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International Responsibility of the European Union for the Activities of its Military Operations. The issue of effective control

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Abstract: European Union military operations entail the participation of a new subject of international law in the area of peace and security. This organization constitutes a special subject of international law, and its internal structure and distribution of powers make difficult to determine, during the deployment of a military operation, the attribution of responsibility in case of breach of international law. This article aims to analyse the different aspects that affect the responsibility of the European Union by acts of its military operations, focusing on the theory and practice of the Organization and analysing issues as the effective control of the operations or the personnel involved.

Keywords: International responsibility – effective control – military operation – European Union - peacekeeping operations

INTRODUCTION

European Union missions abroad have risen in recent years and, although military operations are less common than civilian ones – there are currently eleven ongoing civilian missions and only five military operations, the particularities of these operations, their complexity, the effect they have on private individuals and the level of danger entailed require an analysis of their potential consequences in the event of a breach of International Law. This study will focus on the theory and practice of the European Union (EU). However, in relation to practice, it will take into account ongoing military operations in order to define the area of study.

The responsibility of the EU is currently a subject for debate in different forums, along with the responsibility of international organizations. One of the main outcomes of this active debate has been the Articles on the Responsibility of International Organizations (ARIO), completed by the International Law Commission (ILC) in June 2011 and adopted by the General Assembly in December 2011. As established by the Special Rapporteur, the articles refer to "all the internationally wrongful acts committed by international organizations and the content and implementation of responsibility when an organization is responsible towards another organization or a state or the international community as a whole". The articles "also address questions relating to the responsibility for the conduct of an international organization, as well as the responsibility of an organization for the conduct of a state or another organization"[1].

Therefore these articles include secondary rules referring to breaches of international rules by international organizations, and their consequences. In this sense, and even though the articles on state responsibility can be considered as a codification, the ARIO is in the line of "progressive

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[1] G. Gaja, Articles on the Responsibility of International Organizations, United Nations Audiovisual Library International Law, 2011 (available electronically at <http://legal.un.org/avl/ha/ario/ario.html>).

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development", owing to its basis on a limited practise in this matter[2]. Regarding the content of the articles, the attribution of conduct, which has special consequences relating to the EU, is one of the main subjects. According to article 6, the conduct of an organ of an international organization shall be considered as an act of the organization itself; and according to article 7, the conduct of an organ of a state or international organization placed at the disposal of another international organization shall also be considered as an act of the latter organization when it exercises effective control. Taking into account the difficulties that the attribution of conduct can represent for any international organization in relation to the determination of what is an organ, or the exercise of effective control, which will be analyzed later, such difficulties increase in relation to the EU. This is because of the specificities of the European Union[3] and the complex division of competences between the EU and the member states[4].

These difficulties have led the European Commission to send comments to the Draft Articles on the Responsibility of International Organizations (DARIO). However these have focused mainly on the community aspects of the EU[5], which means that, specifically on the attribution of acts, the European Commission has failed to take into account the specificities of Common Foreign and Security Policy (CFSP) —for example the specific division of competences between the EU and the states, or the absence of control by the European Court of Justice, as established in article 275 TFEU. The European Commission considered that behind the rule of attribution based on effective control was "the perception that international organizations tend to "escape" accountability for international wrongs", and pointed out that the EU has a judicial system that allows it to be fully accountable[6]. It is difficult to see, however, how this statement could apply to the CFSP.

Finally, the European Commission also referred to the specificities of the EU in relation with the role of member states in the fulfillment of EU international obligations, as the EU implements these obligations "through its member states and their authorities, and not necessarily through "organs" or "agents""[7]. It could be inferred from this statement that the member states and its organs, in application of the EU's norms, are acting *de facto* as organs of the EU[8]. In relation with the CFSP

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[2] International Law Commission, Draft articles on the responsibility of international organizations, with commentaries (2011), 2 *Yearbook of the International Law Commission*, 2011, Part Two, at. 2-3.

[3] Comments and Observation received from International Organizations, 14 February 2011, UN doc A/CN.4/637, 7-8.

[4] 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,, y J. Wouters., *The EU's role in Global Governance. The legal dimension*, (Oxford, Oxford University Press, 2013) 126, at. 127.

[5] *Ibid.* at 128.

[6] Comments and Observation received from International Organizations, *supra* n. 3, at. 22-23.

[7] *Ibid.* at. 7.

[8] M. Cortés Martín, "The European Exceptionalism in International Law? The European Union and the System of International Responsibility", in M. Ragazzi, (ed.), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, (Martinus Nijhoff Publishers, Leiden, 2013), at. 195. Otherwise, during the negotiation of the accession to the European Convention of Human Rights, the EU stated that "the attribution of an act to a member state of the EU would not exclude the possibility for the EU to be held responsible", *Third Negotiation Meeting Between the CDDH ad hoc Negotiation Group and The European Commission on the Accession of the European Union to the European Convention on Human Rights*, Meeting report, (47+1(2012) R03), at. 3. See. J.M. Cortés Martín, "Sur l'adhésion à la CEDH et la sauvegarde de l'autonomie de l'ordre juridique de l'Union dans l'identification du défendeur pertinent : le mécanisme du codéfendeur ", 4 *Revue du droit de l'Union Européenne* (2011), 615-665; J.R. Marín Aís, "La adhesión de la Unión Europea al Convenio de

and specifically with EU military operations, the role of the member states differs from that developed in the "community" area, and, as it will be analyzed later, it is possible to consider them as organs or agents placed at the disposal of the EU.

These considerations can lead to the application of common rules of attribution laid down in the ARIO to the EU military operations[9], which will be analyzed in this study, leaving aside the consideration of a *lex specialis*[10] that could also be applied, as can be inferred from the Commission's comments, to the "community" part of the EU. Hence, the analysis of this specific area of responsibility – the actions of EU military operations – endeavours to leave to one side certain general questions pertaining to the responsibility of international organizations in order to focus on more specific subjects related to this particular activity.

As mentioned previously, the responsibility of international organizations has been widely studied[11], as has the responsibility of the EU.[12] However, the responsibility of the EU referring to the

Roma. El cumplimiento de las obligaciones derivadas del Convenio Europeo de Derechos Humanos en el ordenamiento jurídico de la UE", 44 *Revista de Derecho Comunitario Europeo* (2013), 233-276; S. Sanz Caballero, "Crónica de una adhesión anunciada: algunas notas sobre la negociación de la adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos", 38 *Revista de Derecho Comunitario Europeo* (2011), 99-128.

9 A. Sari and R.A. Wessel, supra n. 4, at. 128.

10 J.M. Cortés Martín, *supra* n. 8.

11 F. Seyersted, *Common Law of International Organizations* (Martinus Nijhoff Publishers, Leiden, Boston, 2008); M. Hirsch, *The Responsibility of International Organizations toward third parties: some basic principles* (Martinus Nijhoff Publishers, Dordrecht, 1995); M. Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers, Leiden, Boston, 2005); J.M. Cortés Martín, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional* (Instituto Andaluz de Administración Pública, Sevilla, 2008); C. Eagleton, 'L'Organisation Internationale et le Droit de la Responsabilité', *76 Recueil des Cours* (1950) 319-426; E. Butkiewicz, 'The premises of International Responsibility of Intergovernmental Organizations', 11 *Polish Yearbook of International Law* (1981-82) 117-140; J. D'Aspremont, 'Abuse of the Legal Personality of International Organizations and the responsibility of Member States', 4 *International Organizations Law Review* (2007) 91-119 ; A. Rey Aneiros, *Una aproximación a la responsabilidad internacional de las Organizaciones Internacionales* (Tirant Lo Blanch, Valencia, 2006); M. Pérez González 'Les organisations internationales et le droit de la responsabilité' 92 *Revue Générale de Droit International Public* (1998) 63-102; A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' 8 *Human Rights Law Review* (2008) 151-170; M. H. Arsanjani, 'Claims Against International Organizations: Quis custodiet custodies', *7 The Yale Journal of World Public Order* (1981) 131-176; A. Geslin, 'Réflexions sur la répartition de la responsabilité entre l'Organisation International et ses états membres', 109 *Revue Générale de Droit International Public*, (2005) 535-579; R. Zacklin, 'Responsabilité des Organisations Internationales' in Actes du Colloque du mans de la SFDI, *La Responsabilité dans le système international*, (Pedone, Paris, 1990) 91; T. Stein, 'Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or its Members States?', in C. Tomuschat (ed), *Kosovo and the International Community* , (Kluwer Law International, The Hague, 2002) 243; C. Brölman, *The institutional veil in public international law: international organizations and the law of treaties* (Hart, Oxford, 2007); C. Gutierrez Espada, *La responsabilidad internacional de las organizaciones internacionales a la luz del proyecto definitive de artículos de la Comisión de Derecho Internacional* (2011), (Comares, Granada, 2012).

12 P-J. Kuijper and E. Paasivirta 'Further Exploring International Responsibility: The European Community and the ILC'S Project on Responsibility of International Organizations', 1 *International Organizations Law Review* (2004) 111-138; J.M. Sobrino Heredia, 'La articulación de la responsabilidad internacional de la Unión Europea y sus Estados miembros a la luz del art. 300.7º CE', in *Pacis Artes. Obra Homenaje al Profesor D. Julio González Campos*, (Eurolex, Madrid, 2005); R. Frid, *The relations between the EC and International Organizations* (Kluwer Law International, The Hague, 1995); E. Cannizzaro, 'Sulla Responsabilità internazionale per condotte di Stati membri Dell'Unione Europea: in margine al caso Bosphorus', 88 *Rivista di Diritto Internazionale* (2005) 762-766; A. Pigrau Sole, 'La responsabilidad internacional de la Comunidad Europea' in F. Mariño Menéndez (ed.) *Acción Exterior de la Unión Europea y de la Comunidad Internacional* (Universidad Carlos III, Madrid, 1998) 171; C. Tomuschat, 'The International Responsibility of the European Union', in E. Cannizzaro, *The European Union as an Actor in International Relations* (Kluwer Law International, The Hague, 2002) 177; G. A. Zonnekeyn,

former CSDP, on the other hand, has been less studied.[13] This paper aims to analyse the responsibility of the EU from a different point of view, focusing on on-going military operations, their documents and practice, in order to reach a conclusion, not through general and theoretical analysis of the subject, but rather by studying the specific norms and the special circumstances applicable to these operations.

