

# Chapter 27

## Human Rights Component of EU-Led Missions: the Case of Persons Deprived of their Liberty

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### 1. Introduction

When an international organization, a State or group of States deploys a peace force in a territory, a detention policy is a must, in other words, it is something that cannot be avoided. Sooner or later, there will be arrests and some people will be kept in custody (internment of civilians, pre-trial detention of suspected criminals, post-trial imprisonment, prisoners of war, etc.). Whether they are prisoners in the context of an armed conflict, regular detainees charged with criminal actions or whether they are civilians interned for their own security or because they are a threat, there will always be a need for captors to be aware of the legal rules on human rights –stemming from the International Law of Human Rights, International Humanitarian Law and also from their national legislation- that have to be applied to internees. Whether the crisis management operation has its origin in an emergency, a natural disaster, a conflict, in a post-conflict peace building situation or even if it is an early warning preventive mission, the treatment received by people deprived of their liberty will have to be foreseen and addressed. Holding someone in custody, even if it is for a short period of time, implies obligations towards this person.

### 2. The Apprehension and Detention of Persons

The apprehension, transfer and detention of persons have not been until now a critical question in the EU-led missions. Since the mandate has never foreseen the building or the running of centers of detention nor prison-like facilities, cases of detention of persons did not normally last so long as to raise difficulties in terms

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of human rights infringements.<sup>1</sup> On the contrary, as a rule, in the military EU-led operations, individuals who come into the EU custody have been immediately transferred into the custody of national authorities.<sup>2</sup> In fact, persons apprehended by members of a multinational operation do not last very long in the power of the troop-contributing States, except in the case of failed States, dysfunctional judicial and prison system or threat of ill-treatment. But even if short in time, the treatment that detainees receive constitutes a key element of the EU human rights policy. Nevertheless, operational considerations may force the multinational operation to hold detainees for a longer period of time. This is the case of the Somali operation (Atalanta).<sup>3</sup> The lack of a proper State structure has made it impossible for international troops to transfer detainees charged with piracy to local authorities. Prosecution and detention of pirates are key components of the operation: the EU agrees on the need of strong support for continued capacity-building in the penal detention sector in Somalia and the wider region. The EU considers that work needs to be taken forward in order to contribute to the progress on implementing lasting solutions for the prosecution of pirates, and taking into account ongoing work in the UN context. Atalanta military personnel can detain and transfer persons who are suspected of having committed or who have committed acts of piracy or armed robbery. They can seize the vessels of the pirates or the vessels captured following an act of piracy or an armed robbery,<sup>4</sup> as well as the goods on board. The suspects can be prosecuted by an EU Member State or by Kenya under an agreement signed with the EU on 6 March 2009 giving the Kenyan authorities the right to prosecute. An exchange of letters concluded on 30 October 2009 between the EU and the Republic of Seychelles allows the transfer of suspected pirates and armed robbers apprehended by Atalanta in the operation area. This arrangement constitutes an important new contribution to the counter-piracy efforts. On 22 March 2010 the Council of the EU authorized the High Representative to start negotiations with

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1 NAERT, F: 'Setting up the scene: Transfers and humanitarian concerns: an EU perspective', in *Proceeding of the Bruges Colloquium: Transfers of Persons in Situations of Armed Conflict*, College of Europe, Brussels, 2008, pp. 18-26, p. 18 and 21.

2 STEWART, D.: 'Setting up the scene: Transfers and humanitarian concerns: new legal and operational issues: a NATO perspective', in *Proceeding of the Bruges Colloquium: Transfers of Persons in Situations of Armed Conflict*, College of Europe, Brussels, 2008, pp. 11-26, p. 14.

3 See Chapter 14.

4 EU Factsheet on Operation Atalanta of February 2010, available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/missionPress/files/100201%20Factsheet%20EU%20NAVFOR%20Somalia%20-%20version%2014\\_EN04.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/100201%20Factsheet%20EU%20NAVFOR%20Somalia%20-%20version%2014_EN04.pdf)

Mauritius, Mozambique, South Africa, Tanzania and Uganda aimed at concluding further transfer agreements.<sup>5</sup>

Before the deployment of a CSDP crisis management mission, the EU personnel should receive instructions on the maximum detention deadline, on the rights regarding a future judicial process, on the reasons for imprisonment, internment and detention (deterrence, punishment reform, public protection, etc.), on who is accountable for abuses during detention, etc. and in which way. Likewise, all the States involved in the operation should agree before the deployment on matters such as the number of detention centres that will be used during the operations, the conditions of detention facilities, on whether the EU mission personnel will build new ones, on who will be responsible for the security of these centres and for their logistics (providing food, safe water, places to sleep, clothes for inmates), who will control detention centers and prisons, disciplinary measures, reporting procedures, whether persons deprived of their liberty will be allowed to receive visits, whether they will have access to a doctor and to a lawyer, etc. In short: it is essential that adequate safeguards are put in place to avoid arbitrary detention and ill-treatment to persons hold in custody.

