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Maïke Kuhn, Die Europäische Sicherheits- und Verteidigungspolitik im Mehrebenensystem

Summary

The European Security and Defence Policy in a Multi-level System

A Legal Analysis Exemplified by the Military Operation of the European Union in the Democratic Republic of Congo 2003

The military operation of the European Union in the Democratic Republic of Congo in 2003 – Artemis – was the first military operation of the EU without recourse to NATO assets and capabilities. France acted as the Framework Nation of the operation which was aimed, inter alia, at contributing to the stabilization of the security conditions and the improvement of the humanitarian situation in Bunia. The operation was conducted in accordance with the United Nations (UN) Security Council Resolution 1484 (30 May 2003). Of course, the decision to conduct this operation in the framework of the European Security and Defence Policy (ESDP) was a political one. For this and other reasons the operation was not typical for autonomous EU operations. Nevertheless it is possible to draw general legal conclusions from it. Since Artemis the procedures for EU operations have been institutionalized.

EU operations and missions are derived from Art. 14 Treaty of the European Union (Nice) in the form of a common action which is (usually) legally binding for all EU Member States – except Denmark which secured itself an opt-out. This type of action is typical for the operative progression of the EU. In a common action, the goal, the means, the complexity, the terms and conditions, and (if necessary) the period of action must all be specified. But these are (only) formal requirements. The requirement of unanimity for decision-making underlines the intergovernmental character of the ESDP and the central role of the Council of the EU. Thus, only the Member States that abstain from voting without blocking the whole operation or mission are not obliged to contribute to the financing of the specific action. Under the Treaty of Lisbon, Art. 28 Treaty of the European Union (TEU/ Lisbon) serves as legal basis for operational action taken by the EU. The instrument

'common action' was renamed as 'decision' without changing its basic parameters.

Both civil and military ESDP missions and operations are typically executed in a two-step procedure. In the first step, the Council decides upon a common action, which regulates the basic parameters for a common approach to a concrete conflict. In a second step, the Council then initiates the mission or operation and thus lets it become operative.

According to the principle of EU decision autonomy, third States can only take part in the latter phase. That means, they are able to participate just in the operative part of an action, after the Council has already decided to conduct an operation on the basis of the input by the Political and Security Committee (PSC).

In order to enable the European Union to assume fully its responsibilities for crisis management, the European Council (Helsinki, December 1999) decided to establish permanent political and military structures. The Political and Security Committee (PSC) meets at the ambassadorial level as a preparatory body for the Council of the EU. Its main functions are keeping track of the international situation, and helping to define policies within the Common Foreign and Security Policy (CFSP) including the ESDP. It prepares a coherent EU response to a crisis and exercises its political control and strategic direction. The European Union Military Committee (EUMC) is the highest military body set up within the Council. It is composed of the Chiefs of Defence of the Member States, who are regularly represented by their permanent military representatives. The EUMC provides the PSC with advice and recommendations on all military matters within the EU. Parallel to the EUMC, the PSC is advised by a Committee for Civilian Aspects of Crisis Management. This committee provides information, drafts recommendations, and gives its opinion to the PSC on the civilian aspects of crisis management. The European Union Military Staff (EUMS) is composed of military and civilian experts seconded to the Council Secretariat by the Member States and officials of the Council General Secretariat. The EU Commission and the European Union Parliament have no decision competencies regarding ESDP military operations.

Artemis has been a crisis management operation in the sense of the so-called Petersberg-tasks in Art. 17 para. 2 EU Treaty (Nice). The Petersberg-tasks include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking. Although they are not exclusive, the Petersberg-tasks constitute an especially clear legal basis for the explicitly named types of operations. Under the Treaty of Lisbon the catalogue of Petersberg-tasks further

includes joint disarmament operations, military advice and assistance tasks, conflict prevention tasks and post-conflict stabilization. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories (Art. 43 para. 1 EU Treaty of Lisbon).