To establish the responsibility of the EU for the actions of its military operations, first and foremost, we must establish which norms might be breached by these operations. As mentioned previously, this subject has been studied by Naert and his conclusions will form the basis of this work. However, to gain a closer understanding of EU practices, references to these norms found in the documents of EU military operations must also be examined, in order to ascertain the specific obligations to which the EU is bound in these specific operations. Secondly, for the attribution of responsibility, the definition of the personnel involved in these operations will be decisive, as will their consideration as personnel of the EU, personnel of the contributing states or personnel at the disposal of the Organization. Although this matter has been studied in relation to international organizations, it requires in-depth analysis in relation to the EU.

Finally, the most controversial issue is that of effective control. Effective control and personnel have been widely studied especially in relation to the United Nations (UN), but this paper will focus its analysis on the EU, taking into account the chains of command and the responsibilities of the different bodies in EU operations.

In conclusion, the focus of this paper is to apply theoretical analysis of the responsibility of international organizations and the EU to the practices of specific on-going EU military operations.

INTERNATIONAL NORMS APPLICABLE TO EU OPERATIONS

Before analysing whether or not the EU can be held responsible for a breach of International Law resulting from the actions of its troops involved in a military operation, it is necessary to establish which rules affect these operations.

Taking into account the activity carried out by EU military operations, the rules relating to these activities might be international humanitarian Law, human rights law, the laws of the host state, the rules included in the agreements signed by the EU for deployed operations, as well as other rules of International Law.

'EC liability for the non-implementation of WTO dispute settlement decisions –Advocate general Albert proposes a 'Copernican Innovation' in the case law of the ECJ', *6 Journal of International Economic Law* (2003) 761-769.

[13] 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* (Intersentia, Antwerp-Oxford-Portland, 2010); M. Zwanenburg, 'Toward a more mature ESDP: Responsibility for violations of international Humanitarian Law by EU crisis management operations', in S. Blockmans (ed.), *The European Union and Crisis Management. Policy and Legal Aspects* (T.M.C. Asser Institut, The Hague, 2008) 395; F. Naert. 'Accountability for Violations of Human Rights Law by EU Forces' in S. Blockmans (ed.), *The EU and Crisis Management. Policy and Legal Aspects*, (T.M.C. Asser Institut, The Hague, 2008) 375; R. A. Wessel, 'Legal Responsibility for Agreements concluded by European Union', *5 CSFP Forum* (2010) 10-12; G. Fernández Arribas, *Las capacidades de la Unión Europea como sujeto de Derecho Internacional* (Educatori, Granada, 2010); A. Sari and R.A. Wessel, *supra* n. 4.

(1) International Humanitarian Law. Different Sources of Obligation

The application of international humanitarian law to EU military operations is a controversial matter, just as it is in relation to UN peace-keeping operations[14] and NATO operations.[15]

The first question to resolve is when this law can be applicable, and as the majority of the doctrine affirms,[16] it must be applicable in situations of armed conflict. Therefore, this law is not directly applicable to a simple deployment of a military operation;[17] there must be an armed conflict. However, this is not the only requirement; the organization's troops must also be involved in the conflict as combatants.[18]

EU military operations to date have never been involved in an armed conflict as combatants. By way of an example, the five ongoing military operations[19] are deployed in countries where there is no military conflict, the operation EUTH Somalia, which could be considered as being deployed in a country in a situation of armed conflict, is actually deployed in Uganda, the host state;[20] and the operation in Central African Republic is deployed in a 18-month transition process got by the Libreville Agreements and the N'Djamena declaration of 18 April 2014. Regarding the condition that EU military operations must not take part in a situation of armed conflict, the participation of Switzerland in operation ALTHEA[21] is particularly enlightening, since its status as a neutral country determines the non-combatant nature of operation personnel.

However, should an EU military operation be involved in an armed conflict as combatants, what are the foundations for the application of international humanitarian law?

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[14] Seyersted, *supra* n. 11; Hirsch, , *supra* n. 11; D. W. Bowett, *United Nations Forces* (Friederick A. Prayer Publishers, New York, 1964); H. McCoubrey and N. D. White, *The Blue Helmets. Legal regulation of United Nations military operations* (Dartmouth, Aldershot, 1996); Zwanenburg, *supra* n. 11; R. Siekman, *National Contingents in United Nations Peace-Keeping Forces* (Martinus Nijhoff Publishers, Boston, Leiden, 1991); G. J. Cartledge, "Legal constraints on Military Personnel Deployed on Peacekeeping Operations", in H. Durham and T. L. H. McCormack (eds.) *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Kluwer Law International, The Hague, 1999) 121.

[15] Zwanenburg, *supra* n. 11.

[16] Bowett, *supra* n. 14, at. 493-506; McCoubrey and White, *supra* n. 14, at. 156-160; Zwanenburg, *supra* n. 11, at. 169; Cartledge, *supra* n. 14, at. 125; Naert, *supra* n. 13, at. 470.

[17] Naert, *supra* n. 13, at. 469.

[18] This is also the position of the United Nations as was established in the Secretary General Bulletin on the Observance by the United Nations forces on international humanitarian law. Section 1 sets up that "The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants". The Institut de Droit International also has affirmed that UN forces can be considered as belligerent in an armed conflict, therefore in these cases law of war should be applicable. *See* Bowett, *supra* n. 14, at. 499; McCoubrey and White, *supra* n. 14, at.156-160; Zwanenburg, supra n. 11, at. 187. Regarding the existence of armed conflicts see M.J. Aznar Gómez, "La responsabilidad internacional de las organizaciones internacionales por daños al patrimonio cultural causados por sus misiones de paz", in J. Cardona Llorens, J. Pueyo Losa, J.L. Rodriguez-Villasante y Prieto (eds.) *Estudios de Derecho Internacional y de Derecho Europeo en Homenaje al Profesor Manuel Pérez González* (Tirant lo Blanch, Valencia, 2012) 167, at. 176-178

[19] EUFOR ALTHEA, EUNAVFOR-Atalanta, EUTM SOMALIA, EUTM- Mali, EUFOR RCA.

[20] Article 1.2 Council Decision 2010/96/CFSP of 15 February 2010 on an European Union military mission to contribute to the training of Somali security forces. OJ 2010 L 44/16.

[21] Agreement between the European Union and the Swiss Confederation on the participation of the Swiss Confederation in the European Union military crisis management operation in Bosnia and Herzegovina (operation ALTHEA).OJ 2005 L 20/42

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It is clear that the EU is not bound by the Hague Conventions or by the Geneva Conventions[22] as conventional law,[23] as it is not party to those agreements. However, the rules contained in these conventions could be binding for the EU by other means.

It has been established, even by the EU,[24] that the rules of the Geneva Conventions are customary international law and, therefore, they must be applied by all subjects of International Law,[25] which refers to the EU, this applicability is supported by TEU and EU case law which states "that European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation…"[26]. One of the problems arising from this assertion is the question of which rules are applicable to a conflict in which the EU is involved. The rules of international armed conflict or the rules of internal armed conflict - which entails the application of Common Article 3 of the Geneva Convention and Protocol II relating to the Protection of Victims of Non-International Armed Conflicts?[27]

In this respect, the participation of the EU in an armed conflict against another subject of International Law can be classed as international armed conflict owing to the participation of two subjects of International Law. In contrast to this opinion, there is a different view which considers confrontation between an international organization and an armed group to be an internal conflict.[28]

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[22] These two conventions contain the main rules on international humanitarian law, knowing as well as *ius in bello* or the law of armed conflict. Cartledge affirms that international humanitarian law includes law of armed conflict and also human rights law. Cartledge, *supra* n. 14, at. 134.

[23] These conventions could be applicable to the EU, maybe as a conventional law, if they would have been include in the agreements conclude by the EU with third states to carry out the operations, but no agreements make reference to that rules neither the SOFA applicable to the ALTHEA operation that was the same applicable to NATO and included in Dayton Peace Agreement (Appendix A to Annex 1A).

[24] "The principal IHL Conventions are listed in the Annex to these Guidelines. The most important are the 1907 Hague Regulations, the four Geneva Conventions from 1949 and their 1977 Additional Protocols. The Hague Regulation and most of the provisions of the Geneva Conventions and the 1977 Additional Protocols are generally recognised as customary law". European Union Guidelines on promoting compliance with international humanitarian law (IHL). OJ 2005 C 327/12. *See* T. Ferraro, 'Le droit international humanitaire dans la politique étrangère et de sécurité commune de l'Union européenne', 84 *International Review of the Red Cross* (2002) 435-461; Zwanenburg, *supra* n. 13, at. 400.

[25] The ICJ in its advisory opinion on the Interpretation of the Agreement of 25 March 1951 between The WHO and Egypt ruled that "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties". *Interpretation of the Agreement of 25 March 1951 between The WHO and Egypt*, I.C.J. Reports (1980), at. 37. Hirsch refers to the UN operations in Korea and Congo where allegations of breached of customary laws of war were made. Hirsch, *supra* n. 11, at. 31-32. In relation to the applicability of the international humanitarian law to UN, Zwanenburg stated that article 1 (I), article 3 and article 103 of the UN Charter "together make clear that UN Security Council can derogate from customary law", when acting under the chapter VII of the UN Chapter. This would be an exception to the general rule settled in WHO advisory opinion. Zwanenburg, *supra* n. 11, at. 143.

