also the 2008 compilation of relevant documents 'Mainstreaming Human Rights and gender into European Security and Defence Policy', available at www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news144.pdf; and EU Council Doc. 17138/1/10 of 30 November 2010 (Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions).

[74] Article 3(i) of Council Joint Action 2008/124/CFSP of 4 February 2008, (2008) OJ L 42/92 (as amended).

[75] Article 12 Council Joint Action 2008/851/CFSP, n. 10.

in the region (Kenya,[76] the Seychelles,[77] Mauritius[78] and Tanzania)[79] and arrangements with third states participating in Atalanta (e.g. Croatia[80] prior to its accession to the EU and Montenegro),[81] which contain substantial provisions aiming to ensure respect for human rights.

2.3.3 *Jus ad bellum* and obligations under the UN Charter

This point is treated only very briefly. First, as regards those *jus ad bellum* rules that are part of customary law, the same can be said as above in relation to IHL.

Second, the question to what extent the EU is bound by UN Charter rules or obligations arising from the Charter, including those laid down in Security Council resolutions, is more complex and cannot be addressed within the confines of this chapter.[82]

Third, the most common legal bases under international law for EU military operations are a UN Security Council resolution, host state government consent (which is the rule in civilian operations), and/or a peace agreement (or a combination of these). There may be further bases such as the law of the sea in Atalanta.[83]

[76] (2009) OJ L 79/49 (no longer in force).
[77] (2009) OJ L 315/37.
[78] (2011) OJ L 254/3.
[79] (2014) OJ L 108/3.
[80] See Article 3 of, and the Annex to, the participation agreement with Croatia, (2009) OJ L 202/84.
[81] See Article 3 of, and the Annex to, the participation agreement with Montenegro, (2010) OJ L 88/3.
[82] See from an EU law perspective especially Articles 3(5), 21 and 42(1) and (7) TEU, n. 3; and Declaration (No. 13) concerning the CFSP and *Kadi*, n. 67; *Kadi* v. *European Commission*, Case T-85/09, ECLI:EU:T:2010:418 (30 September 2010); and *European Commission and others* v. *Kadi*, Cases C-595/10 P, C-593/10 P, and C-584/10 P, ECLI:EU:C:2013:518 (18 July 2013). See generally Naert, *International Law Aspects of the EU's Security and Defence Policy*, n. 1, 233-248 and 419-434; and F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations', in J. Wouters, E. Brems, S. Smis, and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations* (Antwerp: Intersentia, 2010), 140.
[83] This is combined with a series of UN Security Council resolutions and notifications by Somalia as regards the territory and territorial waters of Somalia, as well as the consent of some other states in the region.

3. Secondary rules and process

Different kinds of responsibility may be relevant in CSDP operations. In particular: first, international responsibility of states and international organisations, including the EU, under (general) international law and under EU law; second, individual disciplinary or criminal responsibility; and third, civil responsibility of natural or legal persons (under domestic or international law).

These forms of responsibility may overlap. For instance, a private person may be able to bring a civil action for damages for conduct which engages the international responsibility of a state, e.g. regarding a human rights violation. This chapter focuses on international responsibility, under both EU law and general international law, but also touches upon other aspects of responsibility (since the EU – member state question permeates all responsibility questions, all these elements may provide indications for attribution of international responsibility). It will distinguish the kinds of responsibility mainly in the final section, which will focus on international responsibility (section 4).

Subsection 3.1 identifies provisions relevant for responsibility in international agreements concerning EU military operations, subsection 3.2 covers some specific aspects of responsibility under EU law, and subsection 3.3 addresses the EU accession to the ECHR and domestic case law.

3.1 Provisions in international agreements

3.1.1 SOFA/SOMAs with host states

As indicated above, the EU normally concludes a SOFA/SOMA based on a model text.[84] The model SOFA inter alia lays down the privileges and immunities of the EU-led Force (EUFOR) and of its personnel *in the host state*.