In the first step of the analysis, the national level is connected to the European level with respect to legitimacy on both levels. Regarding European Security and Defence Policy there is no real horizontal separation of powers. As already seen, the Council is the organ which decides the main issues. The European Commission, the European Parliament or the European Court of Justice cannot control the Council effectively in security and defence matters. Therefore only the national parliaments can exercise control in this field of politics. The national representatives in the Council are controlled by their national parliaments. Nevertheless they cannot control the Council as such. Furthermore, the national parliaments of 27 Member States have different traditions, legal bases and effective influences. For example, in Denmark, Sweden, Germany and (since end of 2005) also in Spain the national parliaments must approve the deployment of armed forces abroad. On the other hand, Great Britain and France are able to deploy armed forces without previous parliamentary consent. Since mid-2008 the French parliament must approve the continuation of an assignment abroad if it exceeds four months. In Poland the consent of the parliament is not necessary for the engagement of armed forces abroad.

Standard national control cannot overcome the different constitutional traditions. Therefore the judgment of the German Federal Constitutional Court regarding the Lisbon Treaty (2 BvE 2/08 of 30 June 2009) – stating that the German constitutional parliamentary reservation for the deployment of armed forces cannot be overcome by integration – seems unlikely to become a leading one. But common European standards of military control in the framework of the European Parliament affecting the national parliaments could be a possibility to improve the current situation. This type of legitimacy could function similar to the system of European control of basic rights. A complete, independent legitimacy would only be possible with the creation of an European army. Politically, this seems unlikely to occur even in the long-term, because of national sovereignty concerns. An ombudsman of the EP could be informed about sensitive issues. This would strengthen democratic legitimacy and at the same time preserve secrecy. Furthermore, the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) could be extended to an inter-

parliamentary cooperation committee. Protocol No. 1 to the Lisbon Treaty already says that COSAC shall promote the exchange of information and best practices between national parliaments and the European Parliament, including their special committees. It may also organize inter-parliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. Contributions from COSAC shall not bind national parliaments and shall not prejudge their positions.

Nevertheless, vertical control cannot adequately compensate for the missing horizontal separation of powers between the EU organs. Within the Council issues are usually not discussed as regards to content. In the majority of cases these discussions take place in bodies and committees which do the preliminary work for the Council, such as the PSC. Thus, the national control of the Council representatives is just a formal one which cannot compensate for the lack of a horizontal separation of powers.

As already stated, military ESDP operations are typically executed in a two-step procedure. On the European level this statement needs further specification. In the first step, the Council decides upon a common action (Nice) or a decision (Lisbon) and then, as a second step in the process, allows it to become operational. The execution of military operations is part of the EU common defence policy according to Art. 17 para. 1 EU Treaty of Nice, or Art. 42 para. 2 EU Treaty of Lisbon respectively. The crucial question is whether the EU is acting as an organization or whether its Member States are solely acting together within the framework of the CFSP/ ESDP. In this instance, it would appear to be the latter. Both under the Treaty of Nice and the Treaty of Lisbon the EU is not acting as an independent subject under public international law. Under the Treaty of Nice the EU had no international legal personality – in contrast to the European Community. Even the interpretation of the different treaties could not attribute implicit international personality to the EU. Within the framework of the CFSP and the ESDP, the principle of unanimity did not allow the EU to develop an intention or will of its own. Even the competence to conclude treaties under Art. 24 TEU (Nice) did not change this fact. Indeed, the EU has concluded more and more agreements and treaties with third States on this legal basis. Nevertheless it was not covered by the historic wills of the Member States and not even intended by them to give the EU legal personality through Art. 24 TEU (Nice). That means, the EU formed the institutional framework for action taken by its Member States using the specific instruments of the EU. The principle of una-

nimity does not allow the EU to act as an organization on its own; rather the Member States are acting together. The Council just implements the will of the European Council, that means the will of the Member States. Therefore the common action and the decision to launch a military operation under the Treaty of Nice are attributed to the Member States as a whole – apart from Denmark which does not participate in ESDP because of an opt-out. The legal basis for attribution of these decisions can be found in Art. 14 EU Treaty (Nice).

