

INTRODUCTION

HUMAN RIGHTS IN EU CRISIS MANAGEMENT OPERATIONS: A DUTY TO RESPECT AND TO PROTECT?

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Over the course of the last decade, the European Union has acquired an operational capability enabling it to deploy military and civilian crisis management missions in third countries in pursuit of its foreign and security policy. As a result of this development, the EU has launched more than twenty crisis management missions since 2003, ranging from large-scale military and civilian deployments in the Balkans to more modest security sector and monitoring missions in Georgia, Guinea Bissau and elsewhere.

The purpose of the present working paper is to assess the role of human rights and fundamental freedoms in EU crisis management operations. To this end, the paper brings together contributions from recognised experts on two cross-cutting themes: the duty to ensure respect for human rights and fundamental freedoms in the conduct of EU crisis management missions and the contribution that such missions make to the Union's long-standing policy of promoting human rights at the international level.

The choice of these two themes reflects the dual role that human rights play in the external activities of the EU. On the one hand, its founding Treaties direct the Union to respect human rights whenever it acts on the international scene, including in the field of crisis management.¹ The founding Treaties thus suggest that the EU is subject to its own legal obligations to respect human rights and fundamental freedoms in addition to the obligations binding its Member States. The Treaties also signal a broader political or moral commitment on part of the Union to conduct its external activities in a manner that upholds the highest human rights standards. On the other hand, the promotion of human rights at the international level is one of the principal foreign policy objectives of the EU's external action as a whole.² European crisis management missions can

¹ Art. 2 TEU declares that the 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' Art. 21(1) TEU applies this general principle to the area of foreign and security policy by providing that 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'

² This is evident from Art. 3(5) TEU, which provides that 'In its relations with the wider world, 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

make a significant contribution to this objective. For example, the EU may deploy military forces in order to contribute to the establishment of a secure environment in which the humanitarian needs of local populations can be addressed.³

However, in practice the implementation of this dual commitment to ensure respect for and to promote human rights encounters certain difficulties. First, the protection of human rights in EU crisis management missions is not governed by a single legal regime. Rather, EU-led operations involve action by a multitude of entities—including the EU, its Member States and any contributing third States and international organisations—subject to diverse instruments and obligations (international, regional and domestic). This not only raises questions about the consistency of human rights protection in EU missions, but it also means that it may be unclear where responsibility for violations of individual rights lies in specific cases. Second, the legal effect and applicability of the relevant human rights instruments is uncertain in important respects. For example, while the extra-territorial applicability of the European Convention on Human Rights (ECHR) is well-established in principle, significant doubts remain about the Convention's reach in crisis management missions, especially in the light of the decision of the European Court of Human Rights in the *Behrami* and *Saramati* cases. Third, the entry into force of the Lisbon Treaty on 1 December, 2009 has significantly altered the regulatory framework of EU external action. In particular, the Treaty calls for the accession of the EU to the ECHR and provides that the EU Charter of Fundamental Rights has the same legal value as the founding Treaties. These are major developments with potentially far-reaching implications that need to be investigated as a matter of urgency. Fourth, the fact that EU missions are deployed in operationally challenging environments may lead to certain tensions between human rights and operational effectiveness. For instance, EU personnel normally benefit from certain immunities from local jurisdiction. Such derogations raise questions about their compatibility with the Union's obligations and commitments to uphold human rights, in particular as regards their necessity and proportionality. Fifth, the EU's long-standing commitment to human rights, its relatively high level of political homogeneity and the robustness of its decision-making processes suggests that it should be an ideal framework for the development of best practices and standards in crisis management. It is unclear, however, to what extent the EU has succeeded in setting an example for other organisations or indeed what lessons it should learn in areas where it has not fully lived up to its commitments and potential.

and 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.' This basic principle is once again applied to the area of foreign and security policy by Art. 21(2), which states that 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: ... (b) consolidate and support democracy, the rule of law, human rights and the principles of international law'.

³ E.g. Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic, OJ [2007] L 279/21.

The contributions to this working paper engage with a number of these questions. Offering an insider's perspective, **Hadewych Hazelzet** starts off by arguing convincingly that over the past decade the EU has made a very important *indirect* contribution to human rights protection by helping to build the rule of law and stability in many post-crisis situations around the world. Yet, it remains difficult to explicitly integrate human rights concerns into the missions' mandates. At the same time, host-governments will also have to be convinced more stringently to adhere to human rights standards in the context of deploying an EU mission or operation. Her main message is that the nexus between human rights and security is as fundamental as the one between security and development.

Before going into detail as to how human rights and humanitarian law could be applied in specific cases, the question is which general principles of international law may have to be taken into account by the EU when employing civilian and military missions. In a general introduction to the topic, **Gentian Zyberi** addresses the question of to what extent the EU would be bound by those general principles, including a large number of international human rights standards. Given the fact that the EU as such is not a party to the most relevant treaties, it is necessary to take the customary nature of the norms into account, as well as the fact that EU Member States remain bound. Zyberi concludes that a considerable number of general principles and instruments of international law are applicable and guide the EU's activities in the CSDP area.

The legal framework governing the protection and promotion of human rights at EU level is analysed by **Frederik Naert**, who is also able to take an insider's view. Naert analyses the relevant provisions in the EU Treaties and argues that there is a solid basis for both respect for and promotion of human rights in CSDP missions. The bottom-line is that the Treaties and several other documents can and should serve as a basis for application of human rights to CSDP missions. At the same time several provisions call for human rights as an objective of missions abroad.

Obviously, the EU Treaties do not form the only legal context for the application of human rights. The ECHR is equally relevant. Since all EU Member States are Member States of the ECHR and Art. 6 (2) TEU still promises that the EU itself will accede to the Convention, the European Court of Human Rights will *prima facie* have jurisdiction over human rights violations which occur during EU crisis management missions. However, as **Heike Krieger** argues, the judicial enforcement of civilians' human rights during military operations abroad is a highly contentious issue. There are numerous unresolved legal issues implicated which might speak against the jurisdiction of the Court or even against the responsibility or accountability of the EU or its Member States. Two cases, *Al Skeini* and *Al Jedda*, are used to further analyse in particular the problem of extraterritoriality when applying the ECHR provisions.

The clear military nature of some of the EU missions calls for the more specific question of whether there is a duty to respect international humanitarian law (IHL) during EU-led operations, and if so, who is the addressee of this obligation. **Marten Zwanenburg** argues that the EU may indeed itself become

a party to an armed conflict when an EU-led operation becomes involved in hostilities. At the same time, this does not preclude troop-contributing states from also becoming such parties. The question then is how to determine whether the EU or rather troop-contributing states are accountable under the rules of IHL.

Finally, the democratic oversight of the application of human rights principles by the EU is analysed by **Wanda Trosczyńska-Van Genderen**. Providing again an insider's perspective she discusses the human rights-related priorities of the European Parliament, including adherence to international human rights and humanitarian law in the context of CSDP missions and operations, as well as ensuring adequate staffing, training and expertise related to broadly defined human rights work praxis. Although the European Parliament is actively involved in advancing the fundamental rights agenda, its capacities are limited.

The present Working Paper thus aims to bring together a number of issues related to the application of human rights to EU civilian and military missions. With the coming of age of the EU's CSDP the questions raised become more prominent and a new research agenda clearly emerges. The Editors are grateful to the Royal Netherlands Academy of Arts and Sciences (KNAW) for supporting the workshop and to Dr. Tamara Takacs at the Centre for the Law of EU External Relations (CLEER) and the T.M.C. Asser Instituut who continued to stimulate this project.