[84] See n. 17 and accompanying text. See e.g. the SOFA with Chad, (2008) OJ L 83/40. For guidance on claims in one of the first EU operations, see EU Council Doc. 7307/03 of 7 April 2003.

Article 6 of the model SOFA details the privileges and immunities of EUFOR personnel. These do not exempt EUFOR personnel from the jurisdictions of the respective sending states[85] and are not further discussed here.

Furthermore, SOFAs usually contain a provision on claims for death, injury, damage and loss. Article 15 of the model SOFA provides for a three phased claims procedure: amicable settlement; a claims commission composed on an equal basis of representatives of EUFOR and representatives of the host state; and arbitration (or diplomatic means for claims up to 40.000 EUR). EUFOR is defined in Article 1(3)(a) of the model SOFA as meaning 'EU military headquarters and national contingents contributing to the operation, their equipment and their means of transport'.

The claims commission functions at the theatre level, whereas diplomatic means or arbitration involves the EU political level. Similarly, Article 16 provides for a two levels of process in relation to disputes between the parties about the SOFA: first a joint examination at theatre level; and second, settlement exclusively by diplomatic means between the host state and EU representatives.

To the author's knowledge, no claims commission or arbitral tribunal has actually been set up, with the possible exception of Althea[86] and two arbitrations in relation to staff in a civilian mission. Claims have been brought in courts only in very few cases.[87] It therefore appears that most claims have been settled amicably.[88] Furthermore, rather few claims have been brought at all.

[85] There have been very few cases of alleged (serious) criminal conduct in EU operations. A report entitled 'A Responsibility to Assist. Human Rights Policy and Practice in European Union Crisis Management Operations. A COST Report', edited by T. Hadden (Oxford/Portland: Hart, 2009) did not list any cases of sending state criminal jurisdiction concerning EU operations. Allegations of abuse were made in respected of operation 'Artemis', but an investigation in the member state concerned appears to have concluded that the allegations were unfounded.

[86] This EU operation applies the SOFA that applied to NATO's Implementation Force (IFOR) and Stabilisation Force (SFOR) operations. Under the latter operations, a claims commission was established and used. The author has not verified whether this claims commission has been used for Althea.

[87] To the author's knowledge, there are some pending staff cases and one case relating to a traffic accident (settled out of court) in host state courts, as well as some staff and procurement cases brought before the courts of member states and/or the EU courts. The relevant judgments in the latter cases are discussed in subsections 3.2.2-3.2.3 below.

[88] E.g. victims of a crashed Unmanned Arial Vehicle in one operation amicably settled their claim.

3.1.2 SOFA and claims agreements between member states

There is an Agreement *between the member states* of the EU to regulate the status of their forces and personnel within each other's territory (EU SOFA).[89] Pending its entry into force, other existing agreements are applied (e.g. the NATO SOFA),[90] and/or specific arrangements can be made (e.g. relating to EU Operational Headquarters). This is complemented by an Agreement between the member states of the EU concerning claims introduced between them in the context of an EU crisis management operation,[91] which has not yet entered into force either. However, a declaration to the latter Agreement provides that as of signature all member states will endeavour to limit as far as possible their claims against each other for injury or death of their military or civilian personnel, or damage to any of their assets, except in cases of gross negligence or wilful misconduct. These agreements differ significantly from SOFAs with states hosting EU operations and are not discussed here.

3.1.3 Participation agreements

As indicated above, the modalities of the participation of third states in a CSDP operation are laid down in a participation agreement. E.g., pursuant to the Framework Participation Agreement with Ukraine,[92] Ukraine shall ensure that its personnel participating in an EU operation undertake their mission in conformity with the operation's mandate and planning documents, and such personnel shall conduct themselves solely with the interest of the EU operation in mind (Articles 5, 6(1) and 9), the chain of command reflects that within the EU with the same transfer of authority and a

[89] Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context, 16 November 2003, (2003) OJ C 321/6 (EU SOFA). See especially its Article 18 on claims.