[26] Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR, 3655, at 3704.

[27] McCoubrey and White, *supra* n. 14, at.170.

[28] Zwanenburg, *supra* n. 11, at. 182-186; Naert, *supra* n. 13, at. 491; Contrary to this opinion, McCoubrey and White. consider that the involvement of an international organization do not render the conflict international. *See* McCoubrey and White, *supra* n. 14, at.173. Sassòli considers that "if the EU or another international organization intervenes with the consent of *de facto* government of the State concerned against insurgent, then the law of non-international armed conflicts applies. On the contrary, if the intervention is directed against the forces of a *de facto* government of an existing State, then the law of international armed conflicts applies", M. Sassòli, "EU missions, International Humanitarian Law (IHL) and International Human Rights Law (IHRL)", in M.J. Aznar and M. Costas (eds), *The Integration of the Human Rights*

This division between international and internal armed conflict could entail, as established previously, the application of different rules. However, in the case of customary international law, the received view is that the whole customary body can be applicable to both internal and international armed conflict.

Most of the customary rules of international humanitarian law are included in The Hague Convention and the Geneva Conventions. Not all the rules of the Geneva Conventions can be considered customary laws since some of them have never been applied,[29] but its main provisions could be classed as customary law.[30] Furthermore, the provisions of the Hague Convention have also been classed as customary law.[31]

Yet, customary law is not the only source of International Law that could bind the EU in relation to international humanitarian law. The Lisbon Treaty, and in particular the Treaty of European Union, contain provisions that refer to respecting the principles of International Law as well as human rights.[32] In this sense, the expression human rights should be understood in a broader sense to include humanitarian law.[33] This broad interpretation of human rights indicates that the binding of the EU by international humanitarian law in grounded in its treaties.

The general principles of the EU have also been considered a source of obligation for the EU in humanitarian law. Naert supports this assertion in the "widespread and largely convergent ratification of LOAC treaty obligations by the EU member states and the close link between a number of such obligations and human rights".[34]

A further source of obligation might also include unilateral acts. In relation to this matter, there are two key declarations: The Salamanca Declaration[35] and the European Union Guidelines on Promoting Compliance with International Humanitarian Law. Both of them might well be considered unilateral acts. However, the absence of one of the requirements for the existence of a unilateral act such as the intent to generate legal effect, when combined with the vague[36] content of the documents as well as the purpose of the second document to "promote compliance with international humanitarian law" among non-member states, have hampered the classification of these documents as

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Component and International Humanitarian Law in Peace Missions Led by the European Union, (Psylicom, Valencia, 2011) 50, at. 53.

[29] Zwanenburg, *supra* n. 11, at. 201; Hirsch, *supra* n. 11, at. 32.

[30] McCoubrey, and White, *supra* n. 14, at.. 158-160. These authors refer to those rules which may be accepted as customary law: "a range of proscriptions upon methods and means of warfare calculated to inflict 'unnecessary suffering', bans upon perfidious conduct and policies of 'no quarter', basic requirements of impartial and humane treatment of the wounded, sick and /or shipwrecked who abstain from hostile action, humane treatment of prisoners of war, and certain protection for civilians in zones of conflict".

[31] McCoubrey and White, *supra* n. 14, at. 158-160; Zwanenburg, *supra* n. 11, at. 200; Cortés Martín, *supra* n. 11.

[32] Article 2 TEU, Article 3.5 TEU, Article 6.3 TEU, Article 21.1 TEU, Article 21.2 (c) TEU.

[33] Zwanenburg, *supra* n. 13, at. 402.

[34] Naert, *supra* n. 13, at. 536.

[35] The Salamanca Declaration was the result of a seminar organized by the Spanish Presidency in April 2002-. This Declaration established that the political and military structures of the EU must ensure the application of the main rules of International Law, included international humanitarian law, when exercising strategic direction and political control. But as the author sets up "it is unclear whether this should be understood as referring to obligations of the European Union or as a policy statement". Zwanenburg, *supra* n. 13, at. 402.

[36] Naert, *supra* n. 13, at. 528 M. Zwanenburg, supra n. 11, at. 171; Cortés Martín, supra n. 11, at. 157.

unilateral acts.

Council joint actions might be also considered a source of unilateral acts.[37] In relation to EU military operations, in some of the Council joint actions pertaining to operation EUNAVFOR,[38] the EU makes reference to different UN Security Council Resolutions as a basis for its operation. In these resolutions, the Security Council allows the states to enter and use the territorial waters of Somalia to fight against piracy in a manner consistent with relevant International Law,[39] which in the case of an armed conflict would be international humanitarian law. This limitation has also been included in the 'Whereas' sections of one of the Council joint action.[40] According to this conclusion, it is possible to affirm that the EU is bound by international humanitarian law.

This indirect binding by international humanitarian law is confirmed in a subsequent Resolution of the UN Security Council,[41] in which there are specific references to regional organizations to fight against piracy but taking into account that "any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law".[42]

Finally the EU, just like all other international subjects, is also bound by the rules of *jus cogens*.[43] Article 53 of the 1986 Vienna Convention establishes the nullity of a treaty which conflicts with a peremptory norm of general international law; hence, it can be assumed that international organizations are bound by the norms of *jus cogens*.

In relation to EU military operations and humanitarian law, there is no consensus about which norms can be classed as *jus cogens*. Zwanenburg makes reference to the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[44] in which the CIJ "suggest that at least certain norms of international humanitarian law may have a peremptory character",[45] but it does not establish which of them should be classed as such. The norms that can be considered to be peremptory are the basic rules of humanitarian Law, derived from the Geneva Conventions, and can be identified by taking into account the prohibition of derogatory agreements,

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37 R. A. Wessel, *The European Union's Foreign and Security Policy. A Legal Institutional Perspective*, (Kluwer Law International, The Hague, 1999), at. 193-195.

38 Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO), OJ 2008 L 252/93; Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301/33.

39 SC Res. 1814 (2008) 15 May 2008; SC Res. 1816 (2008) 2 June 2008; SC Res. 1838 (2008) 7 October 2008.

40 "[T]o enter the territorial waters of Somalia and to use, in a manner consistent with international law, all necessary means to repress acts of piracy and armed robbery at sea". Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301/33.

41 SC Res. 1851 (2008) 16 December 2008.

42 *Ibidem*

43 International Law Association, 'Berlin Conference (2004). Accountability of International Organizations', 1 *International Organizations Law Review* (2004); Cortés Martín, supra n. 11, at. 124; Hirsch, *supra* n. 11, at. 30; Zwanenburg, *supra* n. 11, at. 145; Naert, *supra* n. 13, at. 536.

44 *Legal Consequences of the construction of a wall in the occupied Palestinian Territory*, I.C.J. Reports (2004).

45 Zwanenburg, *supra* n. 11, at. 145.

the structure of denunciation clauses, the criminalization of breaches and the limits on reciprocity;[46] hence, norms such as the prohibition of war crimes, crimes against humanity and genocide can be considered peremptory norms.[47]

(2) The Obligation to Respect Human Rights in EU External Relations

As in the case of international humanitarian law, the EU can be bound by human rights rules by different means, and these norms will be apply also during peacetime.[48] The European Court of Justice (ECJ) has also ruled that human rights laws are binding for the former EC, establishing that "fundamental Human Rights are part of the Community Law".[49] This statement was made in light of the lack of reference to human rights in the treaties, but it is still applicable, and confirms one of the EU's sources of obligation: the general principles of EU Law.[50] This gap has been solved through the reform of the treaties, and in the current Lisbon Treaty, references to respect for human rights are visible in different articles, constituting a source of obligation for the EU.[51]

References to human rights in the TEU start in the Preamble, supporting the affiliation of the EU to human rights, and continue in Article 2 where human rights are considered one of the values on which the EU is founded. Among other references in Articles 3.5 and 21.2.b, Article 21.1 establishes that the action of the EU in the international arena shall be guided by respect for human rights, from which it is possible to infer that human rights shall be respected in EU operations abroad.

The references to human rights in the TEU constitute a source of obligation for the EU grounded in its own rules, but they are not the only one, since the inclusion of the Charter of Fundamental Rights in the Lisbon Treaty also brings new obligations to the EU, Article 6 TEU establishes:

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties"

It is also well known that human rights are an object of customary law and peremptory norms; however, as in the case of humanitarian law, there is no catalogue for customary human rights rules[52] or norms of *jus cogens*. In any case, both of them are also applicable to the EU as a subject of International Law and must been taken into account in the development of its operations.

Conventional human rights law can also be binding for the EU. The Lisbon Treaty establishes in Article 6 TEU the future accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, in the future, once accession takes place, the EU will be party to the Convention and bound by its provisions. The current relationship between

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[46] A. Orakhelashvili, *Peremptory Norms and International Law*, (Oxford University Press, Oxford, 2007) at. 36.

[47] *Ibid*. at. 64.

[48] Cartledge, *supra* n. 14, at. 134; Naert, "Accountability...,.*supra* n. 13, at. 384.

[49] Case 29/69 Erich Stauder v. Stadt Ulm - Sozialamt [1969] ECR 419, at. 425. Hirsch, *supra* n. 11, at. 44; Naert, "Accountability..., *supra* n. 13, at. 387.

[50] The Court explains the general principles and traditions of member states. Hirsch, *supra* n. 11, at. 45.

[51] In any case it has to be taking into account that the ECJ ruled the former Article 300.7 TEC should be considered as *res inter alios acta*. *See* Kuijper and Paasivirta, *supra* n. 12, at 134.