Under the Treaty of Lisbon the pillar structure is only formally dissolved. The European Security and Defence Policy remains intergovernmental. In this field the Council can only reflect the Member States as a whole and their common will. Thus, decisions to launch and initiate a military operation are attributed to the Member States as a whole if they have given their consent to a specific operation in the Council. Art. 28 TEU/ Lisbon constitutes the legal basis for this attribution.

In the second step of the process on the European level, the EU Member States decide whether they will provide armed forces for a specific military operation. There is no legal commitment for the Member States to do so. If they give their consent to an operation within the Council they are only obliged to finance the operation. The EU does not possess permanent command structures. The principle of recourse is decisive for conducting EU military operations. That means, the EU either has recourse to armed forces of its Member States (autonomous operation) or to NATO assets and capabilities according to the Berlin-plus arrangements.

The “Berlin plus” arrangements, concluded on 17 March 2003, laid the foundations for NATO-EU cooperation in the field of crisis management: they enabled the Alliance to support EU-led operations in which NATO as a whole is not engaged. The main elements of these arrangements can be summarized as follows:

- assured access of the EU to NATO planning capabilities with a view to effective use in the context of military planning of EU-led crisis management operations;
- post of Deputy to the NATO Supreme Allied Commander Europe – who will command EU-led operations (and who is always a European) – and NATO European Command options;
- assured access to NATO’s collective assets and capabilities (communication units, headquarters, etc.) for EU-led crisis management operations;

- NATO-EU agreement on security (exchange of classified information under the rules of mutual protection);
- procedures as to the management of NATO assets and capabilities (release, monitoring, return and recall);
- NATO-EU consultation arrangements in the context of an EU-led crisis management operation calling on NATO assets and capabilities;
- integration in NATO's longstanding defence planning system of the military requirements and capabilities which may be needed for EU-led military operations, in order to guarantee the availability of well-equipped forces trained for either NATO-led or EU-led operations.

The chain of command within EU operations is built on an *ad hoc* basis. The EUMS connects both the military and political levels, as well as the European and national levels. The sending States never lose full command over their armed forces. Rather, they only assign operational command for the duration of an operation, which is necessary to lead the armed forces on-site. The operation commander does not retain control over the armed forces with respect to disciplinary or criminal law matters.

The military approach to conducting an operation reflects a C 2-structure on three levels – similar to the Combined Joint Task Force Concept of NATO:

- Military-strategic level: Operation commander designed by the Council and Operation Headquarters;
- Operative level: Force commander designed by the Council and usually a Force Headquarters;
- Tactical level: Component commanders with their main command posts/ staff.

The possible Operation Headquarters for autonomous EU operations are national headquarters multinationalized only for the length of the operation. They are financed only for the period of the operation through the special financing mechanism ATHENA. This is the main difference to NATO Operation Headquarters, which are always financed and used by NATO Member States as a whole.

The Treaty of the European Union (under Nice as well as under Lisbon) improves operational and flexible action by the instrument of enhanced cooperation.

Enhanced cooperation outside of the framework of the CFSP (Art. 17 para. 4 TEU/ Nice) means that the Member States are acting autonomously outside the EU Treaty. It is a cooperation based on public international law. The European level of decision is not relevant in this context. Examples for enhanced cooperation outside of the CFSP are the Eurocorps and the German-Dutch Corps.