[90] Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, Ottawa, 20 September 1951, in force 18 May 1954, 200 UNTS 3.

[91] Agreement between the Member States of the European Union concerning claims introduced by each Member State against any other Member State for damage to any property owned, used or operated by it or injury or death suffered by any military or civilian staff of its services, in the context of an EU crisis management operation, 28 April 2004, (2004) OJ C 116/1. Under this agreement, most claims are waived between member states.

[92] Framework Participation Agreement with Ukraine, n. 20.

designated senior Ukrainian representative is responsible for day-to-day contingent discipline (Articles 6 and 10).

Article 3 of the Framework Participation Agreement with Ukraine addresses the status of personnel and forces. It inter alia provides that Ukraine shall exercise jurisdiction over its personnel participating in the EU operation and 'shall be responsible for answering any claims linked to [that] participation … from or concerning any of its personnel', and 'for bringing any action, in particular legal or disciplinary, against any of its personnel'. Furthermore, Ukraine and EU member states undertake to make declarations as regards a mutual waiver of claims when signing the Agreement.

In more recent Framework Participation Agreements, e.g. with Moldova and the United States, the corresponding provision contains a mutual waiver between *the EU* and the third state, as well as an undertaking by this third state to make a waiver declaration towards the member states, and an undertaking by the Union to ensure that its member states make a waiver declaration towards this third state.[93]

Furthermore, Article 11(2) of the Agreement with Ukraine states that '[i]n case of death, injury, loss or damage to natural or legal persons from the State(s) in which the operation is conducted, Ukraine shall, when its liability has been established, pay compensation under the conditions foreseen in the [SOFA], if available' (see also Article 7(2)).

Finally, disputes concerning the interpretation or application of the Framework Participation Agreement with Ukraine shall be settled by diplomatic means between the parties (Article 15).

3.1.4 Other agreements/arrangements

There may also be other agreements specific to a given operation. For instance, in the framework of the EU's counter-piracy operation Atalanta, pursuant to Article 12 of Council Joint Action

[93] Framework Participation Agreement with the United States; Framework Participation Agreement with Moldova, n. 20, both Article 3(5)-(7).

2008/851/CFSP, the EU has concluded 'transfer agreements' with Kenya, the Seychelles, Mauritius and Tanzania (see section 2.3.2 above).

In addition, there may be agreements and/or arrangements with other international organisations regarding a specific operation. This could include arrangements with NATO, in case of EU operations having recourse to NATO assets (see above), and arrangements with the UN, NATO or the AU, in case of operations cooperating in the same theatre. There may also be arrangements with international criminal tribunals.[94] Such agreements/arrangements may contain provisions on dispute settlement. However, such provisions normally only address claims between both organisations (possibly including their staff). Thus in relation to third parties they will likely be of limited assistance. E.g. if a person affected by a coordinated counter-piracy action by Atalanta and Ocean Shield claims damages, he/she could invoke any applicable claims procedures against both, but these will not be the same and could not necessarily be joined (except possibly as regards negotiations on an amicable settlement).

3.2 Specific aspects of responsibility under EU law[95]

3.2.1 Provisions in the treaties

Article 340 TFEU addresses the contractual[96] and non-contractual liability of the Union. The latter covers 'damage caused by its institutions or by its servants in the performance of their duties'.

As regards 'servants', i.e. essentially officials and other staff covered by the EU's staff rules,[97] this is of limited relevance to crisis management operations, because servants of the EU are

[94] E.g., in implementation of the Agreement between the International Criminal Court and the EU ((2006) OJ L 115/50), it was agreed that EUFOR Tchad/RCA could provide support to the Court, see www.eeas.europa.eu/human_rights/icc/docs/2010_euandicc_en.pdf, 21.