### 3. The Transfer of Persons

A relevant issue related to detainees in EU CSDP operations is the transfer of persons, that is, the handover of a detainee from the hands of the EU mission to the State where the operation is deployed or to a third State. In recent years there have been transfers of prisoners from multilateral troops or peacekeeping forces to the host State, in Iraq, Afghanistan, RDC, Chad or Central African Republic.<sup>6</sup> Even if the transfer of persons is usually considered under the angle of immigration law, it is also an important issue for International Humanitarian Law (prisoners of war in the context of armed conflict situations) and International Human Rights Law (detainees in the framework of a peacekeeping operation).

Under international law, the detaining authorities bear certain responsibilities for the persons deprived of liberty even when they release them, since they have the duty to preserve their safety in so doing.<sup>7</sup> In particular, EU action in CSDP missions is expected to respect the principle of *non-refoulement* that has reached the status of

5 Foreign Affairs Council conclusions of 22 march 2010.

6 DROEGE, C., 'An ICRC perspective', in *Proceeding of the Bruges Colloquium: Transfer of Persons in Situations of Armed Conflict*, College of Europe, Brussels, 2008, pp. 54-69, p. 55.

7 HEENAN, J.: 'The risks of using diplomatic assurances in transfers of individuals', in *Proceeding of the Bruges Colloquium: Transfer of Persons in Situations of Armed Conflict*, College of Europe, Brussels, 2008, pp. 81-93; DROEGE, C., *op.cit.*, p. 56.

general international law.<sup>8</sup> But transfer of detainees may pose difficulties where the local law enforcement system or judicial system are not functioning well or are not in conformity with international human rights standards. In such circumstances, the EU mission personnel can find themselves in a complex legal situation. On the one hand, a long period of internment controlled by EU mission personnel may amount to a human rights violation, especially when the person is not deprived of his liberty on criminal charges but for security reasons (when the person poses a security threat for the mission). But on the other, the transfer of this person to local authorities could also amount to a human rights infringement when risk of ill-treatment exists. Finally, the release of the detainee would also be a misdemeanour if he poses a threat for the security of the mission. In the long run, helping local authorities to improve national institutions may solve the problem. But the problem remains in the short run, that is, while the mission is deployed.<sup>9</sup>

#### **4. International Standards on the Treatment of Persons Deprived of their Liberty Applicable to EU CSDP Missions**

The outcome of the Copenhagen Conference on the Handling of detainees in international military operations, pinpointed as the main areas to pay attention to where an international peace force has the power to deprive persons of their liberty: 1) the legal basis for detention; 2) the conditions of detention; and 3) the review of detention and the transfer of detainees to local authorities, to other troop contributing States or to Third States.<sup>10</sup> Another important aspect is the issue of the individual accountability of military staff in case of abuses and the responsibility of both States and international organizations, including the EU.<sup>11</sup>

IHL and IHLR do not properly address and solve all the legal problems that arise when the personnel of EU-led operations detain people and hold them in custody.<sup>12</sup>

8 This principle is implicitly contained in the Third and Fourth 1949 Geneva Conventions (arts. 12.2 and 45.4, respectively), Prot. II to the Geneva Conventions for the case of non-international conflict, and in refugee law.

9 NAERT F.: 'Detention in peace operations; the legal framework and main categories of detainees', in *Institute for International Law Working Paper*, may 2006, n° 94, p. 22.

10 Copenhagen Conference on the Handling of detainees in International military operations: Non paper on legal framework and aspects of detention, 11-12 October 2007, available at <http://www.ambottawa.um.dk/NR/rdonlyres>

11 OSWALD, B., *op.cit.*, p. 343.

12 Relevant instruments would include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Prevention and Punishment of the Crime of Genocide, the Standard Minimum Rules for the Treatment of Prisoners, the Vienna Convention on Consular Relations, the International Convention on the Protection against Forced Disappearances, the Convention on the Rights of the Child, the Convention on

More specifically, the extremely fragmented nature of the legal regimes that may be relevant during detention (IHL, IHRL, international criminal law, law of refugees, occupation law, local law of the host country, local law of the contributing state (...)<sup>13</sup> underlines the need to create a general and clear legal regime for dealing with detainees in EU-led operations. In fact, the legal panorama surrounding the handling of detainees during EU peace operations is complex, inconsistent and confusing, especially when other international organizations or international coalitions are deployed in the same territory and their norms interact with each other. As a result, a detainee may be treated differently depending on the justification of the detention, his status, the length of detention or when and to whom he may be transferred to.<sup>14</sup>