Enhanced cooperation within the framework of the CFSP (Art. 27 lit. a – lit. e TEU/ Nice; Art. 20 EU Treaty of Lisbon in connection with Art. 326-334 Treaty on the Functioning of the European Union) means that a group of States, enabled by a basic decision of the Council, implement partial secondary legislation. Therefore, the Member States use the organs, proceedings and mechanisms of the European treaties. Under the Treaty of Lisbon enhanced cooperation is also possible in the field of military and defence policy (this was not possible under the Treaty of Nice). Thus, enhanced cooperation could become interesting because this field is too sensitive for majority rules.

Not all EU Member States are at the same time members of NATO and vice versa. Hence, situations of obstruction are possible, especially because of the conflict between EU Member State Greece and NATO Member State Turkey. As far as States are members both of NATO and EU, both organizations have recourse to the same pool of armed forces.

The actions taken within the framework of enhanced cooperation out of the CFSP are attributed to the Member States who cooperate therein.

Within the framework of the CFSP there exists a European obligation. According to Art. 47 Draft Articles on State Responsibility of the International Law Commission (ILC) the responsibility of each State may be invoked as to the same internationally wrongful act where several States are responsible for that act. The Draft Articles are only additional means of interpretation, but they codify internationally accepted principles for the responsibility of States and their liability. Hence, it is possible to draw conclusions for the attribution of decisions. Art. 47 ILC Draft Articles on State Responsibility deals with the situation where there is a plurality of responsible States in respect to the same wrongful act. It states the general principle that in such cases, each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act. There is no deviating contractual agreement between the Member States. Under the Treaty of Nice enhanced cooperation did not include questions with military or defence policy reference. Therefore, ATHENA is not applicable in this field. Under the Treaty of Lisbon, Art. 332 of the Treaty on the Func-

tioning of the EU confirms that expenditures resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States. Thus, the action undertaken in the framework of enhanced cooperation within the CFSP is attributed to the individual Member States taking part in that cooperation.

In a third step the analysis focuses on the level of public international law. In the framework of EU military operations the participating Member States as a whole are addressees of rights and obligations under public international law regarding the temporary common headquarters. On the other hand, the particular Member States remain addressees of rights and obligations under public international law for their armed forces. This is valid under the Treaty of Nice as well as under the Treaty of Lisbon. The starting point is the national attribution of armed forces. Armed forces are organs of their States as long as there is no legal basis for the attribution to another subject under international law.

Art. 43 para. 4 EU ATHENA (2008) and Art. 42 para. 4 ATHENA (2011) respectively form the legal basis for non-contractual liability. In this case any damage caused by the operation headquarters, force headquarters and component headquarters of the crisis structure or by their staff in the course of their duties, shall be covered through ATHENA by the contributing States. That means the Member States taking part in a military operation are joint and severally liable for damages regarding their headquarters.

On the other hand, the national armed forces remain organs of their Member States. The operation commander can only exercise operational command for the length of the specific military operation. Full command rests within the States. Armed forces do not become organs of the EU. They do not lose their national identity. They are not outsourced effectively from their national sovereignty. The Member States even have the right to recall them from an ongoing operation.

Under the Treaty of Lisbon the European Union has formal legal personality under public international law. Nevertheless there is no legal basis to attribute armed forces of the Member States to the EU itself. Full command still rests with the Member States. The operation commander merely exercises operational command. Furthermore, Art. 42 para. 4 ATHENA (2011) does not allow an attribution to the European Union itself, because of its explicit wording (“participating Member States”). A review of the mechanism after the Lisbon Treaty entered into force did not change this regulation.

The legal construction of a cooperation of States in the military field is determined by the principles of voluntariness and intergovernmentalism.