[52] Naert sets up that this catalog could be the core of human rights rules. Naert, "Accountability..., *supra* n. 13, at. 390.

the EU and the European Court of Human Rights (ECHR) has been the object of various analyses and statements from the ECJ and ECHR. The ECJ has never considered the EU to be bound by the provisions of the Conventions since the Organization is not party to it.[53] Furthermore, the ECHR has maintained member states obligations under the Convention even though power has been transferred to the EU. Clearly the accession of the EU to the Convention would eliminate this controversial relationship.

Continuing with conventional obligations, the EU has signed different agreements in order to develop its military operations. As part of operation ATALANTA, the EU signed two agreements containing explicit references to respect for human rights, representing an important advancement and innovation in this matter.

The first agreement was signed with Kenya[54] regarding the conditions and means by which people would be transferred, establishing that people will be treated in accordance with international human rights obligations both prior to and after being transferred.[55] The second agreement was signed with Croatia regarding the latter's participation in EU military operations. The references to human rights in this agreement are the same as in the Kenya agreement, since the exchange of letters between the EU and Kenya were included as an annex to the agreement between the EU and Croatia.

These are the two agreements where there are direct references to respect for human rights. However, there are other agreements reached by the EU with a view to developing operation ATALANTA, which contain indirect references to respect for human rights, since they take into account (as set up in the agreements) the UN resolutions on the Somali piracy conflict, in which respect for human rights is a condition for fighting piracy.[56]

Finally, the unilateral acts of the EU can also be a source of obligation as they are in international humanitarian law. By way of an example, Council Joint Action 2088/749/CFSP,[57] Council Joint

[53] But the ECJ has ruled that human rights can be considered part of the general principles of the EU "derived from the common constitutional traditions of the Member States but also from their international treaty obligations, including especially the ECHR". Naert, "Accountability..., *supra* n. 13, at. 387.

[54] Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union -led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer. OJ 2009 L 79/49.

[55] Par. 2c) also par. 3 a) refers to respect for human rights by Kenya.

[56] These agreements are: Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union -led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer. OJ 2009 L 79/49; Agreement between the European Union and the Republic of Djibouti on the status of the European Union -led forces in the Republic of Djibouti in the framework of the European Union military operation Atalanta, OJ 2009 L 33/43; Agreement between the European Union and the Republic of Seychelles on the status of the European Union - led forces in the Republic of Seychelles in the framework of the European Union military operation Atalanta, OJ 2009 L 323/14. These agreements make references to the SC Res. 1814 (2008) 15 May 2008; SC Res. 1838 (2008) 7 October 2008; SC Res. 1814 (2008) 15 May 2008; SC Res. 1846 (2008) 2 December 2008; SC Res. 1851 (2008) 16 December 2008. All of them call for the respect for human rights while carrying on the operation.

[57] Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO), OJ 2008 L 252/389.

Action 2008/851/CFSP[58] and Council Decision 2008/918/CFSP[59] contain references to respect for the relevant International Law and the UN Security Council Resolutions 1816 (2008) 2 June 2008 in which there are express demands for the respect of human rights.[60] Therefore, through these acts, the EU expresses its intention to apply and take human rights rules into account when deploying these operations.

As in the case of humanitarian law, it is impossible to establish a catalogue of the norms of *jus cogens*, since there is no consensus as to the kinds of norms that could be classified as such. However, some references can be found to these rules by examining judicial decisions[61] and scholarly work.[62] In relation to EU military operations, certain types of human rights rules will be more closely linked with these kinds of operations. However, it can be stated that most of the rules established as *jus cogens* by tribunals and scholars could be applicable to EU military operations, such as the prohibition of torture, aggression[63] or genocide. In any case, as a subject of International Law, the EU is bound by international human rights rules of *jus cogens*, and it must respect them in the deployment of EU military operations, in which special circumstances and conflict require particular attention to be paid to these kinds of norms, and also according to ICJ case law, which in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* stated that "the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights"[64]

(3) EU International Agreements with Third Countries to Deploy Military Operations

The EU has signed international agreements with third countries to deploy its military operations. These agreements have usually been signed in relation to the participation of third countries in EU military operations[65] and the status of forces[66] or, in the case of operation ATALANTA, regarding the

[58] Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast. OJ 2008 L 301/33.

[59] Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), OJ 2008 L 330/19.

[60] SC Res. 1816 (2008) 2 June 2008, at. 11

[61] Orakhelashvili, *supra* n. 46, at. 40-44.

[62] Cortés Martín, supra n. 11, at. 124-133; Orakhelashvili refers to different studies on the peremptory character of human rights. *See* Orakhelashvili, *supra* n. 46, at. 53-60; Hirsch, *supra* n. 11, at. 30.

[63] Even though the recent definition of aggression adopted in Kampala Conference in order to include it in the International Criminal Court Statute (Resolution RC/Res.6). Also the General Assembly adopted in 1974 a definition of aggression that has not been taking into account by the International Criminal Court. GA Res. 3314 (XXIX), 14 December 1974.

[64] Legal Consequences of the construction of a wall in the occupied Palestinian Territory, I.C.J. Reports (2004), at. 46.

[65] Agreement between the European Union and the former Yugoslav Republic of Macedonia on the participation of the former Yugoslav Republic of Macedonia in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA), OJ 2008 L 188/10 ; or Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the

conditions in which persons suspected of having committed acts of piracy are transferred.[67]

The responsibility of the EU as a party to these agreements can also arise in relation to the breach of them. Agreements on the participation of non-member states contain provisions concerning the rights of those countries in the management of the operation,[68] the assumption of operational costs,[69] or the waiver of claims.[70]

Furthermore, agreements surrounding the transfer of persons contain obligations beyond the respect for human rights mentioned above. Accordingly, the agreement reached with the Seychelles includes a EU commitment to provide "financial, human resource, material, logistical and infrastructural assistance for the detention, incarceration, maintenance, investigation, prosecution, trial and repatriation of the suspected or convicted pirates and armed robbers". Furthermore, the agreement with Kenya includes the assistance of operation EUNAVFOR to Kenya, for example, by handing over detention records or processing evidence[71].

Finally, even though the agreements of the status of forces contain the privileges and immunities of the operation and its personnel, they also include certain obligations, as in the Seychelles agreement which demands authorization to carry arms on other occasions not included in the agreement. However the main obligation set up in SOFAs is respect for the laws and regulations of the host country,[72] a violation of which would also entail a breach of the agreement by the EU.

(4) The Respect of UN Security Council Resolutions

To conclude with sources of obligation, we will make a brief reference to the UN Security Council resolutions which, in the case of operation ATALANTA, are the legal foundation for deployment.

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deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), OJ 2009 L 202/84.

[66] Agreement between the European Union and the Republic of Seychelles on the status of the European Union-led forces in the Republic of Seychelles in the framework of the European Union military operation Atalanta, OJ 2009 L 323/14. As we mentioned before the SOFA applicable to the ALTHEA operation is the same that was applicable to NATO and was included in Dayton Peace Agreement (Appendix A to Annex 1A).

[67] Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union -led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer. OJ 2009 L 79/49.

[68] *See* Article 4.3 between the European Union and the Republic of Chile on the participation of the Republic of Chile in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA), OJ 2005 L 202/40.

[69] *See* Article 6 Agreement between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), OJ 2010 L 88/3.

[70] The waive of claims is included in a declaration annex to the agreements, which are made by member states and by the third state

[71] Article 6. Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union -led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer. OJ 2009 L 79/49.

[72] *See* Article 2 Agreement between the European Union and the Republic of Seychelles on the status of the European Union-led forces in the Republic of Seychelles in the framework of the European Union military operation Atalanta, OJ 2009 L 323/14; or Article 3 Appendix A to Annex 1ª of Dayton Agreement

These resolutions will be used as an indirect means of EU obligation through international norms.

We will take two UN Resolutions into consideration to give an example of how these resolutions contain references to international law and the obligation to abide by it. SC Resolution 1816 (2008) allows states to enter Somali waters to fight against piracy whilst always acting in accordance with applicable International Law, which means respecting the law of the sea, among others.[73] Some doubts may arise in relation to EU obligation since the Resolution makes reference to states, but this Resolution is taken into account by the Council when deciding to deploy the operation.[74]

However, the reference to respect for International Law by regional organizations was included in later resolutions, especially since SC Resolution 1838 (2008) recognizes the establishment of a EU unit. In this sense, SC Resolution 1846 (2008) once again calls on states and international organizations to fight against piracy and armed robbery in accordance with International Law; hence, in this case, the Resolution makes reference to international organizations, which should include the EU since it is specifically mentioned in the Resolution.[75]

The Security Council Resolutions also make reference to human rights, thereby providing another source of obligation, sometimes with express references to the EU, and allow the EU to be bound by certain international norms where, under different circumstances, it would be more difficult to do so.

EUROPEAN UNION MILITARY OPERATIONS PERSONNEL

In order to establish the attribution of actions carried out by military operations of the EU, it is necessary to determine the personnel of the operation responsible for carrying out the different actions and orders.

An easy way to ascertain the personnel of the military operations is to look at the EU agreement with third countries regarding the status of force agreement. These agreements contain one article used to define the different expressions used in the agreement, including the definition of personnel. As an example, according to the EU agreement with Seychelles on the status of EU-led forces in the Republic of Seychelles within the framework of the EU military operation Atalanta, personnel of EUNAVFOR will be:

> "the civilian and military personnel assigned to EUNAVFOR as well as personnel deployed for the preparation of the operation, personnel escorting persons arrested by EUNAVFOR and personnel on mission for a sending state or an EU institution in the framework of the operation, present, except as otherwise provided in this Agreement, within the territory of the host state, with the exception

[73] Security Council makes reference, among others, to UNCLOS. *See* SC Res. 1838 (2008); SC Res. 1846 (2008); SC Res. 1851 (2008).

[74] Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301/33.