In this context, the rules and guidance concerning detention, the treatment of detainees and the consequences of abuses should be unambiguous to avoid uncertainty both from the EU personnel's side and from the detainee's side. In order to be unambiguous and to avoid uncertainty, all these rules and guidance should be made public and should be compulsory for both the EU and its Member States. The EU is in a privileged position to support the increasing capacity of host countries to receive transferred persons in a satisfactory manner and to try them according to international standards. EU operations should not pretend to run parallel detention processes but, instead, they should promote a broader strategic objective: to facilitate nation building by instructing host countries to treat detainees in accordance with IHL and IHRL.

#### 4.1. Relevant International Human Rights Law Instruments

Since most EU CSDP missions have not been deployed in war-like situations and no combats are registered, international human rights law has usually constituted the normative framework of reference applicable to EU led missions. In that context

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the Elimination of all Forms of Discrimination against Women and the Convention on the Elimination of all Forms of Discrimination of Handicapped Persons. Concerning regional instruments applicable to EU led operations, noteworthy is the fact that not only all EU members are parties to the European Convention of Human Rights but the EU is nowadays negotiating its accession to this covenant. The European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has also been ratified by all EU members and should be considered as European customary law for them. The same goes for some of the articles of the European Social Charter (ESC) which, either in its 1961 version or its 1996 revised version, has been ratified by all EU members. Some of the articles of the ESC also reflect European customary law. And it is worth mentioning that some of the rights included in this Charter have a very special connotation in the context of deprivation of liberty (right to clothing, right to health, right to food, right to fresh air, right to sanitation and hygiene, etc.)

13 All these legal regimes, though fragmented, are interconnected and influence one another. The legal vacuums detected are sometimes filled up in an ad hoc way by using the analogy. KRILL, F., 'Opening address', in *Proceeding of the Bruges Colloquium: Transfers of Persons in Situations of Armed Conflict*, College of Europe, Brussels, 2008, pp. 9-10, p. 9.

14 OSVALD, B., *op.cit.*, p. 352.

it has been assumed that the right to liberty under international human rights law applies extraterritorially at least to some extent and in any case to persons detained by personnel of the peace operation.<sup>15</sup>

In absence of a compulsory human rights instrument specifically applicable to the question of the detention of persons by international peacekeeping forces, the European Prison Rules (EPR) approved by the European Council Committee of Ministers Recommendation (2006)2 could play an important role in the context of EU CSDP operations<sup>16</sup> This instrument of “soft law” summarizes the main human rights rules and principles that are applicable in relation to all persons deprived of their liberty and can be easily assumed by EU contributing states.<sup>17</sup>

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15 BANK, R.: ‘Non-refoulement : Aspects of refugee Law and the ECHR’, in *Proceeding of the Bruges Colloquium: Transfers of Persons in Situations of Armed Conflict*, College of Europe, Brussels, 2008, pp. 46-53, p. 46. See also NAERT, F., (2006), *op.cit.*, p. 11.

16 Although doubts have been raised as to whether the EU as such is bound by an instrument which was passed by Member States of a different Organization, it is to be noted all Member States to the EU have adhered to the Council of Europe, and therefore, had also taken part in the process that brought to the approval of this resolution. Besides, the EU has manifested its commitment to these standards. It has done so, for example, in the Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment. In this document, the EU Council states that “the EU may invoke, where relevant, in its contacts with third countries concerning torture and ill-treatment, the following norms, standards and principles (...): The European Prison Rules”. In the same vein, the European Parliament has also stressed positive obligations for the EU stem from the EPR. See General Affairs Council, 18 April 2008 and OJ C 102E vol. 47, EP Recommendation to the Council on the rights of prisoners in the EU of March 3<sup>rd</sup>. 2004.