Possible concepts are:

- Lead-Nation concept: a mixed military alliance led by a national staff; national operational principles are applied; armed forces are not outsourced from their national sovereignty; then national armed forces remain organs of their sending States and the respective sending State is liable for its armed forces.
- Framework-Nation concept: a mixed alliance in which one nation functions as a framework and is responsible for the leadership of the staff; in this case armed forces partly do not remain within their national sovereignty; nevertheless Member States are liable for their respective armed forces individually, because the latter are not lent to the EU.
- Integration concept: an association with a multinational staff in which posts are assigned proportionately, in accordance to the States' contributions; it is not obligatory that armed forces are outsourced from their national sovereignty as the example Eurocorps shows; this depends on the concrete legal arrangements. For example, the peacekeeping contingents of the United Nations become organs of the organization that exercises effective control over them. In practice this is regulated by agreements making the armed forces of the contributing Member States into formal organs of the organization. If armed forces remain national organs of their sending States (f.ex. Eurocorps), the Member States remain liable for them.

Regarding the chain of command, the Political and Security Committee assumes political control and strategic leadership for EU military operations. The Council authorizes the PSC to do so.

The European Union Military Staff, the European Union Military Committee and the PSC work together to conduct military operations. They consist of national representatives who are bound by their respective national instructions. Hence, EU Member States will always try to implement their respective national interests in these bodies. Because of the fact that decision-making in ESDP matters is still ruled by consensus, the Member States are able to apply pressure in a promising way. Therefore the EU's defence and security policy will remain a combined one.

The Operation Commander, who leads an EU military operation, is a national representative, but formally does not receive national instructions in his function. The Council appoints him unanimously. Legally he is only responsible to the Council, which must confirm all crucial decisions of the Operation Commander. He executes the common will of the EU Member States present in the Council. Art. 14 EU Treaty of Nice and Art. 28 TEU/ Lisbon, respectively, form the legal basis for the common attribution. Therefore, the decisions of the Operation Commander are attributed to the Member States in common.

The European Union is not a defence alliance like NATO. According to Art. 17 para. 1 EU Treaty of Nice and Art. 42 para. 2 EU Treaty of Lisbon respectively a common defence must be decided by the European Council, acting unanimously. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

The EU is an “appropriate” international agency in the sense of Art. 48 para. 2 UN Charter. It is able to carry out both non-military measures according to Arts 39 and 41 UN Charter and military measures referred to in Arts 39 and 42 UN Charter. Measures not involving the use of armed force may be sanctions and civil-crisis management instruments. In these matters the European Commission’s role is decisive. The EU is able to carry out military measures according to Arts 39 and 42 UN Charter, because peace-enforcement is part of the so-called Petersberg-tasks in Art. 17 para. 2 EU Treaty of Nice and Art. 43 para. 1 EU Treaty of Lisbon respectively. Legal personality is not necessary in this regard. The Member States remain the addressees and implementing actors. Corresponding to Art. 48 para. 2 UN Charter the international agency merely functions as the framework of action and modality for the implementation by the Member States.

Furthermore, the EU is also a regional agency in the sense of Arts 52 and 53 UN Charter. In particular it has a mechanism to resolve inherent conflicts. The regional agency, which does not need legal personality, forms a system of collective security that is directed primarily at any aggression from its own Member States. The EU’s historic contribution is arranging the relationship between its Member States on a stable and peaceful basis. This task is still ongoing, as well with the Eastern enlargement of the European Union. Arts. 52 and 53 UN Charter are solely executive norms.

Under the Treaty of Nice the EU had no international legal personality. Thus, the Member States were addressees of the UN Charter. One of the objectives of the EU as defined in Art. 11 para. 2 EU Treaty (Nice)

is to preserve peace and strengthen international security in accordance with the principles of the UN Charter when defining and implementing the common foreign and security policy. As the EU Member States are bound by contract – as UN Member States – to these principles, the aforementioned obligation in Art. 11 para. 2 TEU (Nice) is a declaratory one. There are several declarations concerning the collaboration between the United Nations and the EU. Therein it is especially recalled that the UN Security Council has the primary responsibility for the maintenance of international peace and security. Cooperation on the working level has been established. The obligation to work together in the form of consultation and information mechanisms derives from the aforementioned declarations. They are constitutive as far as they overlap the general obligations of EU Member States as Member States of the UN.