[95] See also G. Marhic, 'Violations of Human Rights and International Humanitarian Law in the Context of Missions: Assessing the Responsibility of the European Union', in M. Aznar and M. Costas (eds.), *The Integration of the Human Rights Component and International Humanitarian Law in Peacekeeping Missions Led by the European Union* (Valencia: CEDRI/ATLAS, 2011), 111.

[96] See also Article 272 TFEU, n. 13.

[97] See Regulation (EURATOM, ECSC, EEC) No. 549/69 of the Council of 25 March 1969, (1969) OJ L 74/119, as amended, and the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European

mostly involved only in the planning and follow-up of an operation and not in its actual conduct. The latter is only the case for the Civilian Operations Commander and other CPCC personnel (possibly except seconded personnel within the CPCC).

The Council obviously falls within the scope of the term 'institutions'. However, it is questionable whether this includes operations (see section 3.2.3 below on the status of civilian missions), and it may cover the EEAS.[98] Obviously, this concerns the status under EU law, not international law.[99]

While Article 268 TFEU grants the ECJ jurisdiction over actions for damages, Article 275 TFEU excludes, subject to two exceptions that are not relevant here, the jurisdiction of the ECJ with respect to the provisions relating to the Common Foreign and Security Policy (CFSP) and acts adopted on their basis. Consequently, the ECJ is not competent for actions for damages relating to the conduct of CSDP operations.[100] Claims for damages will therefore have to be brought under a SOFA/SOMA or before member state courts (see Article 19(1), second subparagraph TEU and Article 274 TFEU). In these cases, the Union does not enjoy immunity from jurisdiction in member state courts (see the Protocol on the privileges and immunities of the EU,[101] which implements Article 343 TFEU).

It might therefore be possible to bring a case against the EU and a member state in the same member state court.

Communities laid down in Regulation (EEC, Euratom, ECSC) No. 259/68, (1968) OJ L 56/1, as amended (other servants of the Union include special advisors; see section 3.2.3 below on the latter).

[98] For some considerations, see e.g. the Order of 4 June 2012 in *Elti d.o.o.* v. *Delegation of the European Union in Montenegro*, Case T-395/11, paras. 27 and 29; and the judgment of 8 October 2008 in *Sogelma* v. *European Agency for Reconstruction*, Case T 411/06, paras. 33-43.

[99] Compare A. Sari and R.A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B. Van Vooren, S. Blockmans, and J. Wouters (eds.), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford University Press, 2013), 126.

[100] The Court did not rule on this in its *Opinion 2/13*, n. 68, but in her 'view' of 13 June 2014 in that case, Advocate General Kokott ruled out actions for damages before the EU courts on CFSP matters (paras. 82-103, especially para. 94).

[101] See Protocol No. 7, on the privileges and immunities of the European Union, available in the consolidated version of the TEU, n. 3.

3.2.2 Particular provisions in Council joint actions/decisions and in practice

Some Council legal acts contain additional specific provisions relevant to responsibility.

In civilian missions, an EU institution or member state having seconded a member of staff shall be responsible for answering any claims linked to the secondment, from or concerning the member of staff, and shall be responsible for bringing any action against the seconded person.[102] In addition, it is usually also provided that the Head of Mission shall be responsible for disciplinary control over the staff, but that for seconded staff, disciplinary action shall be exercised by the national or EU authority concerned.[103]

Article 13 of Council Joint Action 2008/851/CFSP[104] provides that '[t]he conditions governing the presence on board merchant ships, particularly those chartered by the WFP, of units belonging to Atalanta, … shall be agreed with the flag States of those vessels.'[105]

Article 5(4) of Council Decision 2010/565/CFSP of 21 September 2010 concerning EUSEC RD Congo states that '[u]nder no circumstances may the EU or the [High Representative] be held liable by contributing Member States as a result of acts or omissions by the Head of Mission in the use of funds from those States.'[106]

The EU established a Human Rights Review Panel for complaints from any person claiming to be the victim of human rights violations by EULEX Kosovo in the conduct of its executive