[75] "*Recalling* that in its resolution 1838 (2008) it commended the contribution made by some states since November 2007 to protect (WFP) maritime convoys, and the establishment by the European Union (EU) of a coordination unit with the task of supporting the surveillance and protection activities carried out by some member States of the European Union off the coast of Somalia".

of personnel employed locally and personnel employed by international commercial contractors".[76]

Civilian personnel should present fewer problems as, in most cases, they are EU agents, so there should not in theory be any problems recognizing them as EU personnel[77] when it comes to the attribution of actions. The main problems in these kinds of missions arise with the attribution of actions carried out by military personnel to the EU.

(1) The Contribution of States and NATO to the EU's Military capabilities

The evolution of the EU's military capabilities[78] has gone through various stages, but the Cologne European Council of 1999 could be established as a relevant date because of the commitment made by the member states in relation to EU capabilities. In the light of this, member states "intend to give the EU the necessary means and capabilities to assume its responsibilities regarding a common European policy on security and defence".[79] This commitment was confirmed by later declarations in which the nature of the forces and the commitments of the member states were clarified. Six months later, at the Helsinki European Council, member states set the headline goals,[80] but they also established that commitments to operations "will be based on their sovereign decision", also mentioning the participation of third countries.

As we can infer from the Council Conclusions and as is clearly recognized by the Nice European Council of 2000, the objective was not to create a european army,[81] but rather to make national military capabilities available to the EU to fulfil its responsibilities in the international arena. The states are, by this reasoning, the main contributors to EU military operations, and the national character of the capabilities is clearly expressed in Article 42.1 of the TEU which establishes that missions "shall be undertaken using capabilities provided by the Member States".

However, these are not the only capabilities used by the EU to develop its military operations. As indicated above, the European Council Conclusions included the participation of non-member

[76] Article 1.3.g). In this case because of the peculiarity of the mission are also include "personnel escorting persons" that does not appear in the rest of the ongoing or completed missions.

[77] The responsibility of the international organizations for the activities of their agents has been also studied by the International Law Commission, which considers that the term agent "is intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization". International Law Commission, Second Report on the Responsibility of International Organizations. A/CN.4/541, 2004, at. 9. In relation to the IO's responsibility for their agents *See* Tomuschat, *supra* n. 12; Eagleton, *supra* n. 11; Butkiewicz, *supra* n. 11; Hirsch, *supra* n. 11; Cortés Martín, *supra* n. 11; Fernández Arribas, *supra* n. 13.

[78] R. A. Wessel, 'The State of Affair in EU Security and Defence', 8 *Journal of Conflict and Security* (2003) 265-288.

[79] European Council Declaration on strengthening the common European policy on security and defence. Cologne European Council. Annex II.

[80] "[B]y the year 2003, cooperating together voluntarily, they will be able to deploy rapidly and then sustain forces capable of the full range of Petersberg tasks as set out in the Amsterdam Treaty, including the most demanding, in operations up to corps level (up to 15 brigades or 50,000-60,000 persons). These forces should be militarily self-sustaining with the necessary command, control and intelligence capabilities, logistics, other combat support services and additionally, as appropriate, air and naval elements. Member States should be able to deploy in full at this level within 60 days, and within this to provide smaller rapid response elements available and deployable at very high readiness. They must be able to sustain such a deployment for at least one year. This will require an additional pool of deployable units (and supporting elements) at lower readiness to provide replacements for the initial forces."

[81] Military Capabilities Commitment Declaration. Nice European Council Conclusions. This declaration expresses again the voluntary character of the member states contributions.

states in operations. The offer of collaboration is open to any non-member state, as demonstrated by the participation of Argentina[82] or New Zealand[83] in the ALTHEA operation, even though the Council Conclusions made reference to certain specific countries as the non-EU members of NATO, candidate countries or Russia and Ukraine.[84] The participation of non-member states has also been included in Council Joint Actions for military operations in which, as in the European Council Conclusions, there are some references to specific states[85] but also to potential partners and other non-member states.[86]

These contributions are regulated through agreements signed by the EU and the contributor state according to the procedure established in former Article 24 TEU and new article 218 TFEU. The agreements include the conditions of participation, which refer to the status of forces or financial aspects, and among which the chain of command will be essential when identifying the attribution of responsibility. These states will also participate in the Contributors' Committee which "will be the main forum where contributing states collectively address questions relating to the employment of their forces in the operation".[87]

But again, the national capabilities of the member states and non-member states are not the only capabilities used by the EU to carry out its military operations. In 2003, the EU reached an agreement with NATO, known as the 'Berlin-Plus' agreement,[88] which allowed the EU access to NATO's assets and capabilities. However, the EU must request the use of such capabilities.[89]

The use of NATO's assets and capabilities and the maintenance of a strong relationship between the two organizations were confirmed through different European Councils,[90] in spite of the future objective to deploy a military operation without recourse to NATO.[91] The two organizations have

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[82] Agreement between the European Union and the Argentine Republic on the participation of the Argentine Republic in the European Union military crisis management operation in Bosnia and Herzegovina (Operation Althea). OJ 2005 L 156/22.

[83] Agreement between the European Union and New Zealand on the participation of New Zealand in the European Union military crisis management operation in Bosnia and Herzegovina (Operation Althea). OJ 2005 L 127/28.

[84] *See* Helsinki European Council, 1999, Presidency Progress Report to the Helsinki European Council on Strengthening the Common European Policy on Security and Defenses, Annex 1 to Annex IV. Nice European Council, 2000, Presidency Report on the European Security and Defence Policy.

[85] Article 11.1 Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina. OJ 2004 L 252/7.

[86] *Ibidem*. *See* also Political and Security Committee Decision BiH/1/2004 of 21 September 2004 on the acceptance of third States' contributions to the European Union military operation in Bosnia and Herzegovina. OJ 2004 L 324/20.

[87] *See* Whereas (3) Political and Security Committee Decision ATALANTA/3/2009 of 21 April 2009 on the setting up of the Committee of Contributors for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta). OJ 2009 L 112/9.

[88] This agreement is actually a package of agreements that wasn't concluded according Article 24 TEU, contrary it was negotiated and signed by exchanged of letters by the High Representative of the European Union, and it has been considered as a gentlemen agreement. *See* M. Reichard, 'Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement', 73 *Nordic Journal of International Law* (2004) 37-67.

[89] Background. EU-NATO: The framework for permanent relations and Berlin Plus, at <http://www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf>, 30 December 2010.

[90] Nice European Council Conclusions. December 2000. Military Capabilities Commitment Declaration.

[91] Cologne European Council Conclusions. June 1999; Nice European Council Conclusions. December 2000. Military Capabilities Commitment Declaration

had the opportunity to put these agreements into practice in two EU operations.

The first EU military operation, CONCORDIA, in the Former Yugoslav Republic of Macedonia in 2003, was set up with recourse to NATO's assets.[92] Article 1 of the Joint Action regarding the military operation established that the operation would be "carried out with recourse to NATO assets and capabilities",[93] and Article 2 established mission headquarters as the Supreme Headquarter Allied Powers Europe (SHAPE).[94] The use of NATO's assets in this specific operation was agreed in an exchange of letters between NATO and the EU.[95]

The next and later operation deployed with recourse to NATO assets and capabilities was operation ALTHEA in Bosnia and Herzegovina in 2004.[96] In this operation, as in CONCORDIA, the Joint Action established recourse to NATO's assets and capabilities, and NATO placed the Deputy Supreme Allied Commander Europe (DSA-CEUR) and the SHAPE[97] at the disposal of the EU.

The collaboration of NATO in these two operations was also based on the "Concerted Approach for the Western Balkans", which outlined "core areas of cooperation and emphasizes the common vision and determination both organizations share to bring stability to the region".[98] Therefore, the use of NATO assets and capabilities has taken place in two EU military operations, and the others were deployed autonomously by the EU.

Having established which personnel would be involved in the military operations, responsible for carrying out the actions and orders that might entail a breach of international law, the status of these personnel in relation to the EU must be clarified: are they EU staff?.

(2) Personnel Placed at the Disposal of an International Organization

The analysis of personnel placed at the disposal of an International Organization has mainly focused on UN peace-keeping forces.[99] In this case, it seems clear to some scholars[100] that the national contingents of member states participating in those operations are placed at the disposal of the UN.

A distinction has to be made in relation to this assertion owing to the difference between operations authorized by the UN and those carried out by the UN. In the former, the UN has never

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[92] EU-NATO: a strategic partnership, <www.nato.int/cps/en/natolive/topics_49217.htm>, 30 December 2010.

[93] Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia. OJ 2003 L 34/26.

[94] The Background EU-NATO: The framework for permanent relations and Berlin Plus, establishes that "the European Union may request that NATO makes available a NATO European command option for an European Union -led military operation. In this case, Deputy Supreme Allied Commander Europe (DSACEUR) is the primary candidate for European Union Operation Commander. He will remain at SHAPE where he establishes the EU OHQ".

[95] Paragraph (4). Council Decision 2003/202/CFSP of 18 March 2003 relating to the launch of the European Union Military Operation in the former Republic Yugoslav of Macedonia. OJ 2003 L 76/43.

[96] Previously was launched ARTEMIS operation Republic Democratic of Congo in 2003, but the EU did not recourse to NATO's assets and capabilities, NATO was only informed.

[97] Article 1.3 and whereas (13). Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina. OJ 2004 L 252/10.

[98] EU-NATO: a strategic partnership, <www.nato.int/cps/en/natolive/topics_49217.htm>, 30 December 2010.

[99] In relation to the European Community, *See* Kuijper and Paasivirta, *supra* n. 12, at 126-128.