Under the Treaty of Lisbon the EU has attained international legal personality. The EU is not a party to the UN Charter and therefore not legally bound by it. But the European Union is bound by customary international law. The prohibition of the use of force and the principle of peaceful settlement of disputes are part of international customary law. These obligations are repeated in Arts 21 para. 2 and 42 para. 1 EU Treaty of Lisbon showing the EU's and its Member States' will to act internationally. Under the Treaty of Lisbon the EU Member States are still bound individually by the UN Charter. As previously mentioned, the European Union itself is bound by customary international law.

EU Member States are obliged to implement non-coercive measures (for example, sanctions) as Member States of the United Nations. They have delegated this competence to the European Union; thus they are obliged to implement such measures in the framework of the EU. The EU itself is bound indirectly through the international obligations of its Member States, which it has to consider because of the principle of loyalty (Art. 10 Treaty of the European Communities/ Nice) and the principle of loyal cooperation (Art. 4 para. 3 TEU/ Lisbon). According to Art. 103 UN Charter, the Member States are obliged to comply with their obligations to implement non-coercive measures also in the framework of the EU. The judgment of the European Court of Justice in the case *Kadi* (Joined Cases C-402/05 P and C-415/05 P – *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*) does not change this basic international obligation by stating that European basic rights have to be taken into account on the European level. The judgment does not touch the basic obligation of implementation. The EU

need only consider the European basic rights on the level of implementation. On the other hand, Member States are not obliged to take part in coercive means with armed forces. Agreements according to Art. 43 UN Charter have never been concluded. Even in the United Nations Standby Arrangement System, that was developed by the UN in 1994, the Member States' contributions for peace-maintaining missions are allotted by the Member States themselves who are able to recall them. The United Nations have no access to armed forces of Member States. Only the financing of such missions is obligatory. Whether the EU engages in an operation mandated by a United Nations Security Council resolution depends on political reasons.

EU Member States are bound by international humanitarian treaty law. Particularly, all Member States are bound by the four Geneva Conventions of 1949 and both Additional Protocols of 1977. In addition, each Member State is bound by further international humanitarian treaties individually. EU Member States have almost the same standards. Differences are marginal and only concern the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1976, the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols of 1954 and 1999 and particular prohibitions of certain weapons. In practice these differences do not have much effect, because they only concern particular Member States and not all Member States take part in EU military operations simultaneously.

The European Union Guidelines on Promoting Compliance with International Humanitarian Law aim to encourage third States to adhere to international humanitarian law by using legally non-binding wording. Furthermore they refer explicitly to the Member States' commitment to international humanitarian treaty law.

Under the Treaty of Nice the EU was neither bound by international humanitarian treaty law nor by international humanitarian customary law, because it had no legal personality. Under the Treaty of Lisbon it is theoretically possible that the EU may become a party to an international armed conflict. Therefore it has to exercise sovereignty over the armed forces. This is not yet the case.

Regarding operationability the working group Air and Missile Warfare of the Harvard Program on Humanitarian Policy and Conflict Research has elaborated certain rules in the program International Humanitarian Law in Air and Missile Warfare. Thereafter a State may not invoke its participation in combined operations as justification for its failure to perform its obligations under the law of international armed conflict.

Furthermore, the legal obligations of a State participating in combined operations do not change when its armed forces are operating in a multinational force under the command or control of a military commander of a different nationality. A State's obligations under the law of international armed conflict do not change when its air or missile forces are operating from the territory of a co-belligerent, including when its air or missile forces are operating from the territory of a co-belligerent that has different obligations under the law of international armed conflict. A State may participate in combined operations with States that do not share its obligations under the law of international armed conflict although these other States may engage in activities prohibited for the first State. In practice, the participating Member States determine the applicable rules of international humanitarian law in the Rules of Engagement (ROE) for a particular military operation. This is necessary for applying international humanitarian law in as uniform a manner as possible.