[102] See e.g. Article 10(2) Council Joint Action 2008/124/CFSP, n. 74. In relation to staff seconded by member states, the question arises whether this rule affects/indicates attribution or is a purely internal arrangement. For an application in a specific case, see the Order of the General Court of 10 July 2014 in *H* v. *Council, Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina*, Case T-271/10 (inadmissibility of an action brought by a former staff member against the decision by which she was redeployed within a mission, indicating competence of the national court concerned); and the appeal against that Order (*H* v. *Council and Commission*, Case C-455/14 P, pending).
[103] Article 8(6) Council Joint Action 2008/124/CFSP, ibid. See also the Order of the General Court of 23 April 2015 in Case T-383/13, *Antonios Chatzianagnostou* v. *Council and Commission and Eulex Kosovo*.
[104] Council Joint Action 2008/851/CFSP, n. 10.
[105] See the agora on Vessel Protection Detachments in (2012) 51 MLLWR 7-148.
[106] (2010) OJ L 248/59.

mandate.[107] For the period 2010-2014, the Panel found human rights violations in eleven cases (while some admissible cases filed during this period are still pending).[108]

3.2.3 Other specific issues

There may be issues of duty of care towards mission staff, including in relation to their security. In civilian missions, the Council act usually sets out some of the responsibilities in this respect.[109]

Civilian missions are normally funded by the EU budget.[110] Until recently, the Head of Mission signed a contract (as special advisor in the CFSP) with the Commission in relation to the implementation of the mission budget,[111] and was then personally responsible for implementing this and for contracting other staff.[112] This system has been reformed and civilian missions are now given legal capacity.[113] Nevertheless, as regards responsibility for the implementation of the budget, the mission and/or its head remain responsible to the Commission. This may be relevant in the context of procurement for missions.[114] In relation to all other aspects of the conduct of the mission, the Head of Mission is responsible to the Civilian Operations Commander and the PSC/High Representative/Council (see section 2.1 above).

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[107] See http://www.hrrp.eu; and the fact-sheet on 'EULEX Accountability' at www.eulex-kosovo.eu/docs/Accountability/EULEX-Accountability-05.01.2010.pdf. See also Marhic, 'Violations of Human Rights and International Humanitarian Law in the Context of Missions', n. 95, 117-118.

[108] 2010 to 2014 *Annual Reports*, available at www.hrrp.eu/annual-report.php. In autumn 2015, several applications for legal aid were brought before the EU General Court in view of intended actions against the Council, Commission and Civilian Operations Commander in relation to EULEX Kosovo, including arguments relating to the Human Rights Review Panel (Cases T-266/15 AJ and T-412/15 AJ to T-418/15 AJ).

[109] E.g. Council Joint Action 2008/124/CFSP, n. 74, Article 7(5) and Article 14(1)-(2).

[110] See Article 41(2) TEU, n. 3.

[111] E.g. Council Joint Action 2008/124/CFSP, n. 74, recital 12, Article 8(5) and Article 16(2)-(4).

[112] See e.g. Article 10(3), ibid.

[113] See e.g. Article 13 of Council Decision 2014/486/CFSP of 22 July 2014 on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine), (2014) OJ L 217/42.

[114] In its Order of 4 June 2013 in *Elitaliana* v. *Eulex Kosovo*, Case T-213/12, the General Court ruled that EULEX Kosovo did not have the capacity to be a defendant before the EU courts, and declared inadmissible the application for annulment and the claim for damages in relation to a contract for helicopter support services. The Court of Justice upheld this on appeal in its judgment of 12 November 2015 in Case C-439/13 P (after finding that it had competence over issues relating to the implementation of (horizontal) EU financial regulations (not adopted under CFSP provisions) even when they involve civilian CSDP missions; the Court furthermore confirmed that for such issues the proper defendant at the time would have been the Commission – the Court did not address the situation of EULEX Kosovo after it had been granted legal capacity, but Advocate General Jääskinen briefly did so in his (second) opinion of 21 May 2015 in this case (para. 63)).