[100] D'Aspremont, *supra* n. 11, at. 97; Butkiewicz, *supra* n. 11, at. 134; See also International Law Commission, *supra* n. 77, at. 11.

recognized its responsibility and its control over the operation; in such situations, personnel are under national command and are not classed as being placed at the disposal of the UN;[101] only when they are part of an operation launched by the UN can they be considered to have been placed at the disposal of the Organization. Peace-keeping operations have also been considered a UN subsidiary organ;[102] therefore personnel can be classed as "international personnel under the authority of the United Nations".[103]

As the ILC highlighted in its DARIO (2001) the notion of "place at the disposal" implies "that the organ is acting with the consent, under the authority and for the purposes of the receiving state".[104] It is possible to affirm the fulfilment of these requirements by EU operations since their actions are based on a Council Decision which authorized and established the operations, under the authority of EU structures, as we will see when analysing the issue of effective control, and in order to accomplish the objectives of the EU that are included in the TEU and the Decision establishing the operations.

Together with this requirement, other conditions have been set in order to consider an organ as being placed at the disposal of a state or international organization.

Perhaps the most important and complicated requirement established by scholars is the issue of effective control: the organization must have effective control over the organs placed at its disposal. But as it has been stated "States usually transfer only limited powers of operational control over their forces to international organizations, and retain supreme authority known as full command, for themselves".[105] Scholars[106] have offered different analyses and interpretations of this term, and even the ECHR has issued its own interpretation.[107] Therefore bearing in mind its complexity, this concept and all the different interpretations will be analysed in depth in the next section.

The performance of tasks and functions pertaining to the international organization[108] is the next criteria to consider an organ as being placed at the disposal of the organization; the organ must exercise the functional competences of the organization.[109] This requirement is related to the necessity of acting on behalf of the international organization.[110]

When acting in a third country, EU operations are exercising competences of the EU as recognized in the EU Treaty. Article 42.1 TEU establishes that the Union may use its operational

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[101] International Law Commission, *supra* n. 77, at. 11.

[102] International Law Commission. *supra* n. 2, at. 21; Siekman, *supra* n. 14, at. 126.

[103] Article 6 Force Regulations. *See* Siekman, *supra* n. 14, at. 126.

[104] International Law Commission, Draft articles on the responsibility of international organizations, with commentaries (2001), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, at.44.

[105] A. Sari and R.A. Wessel., *supra* n 4, at. 133.

[106] D'Aspremont, *supra* n. 11; International Law Association, *supra* n. 32; International Law Commission. *supra* n. 2, at. 22-23; Rey Aneiros, *supra* n. 11; Hirsch, *supra* n. 11; Pérez González, *supra* n. 11; R.A. Wessel., and L. Den Hertog,, "EU Foreing Security and Defense Policy : A Competence-Responsibilty Gap", in M. Evans. and P. Koutrakos, (eds.), *International Responsibility : EU and International Perspectives*, (Oxford Hart Publishing, Oxford, 2012) 339.

[107] Behrami and Behrami v. France and Saramati v. France, Germany and Norway, ECHR, (2007), No. 71412/01; 78166/01.

[108] Butkiewicz, *supra* n. 11, at. 134.

[109] Rey Aneiros, supra n. 11, at. 135-136.

[110] Butkiewicz, *supra* n. 11, at. 134.

capacity "on missions outside the Union for peace-keeping, conflict prevention and strengthening international security („.)". According to article 43.1 TEU these missions shall include "joint disarmament operations, 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 finally, article 28 TEU refers to cases where the "international situation requires operational action by the Union". Taking into account the reference to these operations in the EU Treaty, it is possible to affirm that members of missions are exercising competences pertaining to the organization and acting on behalf of the EU since they also use the EU flag.

EFFECTIVE CONTROL AS A REQUIREMENT FOR THE ATTRIBUTION OF ACTS

Effective control is one of the main requisites for the attribution of illegal acts to an international organization, but it is also the most complicated to establish because of the absence of definition.

Effective control has been established as a requirement, not only by the main scholars[111], but also by the ILC, which stated:

> "When an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question".[112]

In this sense, it has been clearly established by the scholars that effective control is a condition for the attribution of responsibility. However, this reasoning has been contested by the ECHR in its decision on the admissibility of the Behrami and Saramati claims.[113]

In this ruling, the ECHR declares its absence of competence *ratione personae* based on the attribution of responsibility to the UN, as a consequence of its 'ultimate control'[114]. This attribution of responsibility was criticized[115] as it differed from the traditional approach to attribution on the basis of effective control, even though, as established previously, there is no definition of effective control. Other than this, four years later the ECHR, in the Al Jedda case, ruled "that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations"[116], based on the differences between SC Resolutions, and given the fact the role of the United Nations regarding security in Iraq in 2004 was

[111] Butkiewicz, *supra* n. 11, at. 134; M. Zwanenburg, "UN Peace Operations Between Independence and Accountability",30 *International Organizations Law Review* (2008) 23-47; Zwanenburg, *supra* n. 13, at. 402; D'Aspremont, *supra* n. 11, at. p. 97; Naert, "Accountability..., *supra* n. 13, at. 379-380; Hirsch, *supra* n. 11, at. 77.

[112] International Law Commission, *supra* n. 2, at. 22.

[113] Behrami and Behrami v. France and Saramati v. France, Germany and Norway, ECHR, (2007), No. 71412/01; 78166/01

[114] *Ibid*. 133-143.

[115] Sari, *supra* n. 11; A. Rey Aneiros, "TEDH-Resolución de admisibilidad de 02.02.2007, Behrami y Behrami c. Francia, 71412/01, -Saramati c. Francia, Alemania y Noruega, 78166/01- seguridad colectiva y Derechos Humanos- Responsabilidad por violaciones de Derechos Humanos por fuerzas de mantenimiento de la paz", 30 *Revista de Derecho Comunitario Europeo* (2008) 511-526; Cortés Martín, *supra* n. 11, at. 190-191.

[116] Al Jedda v. United Kingdom , ECHR, (2011), No. 27021/08, p. 84.

different from its role regarding security in Kosovo in 1999[117].

Therefore the position of the ECHR after the Al Jedda case seems to have evolved, as the ECHR at least includes in its last judgement effective control as a possible test, and admits the possibility of dual or multiple attributions[118]. In any case, we would have to wait for future rulings of international tribunals to determine the position of international case-law[119].

For the purposes of this article, we will focus chiefly on the concept of effective control, as it has been widely accepted by the scholars, by the ILC and it has also been alleged by the UN to assume its responsibility in different situations.

(1) What is effective control?

The main problem when it comes to giving a definition of effective control is the multiplicity of types of control to which national norms, mandates, doctrine or agreements refer, all in relation to military operations. Analysing such documents, we find expressions such as "command and control",[120] "operational control",[121] "operational command",[122] "operational command and control",[123] "full command",[124] "command authority"[125] or "exclusive control"[126] which further blur our understanding of the concept of effective control.[127]

To clarify this concept, it must be noted that effective control is not a military concept similar to those mentioned previously which entail the exercise of specific tasks; the concept of effective control is a matter of degree,[128] degree of control over the operation, which must be examined in each case[129].

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[117] *Ibid*. p. 83.

[118] The Court does not consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. *Ibid*. p. 80. See. M. Milanovic, "Al-Skeini and Al-Jedda in Strasbourg", 23 (1) *The European Journal of International Law* (2012), 121-139

[119] Also International Criminal Tribunal for the former Yugoslavia has used the concept of 'global control' and it has been rejected by the International Court of Justice. *See* Cortés Martín, *supra* n. 11, at. 195-197.

[120] R. Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo*, (Cambridge University Press, Cambridge, 2007) at. 113; M. Zwanenburg, *supra* n. 111, at. 25.

[121] Murphy, *supra* n. 117. at. 118; F. Seyersted, *United Nations Forces in the Law of Peace and War*, (A.W. Sijhoff, Leiden, 1996) at. 91; Zwanenburg, *supra* n. 11, at. 39; and also several EU agreements i.e: Agreement between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta) OJ 2010 L 88/3.

[122] Siekman, *supra* n. 14, at.112; Zwanenburg, *supra* n. 11, at. 39.

[123] Seyersted, *supra* n. 117, at. 118; Murphy, *supra* n. 117. at. 97.

[124] Murphy, *supra* n. 117. at. 99; G. Weissberg, *The International Status of the United Nations*, (Oceana Publications, New York, 1961) at. 129; McCoubrey and White, *supra* n. 14, at. 144; Zwanenburg, *supra* n. 11, at. 39.

[125] Bowett, *supra* n. 14, at. 341.

[126] *Ibid*., p. 245.

[127] About the attribution of conduct and control, see also Supreme Court of the Netherlands, Judgement in the case of the State of the Netherlands v. Hasan Nuhanovic, 6 september 2013.

[128] Zwanenburg, *supra* n. 13, at. 404; D'Aspremont, *supra* n. 11, at. 97; International Law Commission, *supra* n. 77, at. 20.

[129] Hirsch, *supra* n. 11, at. 64. See also commentaries on Article 7 DARIO and Supreme Court of the Netherlands, Judgment in the case of The State of the Netherlands v. Hasan Nuhanović, 6 September 2013, at. 24 "the attribution of conduct to the seconding State or the international organization is based on the factual control over the specific conduct, in which all factual circumstances and the special context of the case must be taken into account".

It is possible to consider "full command", which is attributed in some cases to the Force Commander[130], as an indication of effective control, bearing in mind NATO's definition of full command: "The military authority and responsibility of a superior officer to issue orders to subordinates"[131]. However, analysing the tasks given to Force Commanders who have received full command, we see that such tasks do not tie in with NATO's definition. In fact, the Force Commander has been deemed to be "operationally responsible for the performance of all functions assigned to the Force by the UN, and for the deployment and assignment of troops placed at the disposal of the Force"[132].