17 According to the European Prison Rules, all persons deprived of their liberty should be treated with dignity and respect for their human rights (1). Prison staff should maintain high standards in their care of prisoners (8). All prisons should be subject to regular inspection and independent monitoring (9). No person should be held as a prisoner without a valid commitment order (14). In the admission process, the identity of the prisoner should be established as well as the reasons for commitment, the day and hour of admission and an inventory of personal property should be done (15). The person deprived of his liberty should receive medical examination as soon as possible (16). The accommodation provided for prisoners should respect human dignity and meet the requirements of health and hygiene and due regard should also be paid to lighting, floor space, content of air, heating and ventilation (18.1). Overcrowding should be avoided (18.4). Males should be separated from females (18.8). Cells should be clean (19.2). Persons deprived of liberty should enjoy sanitary facilities (19.3) and toilettries (19.6). Prisoners should have adequate clothing (20) as well as a nutritious diet prepared and served hygienically and enough drinking water (22). All prisoners are entitled to legal advice (23) and they enjoy, if possible, the right to visits and letters (24). Their families should be immediately informed of their imprisonment (24.8) and they should enjoy human interaction (25). Prison work should not be used as a punishment (26). Prisoners should have time for exercise daily (27). Freedom of thought and religion should be respected within the center (29). The health of the persons deprived of their liberty should be safeguarded (39). In urgency cases, a qualified medical practitioner should be available without delay (41). Confidentiality of medical examination should be preserved (42). Prisoners shall not be subject to any experiments without their consent and experiments that may result in injury or mental distress are prohibited (48). Good order in prison will be safeguarded taking into account the requirements of safety and security (49). Persons being searched shall not be humiliated and they will only be searched by staff of the same gender (54). Disciplinary measures shall be mechanisms of last resort (56) and any punishment imposed shall be in accordance with national law (60). Solitary confinement will be an exceptional measure (60) and prison staff will not use force except in self-defence (64). Prisons should be the responsibility of public authorities separate from

Prison staff of EU-led operations should also be aware of the rich store of human rights law of direct applicability to prisons, namely the extremely large and important corpus of case-law that the European Court of Human Rights has produced while interpreting the rights of people deprived of their liberty in relation to imprisonment and detention conditions.<sup>18</sup>

Amongst human rights treaties, the 1989 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has a crucial significance in this field. Being this instrument the best expression of binding international law on the commitment of banning torture and degrading treatment within prisons and centers of detention controlled by European States, the EU CSDP personnel should also be aware of its norms as well as trained and informed on the main conclusions of the General Reports of the European Committee for the Prevention of Torture (CPT).<sup>19</sup> Within this body of European international human rights law, a mention should also be made to the recommendations on prison matters issued by the Committee of Ministers of the Council of Europe. Despite their non-binding character, they complement and underline the importance of the respect of imprisoned people's rights outlined in other hard law documents such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ECHR or the European Social Charter.

Besides these instruments, other two *soft law* documents adopted in the framework of the UN are of particular interest in the subject matter: the *Code of Conduct for Law*

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military, police or criminal investigation services (71). Prisons should be managed in an ethical context with high professional standards (72). Staff shall be carefully selected (76) because of their integrity, humanity, capacity and personal suitability (77) and they should be trained in order to ensure that prisons are managed to consistently high standards that are in line with international and regional human rights instruments (81 and 83).

18 This judicial body has been able to build such a crucial set of norms especially by applying art. 8 ECHR (right to private and family life), the right to personal integrity (art. 3), the right to life (art. 2), the right to freedom of religion (art. 9), the right to a fair process (art. 6) and the right to be free from illegal arrest (art. 5).

19 The CPT is the organ of application of the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, a covenant that has been ratified by all EU Member States. It organises visits to places of detention, in order to assess how persons deprived of their liberty are treated. These places include prisons, juvenile detention centres, police stations, holding centres for immigration detainees, psychiatric hospitals, social care homes, etc. CPT delegations have unlimited access to places of detention, and the right to move inside such places without restriction. They interview persons deprived of their liberty in private, and communicate freely with anyone who can provide information. After each visit, the CPT sends a detailed report to the State concerned. This report includes the CPT's findings, and its recommendations, comments and requests for information. The CPT also requests a detailed response to the issues raised in its report. These reports and responses form part of the ongoing dialogue with the States concerned. The CPT does not interfere with the European Court of Human Rights' interpretation of the ECHR. On the contrary, it has regard to the Court case-law as a source of guidance. Its General Reports present the European desirable practices and are summarized in a single document called the CPT Standards.

*Enforcement Officials*, adopted by UNGA Resolution 34/169 (17 December 1979)<sup>20</sup> and the *Body of Principles for the protection of all persons under any form of detention or imprisonment*, adopted by UNGA Resolution 43/173 (9 December 1988).<sup>21</sup> Despite their soft law character, both are instruments of crucial importance for members of international missions who have law enforcement capacity, especially those who bear arms and who have the power of arrest or detention. The Code of Conduct clearly establishes that in the performance of their duty, law enforcement officials shall respect and protect human dignity and uphold the human rights of persons and may use force in exceptional circumstances, only when strictly necessary and to the extent required for the performance of their duty.<sup>22</sup> They will not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment. They will also ensure the full protection of the health of persons in their custody and shall not commit any act of corruption.<sup>23</sup> The Body of principles, despite its non binding formal character, is also a reflection of international customary law. This is especially true in relation to the treatment deserved by persons under any form of detention or imprisonment that shall be humane and in full respect of the human dignity.<sup>24</sup>

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20 <http://www2.ohchr.org/english/law/codeofconduct.htm>

21 <http://www.un.org/documents/ga/res/43/a43r173.htm>

22 See articles 2 and 3. The same rule derives from the Basic Principles on the use of force and firearms by law enforcement officials, adopted by the eight UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990, points 15 to 17.