In military operations, costs are carried by each participating state, except for defined common costs, which are charged to the member states jointly (not to the EU budget)[115] and administered by a mechanism called 'Athena'.[116] Article 44 of the legal act governing the Athena mechanism lays down several rules on liability. As regards non-contractual liability, it provides that any damage caused by the operation's headquarters or their staff in the course of their duties shall be covered through Athena by the contributing states, as opposed to damages caused by other units and departments of the operation, for which the Union or the member states may not be held liable by a contributing state. In addition, pursuant to its Article 15(1), '[t]he common costs listed in Annex I shall be at the expense of Athena', and its Annex I, point 2 covers '[i]ndemnities for damages and costs resulting from claims and actions to be paid through Athena'. In a judgment of 27 November 2015, the Brussels Court of First Instance ruled that it had jurisdiction over a claim against Athena relating to the awarding of a contract for EUFOR RCA.

3.3 The EU's accession to the ECHR and domestic case law

As indicated above, the EU is in the process of acceding to the ECHR. The CFSP aspects of this accession gave rise to considerable discussion, including on attribution. Member states have divergent views on the latter.[117] A compromise solution was found and reflected in Article 1(3)-(4) of the draft accession agreement,[118] which provides that:

> 3. Accession to the Convention … shall impose on the [EU] obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf
>
> 4. … an act, measure or omission of organs of a member State of the [EU] or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the [EU], including decisions taken under the [TEU] and under the

[115] Article 41(2) TEU, n. 3.
[116] See Council Decision (CFSP) 2015/528 of 27 March 2015 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena), and repealing Decision 2011/871/CFSP, (2015) OJ L 84/39.
[117] On the position of some states more generally, see O. Engdahl, 'Multinational Peace Operations Forces involved in Armed Conflict: Who are the Parties?', in K.M. Larsen, C.G. Cooper, and G. Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press, 2013), 233.
[118] See n. 65.

> [TFEU]. This shall not preclude the [EU] from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with … Article 3 of this Agreement.

The co-respondent mechanism set out in Article 3 of the draft accession agreement aims to permit that the EU and one or more member states jointly become respondents in a case brought before the European Court of Human Rights (ECtHR), where this is deemed necessary to address situations involving both of them. This includes cases brought against a member state in which the compatibility with the ECHR of a provision of Union law is called into question, 'notably where that violation could have been avoided only by disregarding an obligation under European Union law'. The reverse applies where the compatibility of the Treaties themselves (or equivalent instruments) with the ECHR is called into question. Importantly, '[i]f the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.'

In addition, the explanatory report[119] states that:

> 23. Under EU law, the acts of one or more Member States or of persons acting on their behalf implementing EU law … are attributed to the member State[s] concerned. In particular, where persons employed or appointed by a member State act in the framework of an operation pursuant to a decision of the EU institutions, their acts, measures and omissions are attributed to the member State concerned. Attribution to a member State does not preclude the EU from being responsible as a co-respondent. Conversely, under EU law, acts, measures and omissions of the EU institutions, bodies, offices or agencies, or of persons acting on their behalf, are attributed to the EU. The foregoing applies to acts, measures or omissions, … relating to the EU [CFSP]
>
> 24. … in none of the cases in which the Court has decided on the attribution of extra-territorial acts … in the framework of an international organisation was there a specific rule on attribution … of such acts or measures to either the international organisation concerned or its members.

[119] Ibid.

> 25. The attribution of such an act to a member State of the EU shall not preclude the possibility that the [EU] becomes a co-respondent … if the conditions set out in Article 3 paragraph 2 are met … and that it may be held jointly responsible … in accordance with Article 3, paragraph 7.