This definition of tasks confirms the content of the Secretary General's report on command and control over UN peace support operations, which established that UN command should not be considered full command, but rather something similar to the military concept of "operational command".[133] Contrary to this opinion, the Special Committee on Peace-Keeping operations stated that "the authority of the UN Force Commander is based on the concept of operational control". Both concepts have been defined by NATO[134] and, in accordance with the insufficient definition of the Force Commander's tasks, they could both fit with such functions, which gives rise to confusion in this area.[135]

International organizations have never had full command over operations;[136] as NATO establishes, full command exists "only within national services".[137] In addition, it should also be noted that national commanders retain the responsibility for disciplinary action,[138] as the commentaries of Article 7 DARIO stated in relation with peacekeeping forces, the contributing states retain control over disciplinary and criminal matters.

What has been largely conferred to international organizations is the command and control of the operation[139]. Command and control, although linked, have been defined as different concepts, and in line with these differences, command "is defined as authority to issue orders and to compel obedience",[140] and control "is the process through which a commander, assisted by staff, organizes, directs and co-ordinates the activities of the assigned forces".[141]

Under the command and control of the international organization, and under its authority and the full command of the Force Commander, the national contingents cannot receive instruction or

[130] Weissberg, *supra* n. 121, at. 129; McCoubrey and White, *supra* n. 14, at. 142.

[131] Zwanenburg, *supra* n. 11, at. 39. Murphy makes reference to the Canadian Forces Joint Doctrine Manual which contains a similar definition. Murphy, *supra* n. 117. at. 117.

[132] McCoubrey and White, *supra* n. 14, at. 144; Weissberg, *supra* n. 121, at. 129; Bowett, *supra* n. 14, at. 399.

[133] Zwanenburg, *supra* n. 11, at. 40.

[134] *Ibid.* p. 39. Murphy again takes the definition of the Canadian Forces Joint Doctrine Manual which matches with that of the NATO. Murphy, *supra* n. 117. at. 117-118.

[135] *Ibid.* at. 40.

[136] Bowett, *supra* n. 14, at. 303; Zwanenburg, *supra* n. 11, at. 40.

[137] *Ibid.* at. 39.

[138] Regulation 13 UNEF. Bowett, *supra* n. 14, at. 344.

[139] Zwanenburg, *supra* n. 111, at. 25; Murphy, *supra* n. 117. at. 93-134; Seyersted, *supra* n. 117, at. 91-97.

[140] Murphy, *supra* n. 117. at. 115.

[141] *Ibid.* at. 116.

orders from national authorities[142]. National contingents are under the chain of command established, in most UN peace-keeping forces, by the Force Commander;[143] therefore, national contingents have to fulfil the task, orders and instructions received from the Force Commander through the national commanders. According to these competences and tasks of the organization and its organs, and also taking into account the obligations of national contingents, it could be argued that in this situation an international organization has effective control over an operation.

In spite of this definition of tasks and obligations, there are certain situations in which national contingents still receive orders from their national authorities; in such cases, the organization loses the effective control. In these situations, the international organization in theory had effective control, but in practice it was exercised by national authorities; the contingents carried out the orders of national authorities or breached the orders issued by the Force Commander. The UNOSOM II mission is an example of this situation. In this mission, a complex system of command and control was established whereby in theory, the UN had command and control but in practice, it was retained by the United States Officer in Somalia.[144]

In terms of analysis, the agreements between the international organization and the participating states and other documents pertaining to the operation, which establish command and control, are not decisive[145] for the attribution of conduct; it will be necessary to analyse who was exercising control "over the specific conduct taken by the organ or agent".[146]

Finally, according to received practice and opinions, effective control could be viewed as the power to make decisions of direct applicability over the field of operation and the fulfilment of these decisions, which differs from the ECHR "ultimate control" and the exercising of different tasks set out in documents pertaining to the operation. Regarding military attacks, Gutierrez Espada considers that if an international organization plans and identifies targets and gives the green light to an attack, it should be responsible for any breach of International Law during those attacks. This criterion has been applied to the NATO attacks in Libya that resulted in the murder of Qaddafi. SC Resolution 1973 (2011) authorized the use of force to protect civilians and civilian-populated areas under threat of attack in Libya and to enforce compliance with the ban on flights imposed. Therefore, the UN did not have effective control over operations, as NATO was applying the Resolution, and

[142] Murphy, *supra* n. 117. at. 123; G Weissberg, *supra* n. 121, at. 131; Zwanenburg, *supra* n. 11, at. 39.

[143] Weissberg, *supra* n. 121, at. 129; R. Higgins, *United Nations Peacekeeping. 1946-1967. Documents and Commentary* (Oxford University Press, London, New York, Toronto, 1969) at. 287; Bowett, *supra* n. 14, at. 339; Siekman, *supra* n. 14, at. 111.

[144] Murphy, *supra* n. 117. at. 95. This author also make reference to how the Spanish battalion in Bosnia referred all operational issues to national authorities, and how Indonesian Forces in Cambodia took direction from Indonesian Ambassador in Phnom Penh. Murphy, *supra* n. 117. at. 125; Zwanenburg also mentions other situations as the reports stated that President Chirac "bypassed the UN commanders" in Yugoslavia, as well as Nigerian contingent in Sierra Leona did it with the orders of the Indian Force Commander. Zwanenburg, *supra* n. 11, at. 39.

[145] Zwanenburg, *supra* n. 111, at. 404.

[146] *Ibid.* Cortés Martín states that "la evaluación del quamtum de control y la autoridad ejercida sobre el autor material del hecho ilícito deberían permitir determinar el carácter orgánico de la actividad en cuestión y a qué sujeto se le imputa el ilícito". Cortés Martín, *supra* n. 11, at. 197.

accepted the attacks to the Qaddafi convoy as its own[147].

(2) United Nations as a model of responsibility for International Organizations regarding the actions of its military operations.

The UN has received more complaints than any other international organization resulting from the actions of its military operations. Therefore, its practices can be used as a model to determine the responsibility of other international organizations including the EU,[148] always bearing in mind the differences between the two Organizations and their operations.

The military operations examined here are peace-keeping operations because they have been the object of the largest number of complaints and recognition of responsibility by the UN, and as with EU operations, they are deployed with the consent of the host states. Peace-keeping operations are considered a subsidiary organ[149] of the UN, and personnel are placed at the disposal of the UN by the participating states.[150] These personnel are international personnel, under the authority of the UN and subject to the orders of the Commander.[151]

The pattern of command and control established in UNEF II[152] has been followed in most of the subsequent operations.[153] It was based on the ultimate control of the Security Council and the actual day-to-day control of the Secretary General,[154] who delegated competences to the Force Commander. The Force Commander exercised command and control in the field of operation on behalf of the UN;[155] he was responsible for all functions assigned to the Force and for the deployment and assignment of troops, and he designated the chain of command. Forces are organized into national contingents, to which a national commander is designated.[156] The national commander is under the command of the UN and, just as the rest of the personnel, he may not receive or seek orders from national authorities; he only receives orders from the Force Commander.

According to this structure "the operational command of the UN peace-keeping forces lies with the Commander and the chain of command runs though the commanders of the national contingents".[157]

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147 Gutiérrez Espada considers that there was a breach of international law as it is difficult to understand how a runaway convoy from a sieged and bombed city could represent a threat to civilians. Gutiérrez Espada, *supra* n. 11, at. 38-40

148 As Paasivirta and Kuijper pinted out the EU "is in many ways a classical intergovernmental organization with problems similar to UN in respect to peace-keeping and policy action", E. Paasivirta and P.J. Kuijper., "Does one Size First All? The European Community and the Responsibility of International Organizations", *36 Netherland Journal of International Law* (2005) 169, at. 169.

149 International Law Commission, *supra* n. 2, at. 21; Weissberg, *supra* n. 121, at. 129; Seyersted, *supra* n. 117, at. 118.

150 International Law Commission, *supra* n. 77, at. 18; Weissberg, *supra* n. 121, at. 129.

151 McCoubrey and White, supra n. 14, at. 142

152 The first United Nation Emergency Force (UNEF) was established by the General Assembly. *See* Higgins, *supra* n. 140, at. 273.

153 Murphy, *supra* n. 117. at. 122.

154 *Ibidem*

155 *Ibidem*

156 In relation to the appointment of the national commander, Bowett maintains, specifically in the case of the UNEF and ONUC, that the Force Commander "had no control over the appointment of the commanders of the various national contingents although the regulations of the Force". Bowett, *supra* n. 14, at. 338.

157 Siekman, *supra* n. 14, at. 112.

Having ascertained that the UN has command and control over its peace-keeping forces, the attribution of responsibility for its actions should be easier; the next step should be to confirm that the UN was actually exercising effective control over the troops.

In most cases, command and control and effective control have both been exercised by the UN, giving rise to the assumption of responsibility by the Organization. This was the case in ONUC, the first operation in which the UN recognized its responsibility,[158] or the case of operation UNFCYP in Cyprus;[159] in both cases bilateral agreements were signed with the host countries providing a settlement of disputed procedures.[160]

In any case, the practice of the UN confirms the declaration of the United Nations Secretary General in response to the protest of Russia against the payment of compensation in Congo. This declaration stated that "[i]t has always been the policy of the UN, acting through the Secretary-General, to compensate individuals who have suffered damages for which the organization was legally liable".[161]

(3) Effective control in EU military operations

To establish the effective control of the EU over EU military operations, it is necessary to analyse the chain of command of those operations and determine who might exercise control over them.

Even though agreements between an international organization and participating states, as well as the internal norms regarding the control and command of operations are not a decisive factor when it comes to establishing effective control over an operation, these norms do play an important role in terms of understanding the functioning of the operation and analysing which authority was exercising effective control.

Briefly, the main EU organs that participate in EU military operations are: the Council which decides over the deployment of the operation and plans the operation; the Political and Security Committee (PSC) which exercises 'political control and strategic direction';[162] the European Military Committee (EUMC) which, during operations, "monitors the proper execution of military operations conducted under the responsibility of the operation commander"[163] and gives the Initial Planning Directive to the former; EU Military Staff (EUMS) which "performs the three main operational

[158] International Law Commission, *supra* n. 2, at. 21; Zwanenburg, *supra* n. 111, at. 23; Arsanjani, *supra* n. 11, at. 143; Cortés Martín, *supra* n. 11, at. 188.