ATHENA is the special financing mechanism for military operations of the EU and ATHENA further develops liability as a consequence of responsibility in international law. ATHENA is a permanent mechanism to administer the financing of common costs of operations having military implications. Common costs financed by ATHENA are costs caused by a common leading structure, that means the integrated headquarters and their personnel for the length of a concrete operation. The participating Member States as a whole are liable for common headquarters and their personnel. The breakdown of Member States contributions is determined in accordance with the gross national product scale. If third States are participating in EU common headquarters, they also take part in the financing and thus are liable. Each State remains liable for damages caused by its armed forces.

Human rights establish a complementary system to international humanitarian law. Generally, the limit of the commitment to human rights is designated by recourse to international humanitarian law. Human rights are of special relevance when there are no armed activities. As yet, there has been no armed conflict with participation by EU Member States in the framework of the European Union. Thus, international humanitarian law has not yet been applicable in EU military operations.

EU Member States are parties to different human rights treaties, inter alia to the European Convention on Human Rights and the International Covenant on Civil and Political Rights. It is problematic whether these agreements are applicable on foreign State territory, that means in a typical situation of an assignment abroad. Usually, human rights trea-

ties are only applicable on the State territory or within the sovereignty of a particular Member State. According to the jurisdiction of the European Court of Human Rights, a State exercises sovereignty on foreign State territory, if its armed forces regularly control persons and/ or property in the framework of their mandate.

Another problem is the question as to whom the actions of armed forces are attributable. In the cases *Behrami and Saramati*, the European Court on Human Rights (Appl. No. 71412/01 – Bekir Behrami v France – and No. 78166/01 –Ruzhdi Saramati v France, Germany and Norway – of 31 May 2007) used the criterion of effective control. This is principally correct and affirmed by Art. 5 Draft Articles on the Responsibility of International Organizations of the International Law Commission. As already stated, the EU does not exercise effective control over the armed forces of its Member States.

Especially with regard to detention and direct enforcement, the legal situation remains unsatisfactory. It is not necessary to decide whether German law is applicable abroad, because Art. 5 European Convention on Human Rights and Art. 9 International Covenant on Political and Civil Rights protect the freedom of a person and establish a requirement of judicial decree for detention. Furthermore, Art. 6 in connection with Art. 52 para. 1 and 3 Charter of Fundamental Rights of the European Union – which has become legally binding with the entry into force of the Lisbon Treaty – protects the freedom of person. The Charter binds EU Member States executing common actions (Art. 14 TEU/ Nice) or decisions (Art. 28, 25 lit. b i) EU Treaty of Lisbon). Thus, the Charter is applicable abroad. Third States participating in EU operations, however, are not bound by the Charter.

A legal basis is needed to detain a person, because Art. 5 European Convention on Human Rights also stipulates a legal reservation. The mandate of operation Artemis does not mention detention. The United Nations Security Council Resolution 1484 (2003) just authorizes the participating Member States to use all necessary means to fulfill the mandate. Therefore it is not precise enough to serve as a legal basis. The same is valid for the common actions taken for Artemis (2003/423/CFSP and 2003/432/CFSP) which do not mention affected individual rights.

Each participating EU Member State is liable for violations of human rights by its armed forces. This is due to the lack of an agreement stating otherwise.

In practice there is not really the risk of differing human rights standards. Nevertheless it would be more transparent to define the human

rights applicable in a particular operation in the Rules of Engagement or the Status of Forces or Mission Agreements. The legal framework for such operations has to be defined much more precisely with regard to detention.

Under the Treaty of Lisbon the EU attains international personality. While it is not a party to international human rights treaties, under Lisbon it is possible for the EU to become a party to the European Convention on Human Rights. Furthermore the EU is bound by customary human rights. In practice this is not really relevant, because armed forces and their actions are attributable to their particular sending State.