The second sentence in paragraph 23 suggests that acts of member states' staff in an EU operation are attributable to them. However, in the actual text of Article 1(3)-(4) of the draft accession agreement, the key element is whether a staff member acts on behalf of the Union or of the member state in question. Despite this 'explanation', in view of the above elements in relation to command and control etc., it seems difficult to argue that member states' staff who are subject to the EU chain of command are acting on behalf of their state rather than on behalf of the EU. If this sentence had been included in the text itself of Article 1, then this might have been different and member states would then arguably have accepted that their responsibility is engaged as a special rule.[120] However, a mere 'explanation' can hardly lead to that result and a case-by-case analysis is necessary. Indeed, submissions by member states in the course of *Opinion 2/13* revealed that member states and EU institutions have divergent views on the attribution of conduct of CSDP operations.[121] In its *Opinion 2/13*, the Court did not take a position on this.[122]

Moreover, it remains to be seen what position member states will take when cases are brought against them. For instance, Germany has argued that conduct of its forces in Atalanta is attributable to the EU. In a judgment of 11 November 2011,[123] the Cologne Administrative Court considered that in principle this was indeed the case. However, the Administrative Court nevertheless ruled that Germany was responsible for the transfer to Kenya of suspected pirates held on board a German ship participating in Atalanta, on the basis of the distinct decision-making by Germany concerning this transfer (including a bilateral note verbale to Kenya).[124]

[120] This apparent willingness to assume responsibility may in part result from a link to judicial remedies, which, given the ECJ's limited jurisdiction over the CFSP, mainly exist before member states' courts and specific CSDP claims mechanisms (see section 3.2.1). However, the forum of a remedy should not determine attribution, as the EU can be sued before a member state court in some cases (ibid.).
[121] *Opinion 2/13*, n. 68. The Court's opinion only captures these submissions to a limited extent (see paras. 95, 128-140 and 251), but they indicate significant divergent views on this question.
[122] Ibid., see paras. 249-257.
[123] VG Köln, Urteil vom 11. November 2011, Az. 25 K 4280/09, openjur 2012, 83059, available in German at http://openjur.de/u/451905.html.
[124] Ibid. See especially para. 60.

This judgment was confirmed on appeal,[125] albeit on the basis of arguments that are somewhat different and that relate in part to the situation prior to the Treaty of Lisbon.[126] A few key points about this judgment must be mentioned here from a shared responsibility perspective (without commenting on them). First, the Court of Appeal found primary attribution to Germany because of the initiation and implementation of the transfer by German authorities, without examining whether the German forces in theatre were in principle under EU command, and left open the possibility that the transfer could in addition be attributed to the EU (section 1.2). Second, member states implement CFSP measures such as this operation and their implementing measures are subject to national law and judicial review before national courts; in the absence of ECJ jurisdiction violations of the law can only be avoided though shared responsibility, in the form of a layered responsibility (with the Union's responsibility being secondary) (section 1.3). Third, under German and international law, exclusive attribution of conduct of German officials to an international organisation is only possible under strict conditions, which were not met (taking into account Article 7 ARSIWA and ECtHR case law, German authorities retained significant control and therefore the EU had no effective control over the specific conduct) (section 1.4).

Taking into account the above elements, it is far from clear who is responsible for violations of international law committed in the framework of an EU CSDP operation. The answer is likely to depend on the particular circumstances of the case, and in some cases joint responsibility might be possible. After the EU accession to the ECHR, attribution would become less important for applicants/victims, since the ECtHR would then be competent irrespective of whether the EU or the member states are responsible. However, given the obstacles which the Court has identified in

[125] Oberverwaltungsgericht Nordrhein-Westfalen, Urteil vom 18. September 2014, available in German at http://openjur.de/u/731026.html.

[126] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, (2007) OJ C 306/1. The pre-Lisbon arguments relate in particular to the argument that under German law the EU had no international legal personality at the time (this is contestable), and consequently any transfer agreement was concluded not by the Union but by the member states and required their ratification (sections 1.1 and 2.1).