[159] Hirsch, *supra* n. 11, at. 74-75; International Law Commission, *supra* n. 2, at.21.

[160] Agreement on Legal Status, Facilities, Privileges and Immunities of United Nation Operation in Congo, November 27, 1961; Exchange of Letters Concerning the Status of the United Nations Peace-Keeping Force in Cyprus, Mars 31, 1964. *See* M Arsanjani, supra n. 11, at. 141-142.

[161] UNYJ 1965, at. 41; Zwanenburg, *supra* n. 111, at. 26.

[162] Council decision of 22 January 2001 setting up the Political and Security Committee. OJ 2001 L 27/1. Annex, Article 2; Nice European Council Conclusions. December 2000, Annex III to Annex IV; also in Council Decisions and Joint Actions on agreements on military missions, i.e. Council Decision 2010/96/CFSP of 15 February 2010 on a European Union Military mission to contribute to the training of Somali security forces. OJ 2010 L 44/16; Council Joint Action 2008/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast. OJ 2008 L 301/33.

[163] Council decision of 22 January 2001 setting up the Military Committee of the European Union. OJ 2001 L 27/4. Annex, Article 3.

functions - early warning, situation assessment and strategic planning - and also implements the decisions and guidance of the EUMC";[164] and finally the Operation Commander[165] who is appointed by the Council.

The tasks of the Operation Commander have not been established in any specific decision, but they can be inferred from different norms and agreements of the EU. In this sense the Council decision setting up the European Military Committee established, as noted above, that the execution of the operation is "under the responsibility of the operation commander".[166] Furthermore, the Council Decisions and Joint Actions, among others, regarding CONCORDIA, ALTHEA, ATALANTA and EUTM Somalia, in their articles referring to military direction, establish that "the EUMC shall monitor the proper execution of the EU military operation conducted under the responsibility of the EU Operation Commander".[167] Finally, the agreements with non-member states on the participation of those states in EU military operations, when define the chain of command, establish that "National authorities shall transfer the Operational and Tactical command and/or control of their forces and personnel to the EU Operation Commander".[168]

Taking this distribution of tasks into account, it could be stated that during EU operations, the Organization has the command and control of the operation through a chain of command which runs from the Council to the Operation Commanders, who exercise operational and tactical command and control and are under the authority of the European Military Committee. This transfer of authority from national authorities to the EU could be observed as the exercise of effective control by the EU,[169] especially in light of the fact that in cases where the UN recognized its responsibility, the

[164] Council decision of 10 May 2005 amending Decision 2001/80/CFSP on the establishment of the Military Staff of the European Union. OJ 2005 L 132/17. Annex, Article 3.

[165] Under the Operation Commander it is possible to find more organs as the deputy operation commander and the force commander, as in ATALANTA operation. *See* <www.eunavfor.eu/chain-of-command/>, 30 December 2010 In the case of ALTHEA mission the EU Staff Group is responsible to the operation commander for the day-to-day running of the operation. *See* <www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/100608%20Shape%20-%20EUFOR%20Althea%20OHQ%20-%20how%20it%20works.pdf>, 30 December 2010.

[166] Council Decision of 22 January 2001 setting up the Military Committee of the European Union. OJ 2001 L 27/4. Annex, Article 3.

[167] Council Decision 2010/96/CFSP of 15 February 2010 on a European Union military mission to contribute to the training of Somali security forces, OJ 2010 L 44/16; Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina, OJ 2004 L 252/10; Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia OJ 2003 L 34/26; Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301/33.

[168] Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta) OJ L 2002, 4.8.2009. In CONCORDIA and ALTHEA operations the operation commander was DSACEUR. Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina, OJ 2004 L 252/10; Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia OJ 2003 L 34/26.

[169] Naert, "Accountability..., *supra* n. 13, at. 379. On the contrary Cortés Martín considers that in CFSP "where fundamental elements of EU normative control are missing, since there is no internal judicial organ that can ensure effective compliance by EU member States. As a result, EU member States would continue bearing responsibility for matters covered by CSFP, while the EU could incur responsibility based, not on the rule of attribution, but on the rule of responsibility as stated in the Commission's article 17 on the circumvention of an international obligations through a decision or

transfer of control was similar, and it was the Force Commander who exercised command and control in the field of operation on behalf of the UN. Specifically in the case of ONUC, the chain of command ran from Secretary General under the authority of the Security Council and General Assembly through the Officer-in-charge to the Commander.[170]

However, as observed above, command and control are not decisive in terms of establishing effective control over the operation and consequently the responsibility of the Organization; it is necessary, therefore, to look at specific conduct to know who was exercising control at that moment.[171] Otherwise the criterion of effective control does not eliminate the possibility of dual attribution, as recognised by the ILC,[172] despite the difficulties of establishing in which circumstances the effective control can be exercised by two actors.[173]

An example of this divergence between the chain of command established in the operation rules and effective control can be observed in the case of the arrest of two pirates by the Spanish contingent of Operation ATALANTA.

The chain of command for Operation ATALANTA establishes that the Political and Security Committee exercises political control and strategic direction; the Union Military Committee monitors the correct execution of the operation; the Operation Commander commands the operations from the Operational Headquarters and the Force Commander commands the Naval Force from the Force Headquarters. Given this chain of command, in October 2009, the Spanish vessel Alakrana was hijacked by Somali pirates; some days later two of those pirates were arrested by the members of the Spanish contingent.

The operation unfurled as follows: when the vessel was hijacked, a Spanish flagship, which was part of the ATALANTA contingent, followed the hijacked vessel until it stopped and two pirates left the vessel in a skiff. The Spanish commander, in order to arrest the pirates, requested permission from the Spanish Government to board the skiff[174], instead of requesting authorization from the appropriate European bodies which were in command of the operation as mentioned previously.

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authorization addressed to members". J.M., Cortés Martín, *supra* n. 8, at. 196. Regarding EU operations and chain of command see also Aznar Gómez, *supra* n. 18, at. 195-200

[170] Bowett, *supra* n. 14, at. 339.

[171] *See* Supreme Court of the Netherlands, Judgment in the case of the State of the Netherlands v. Hasan Nuhanovic, 6 september 2013, at. 24. In any case the Dutch Court does not eliminate the possibility of dual attribution. See also A. Nollkaemper, "Dual Atribution. Liability of the Netherlands for conduct of Duchtbat in Srebrenica", 9 *Journal of International Criminal Justice* (2011), 1143-1157.

[172] "Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ". International Law Commission, *supra* n. 2, at. 16. See Aznar Gómez, *supra* n. 18, at. 193.

[173] Nollkaemper, *supra* n. 167, at. 1153.

[174] Press Conference General Dominguez Buj, <http://www.rtve.es/noticias/20091004/fragata-canarias-detiene-dos-piratas-cuando-abandonaron-alakrana-barco-pequeno/295058.shtml>, 30 December 2010. <http://www.elpais.com/articulo/espana/Garzon/abre/procedimiento/asaltantes/Alakrana/detenidos/hoy/elpepuesp/20091004elpepunac_3/Tes>, 30 December 2010. <http://www.elmundo.es/elmundo/2009/10/04/espana/1254656636.html>, 30 December 2010.

In any case, even though the Spanish flagship was part of Operation ATALANTA and was under the command and control of European bodies, the final decision to board the skiff was made by a national government, which makes it difficult to verify whether at that moment the EU had effective control over that action, also making it difficult to establish the responsibility of the Organization in the event of a breach of International Law.

CONCLUDING REMARKS

It can be inferred from this study that it is not possible to establish a general rule to attribute the actions of EU operations to the Organization.

The EU, like all subjects of International Law, is bound by different rules of International Law that are applicable to military operations, particularly humanitarian law and human rights, and it is possible to infer this obligation from the EU norms that are applicable to EU military operations. These norms largely focus on private individuals and the protection of their essential rights. Therefore, it becomes necessary to guarantee respect for these rules. Any breach of these norms by EU operations begs the question of responsibility and the issue of who can be held responsible for that action.

For an action to be considered the responsibility of the EU, it must be established whether the person or organ that breached the norm was an organ of the Organization or acting on behalf the Organization.

The concept of an organ placed at the disposal of an organization allows us to conclude that the organs and persons acting in an EU military operation are acting on behalf of the EU to achieve the objectives of the Organization. In this sense, it is possible to affirm that the personnel of EU military operations have been placed at the disposal of the EU, given that they fulfil the requirements established not only by the scholars but also by the ILC.

Finally, having identified the personnel acting on behalf of the Organization, it must be established whether they are under the effective control of the EU, which is the main requirement for establishing responsibility.

In the case of the EU, the chain of command can help to determine who is exercising effective control. From the chain of command, it is possible to infer the duties of the different bodies, but it does not determine whether, in the precise moment the norm was breached, the EU was exercising its effective control over the specific action, even though it was part of its duties. As indicated by the example of operation ATALANTA, effective control over a specific action can be exercised by a different body from the one to which this has been allocated. Therefore, it will be necessary to look at a specific action and to analyse who was giving the precise order and consequently exercising effective control, in order to conclude whether or not responsibility lies with the EU.

In conclusion, the EU can be held responsible because it is bound by international norms. However, its responsibility for the activities of its military operations will depend on the interpretation of the concept of organs placed at the disposal of the Organization, as well as the concept of effective control. Therefore, it would be helpful for international tribunals to establish a

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common definition of the concept of effective control which would provide the main basis for the attribution of responsibility.

These difficulties determining the responsibility of the EU for actions carried out by its military operations could generate mistrust and legal insecurity among third parties, but it seems to be the best option to maintain the EU's independence, authority and control over its operations.

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