Opinion 2/13, this accession will probably be significantly delayed and may even fail altogether.[127]

4. Some conclusions and reflections

EU practice prior to the Treaty of Lisbon clearly focused on the responsibility of member states. By contrast, in current practice the responsibility of the Union is also addressed to some extent.

However, while a number of rules address certain specific aspects of responsibility under EU law, they only do so in a fragmented and partial manner, and few provisions clearly determine attribution. No provisions clarify attribution in EU operations in general. Moreover, in some respects one has to distinguish (general) international and EU law aspects. The latter are only specifically regulated to a very limited extent, leaving significant room for international law rules on attribution to apply, or at least to be taken into account. Furthermore, in cases where the EU is responsible under international law, EU law may nonetheless require the involvement of member state courts, and may provide that a member state will ultimately pay compensation or be responsible for answering a claim.

In addition, very few cases have arisen in which responsibility and attribution issues were settled. Therefore one has to rely primarily on general international law rules (which are not necessarily entirely clear, even if the ARIO and ARSIWA have clarified and codified some aspects) with

[127] The Court found that the draft accession agreement, n. 65, is incompatible with the Treaties on multiple grounds. Some aspects could perhaps be renegotiated, but it is doubtful whether all the required changes would be acceptable to the non-EU parties to the ECHR. Alternatively, or in addition, a further amendment to the EU Treaties could be considered, but this seems unlikely in the short term. Member states and the institutions are reflecting on how to proceed. For some suggestions by commentators, who have generally been very critical of the Court's opinion (understandably so), see e.g. L. Besselink, 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13', ACELG Blog, 24 December 2014, available at http://acelg.blogactiv.eu/2014/12/24/acceding-to-the-echr-notwithstanding-the-court-of-justice-opinion-213; and P.J. Kuijper, 'Reaction to Leonard Besselink's ACELG Blog', ACELG Blog, 6 January 2015, available at http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks's-acelg-blog/#more-475. In relation to shared responsibility, para. 234 of *Opinion 2/13*, n. 68, merits particular attention ('[t]he question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction').

regard to EU operations, on the basis of responsibilities in relation to the planning and conduct thereof. In that respect, it has to be kept in mind that CSDP operations are established by the Council of the EU; are governed by EU legal instruments, including international agreements, and EU-approved operational planning documents and rules of engagement; and are conducted by Headquarters and forces/personnel put under the command and control of the EU Operation Commander, who acts under the political control and strategic direction of the PSC, and ultimately under the responsibility of the Council and of the High Representative. Under international law, it is likely that these combined elements amount to a degree of (effective) control by the Union entailing, at least in principle, attribution of the acts of an operation and its personnel (not of a private nature) to the Union.[128] In addition, for the Union's responsibility to arise in such cases, it is also necessary that there is a breach of an international obligation *of the Union*.

This does not necessarily preclude any responsibility of the member states, e.g. for their actions in relation to decision making and implementation in the framework of CSDP operations.

The draft agreement on the EU accession to the ECHR provides some indications on attribution of, and responsibility for, conduct of, and relating to, CSDP missions but, as indicated, these are ambiguous and limited to the ECHR. Moreover, that draft agreement was found to be contrary to the EU Treaties and it is unclear what the fate of these provisions might be in any renegotiated agreement. It therefore remains uncertain what point of view the Union and the member states will take when cases are brought against them.

In relation to the participation of third states in EU operations, and cooperation with other international organisations or states in relation to these operations, some arrangements are in place, but hardly any cases of shared responsibility seem to have arisen in practice. Procedures involving third states participating in EU operations are partially integrated into those relating to the EU operation, e.g. under a SOFA/SOMA. By contrast, in the case of cooperation between an EU operation and a non-EU operation, distinct procedures would most likely apply.

[128] See Naert, *International Law Aspects of the EU's Security and Defence Policy*, n. 1, 355-357, 435-449, 506-526 and 641-646. The EU does not seem to have a distinct concept of the degree of control required for attribution, and the required degree of control under international law cannot be discussed here.