23 *Ibid.* Articles 5-7.

24 Principle 2 establishes that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law by competent officials or persons authorized for that purpose. Principle 4 establishes the need for an official control of any detention, imprisonment or measure affecting human rights. But maybe one of the dispositions of this resolution that may lead to contradictory interpretations in the context of international operations is Principle 5, which establishes that all these principles shall apply without discrimination “to all the persons within the territory of any given State”. Principle 5 does not use the expression “to all persons under the jurisdiction for any given State”, which reflects an extraterritorial character that is very adequate when talking about the duties of European personnel deployed in a foreign country. This extraterritorial dimension or connotation is lacking in the expression used by the Body of Principles. However, if we apply art. 31.1 of the Vienna Convention on the law of Treaties by analogy, this Body of Principles should be interpreted in its context, in good faith and in the light of its object and purpose. If we take the latter into account, it is clear that the purpose of this Body of Principles is not to exclude persons deprived of their liberty from the human rights obligations it establishes in the context of peace operations.

## 4.2. The Application of International Humanitarian Law

Should IHL apply to some EU-led missions acting in a territory where combat actions are taking place, this part of international law would apply concurrently with IHRL. Therefore, persons deprived of their liberty in the context of such missions, should enjoy the guarantees of both IHL and IHRL at the same time. However, as *lex specialis*, IHL would prevail in case of contradiction. In this context, international humanitarian law rules may also be applicable to EU personnel that has acquired the status of combatants due to the general use of force between the factions involved in hostilities and has authorized use of force. Under these circumstances, the main principles and rules stemming from the Third 1949 Geneva Convention relative to the treatment of prisoners of war should also be applicable.<sup>25</sup> Accordingly, IHL provides a detailed guidance on who may be deprived of liberty, for what reasons and how that person should be treated in both international and non-international armed conflicts.<sup>26</sup>

A particularly important instrument in this regard is the *UN Secretary General Bulletin on the Observance by UN Forces of International Humanitarian Law* issued in 1999. This document deals with the treatment of persons once they have been captured, but not with their legal status. Although controversial on various points, this Bulletin tries to shed some light on the endorsement of certain rules of IHL to UN forces. However, the EU lacks a similar Bulletin for the European context issued by the Council of the EU or by the High Representative of the EU for the Common Foreign and Security Policy.

## 5. Relevant EU Legal Framework

At the same time, the EU has been increasingly involved in human rights and criminal matters. Article 6 TEU compels the EU to respect human rights, also in the areas of Foreign Affairs and Security Policy and in the area of Freedom, Security and Justice. Due to the powers the EU has acquired in a European area of Freedom, Justice and Security, especially in the fields of police cooperation and judicial cooperation in criminal matters,<sup>27</sup> this international organization could not do otherwise but to work on the relation between human rights and prisons and human rights and detention policy.

25 All EU Member States have ratified this instrument that is customary law.

26 In case IHL is applicable to an EU-led mission, the next question which comes up is whether the conflict should be treated as an international conflict or as a non-international conflict. This question is of relevance with regard to the legal status of detainees. However, the distinction is somehow artificial in the context of peace operations and with regard to detainees hold in the hands of the peace operation staff because a peace mission is composed of forces coming from other States. Thus, even if the fighting will normally take place in a single country, the conflict should be considered international at least with regard to the status of detainees hold in custody by the peace forces. NAERT, F., (2006), *op.cit.*, p. 10.

27 Treaty on the Functioning of the EU; Article 82 ff.

The EU proclaimed in 2000 the Charter of Fundamental Rights of the EU –which has been binding since the entry in force of the Treaty of Lisbon in December 2009. It has also agreed the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.<sup>28</sup>

Apart from that, the EU has promoted a good number of programs on prison education.<sup>29</sup> The EU has been active in sponsoring research in the field, as shown by the Directorate of Justice, Freedom and Security of the European Commission, where analysis have been published on *Minimum standards in pre-trial detention and the ground for regular review in the Member States of the EU*,<sup>30</sup> on *Long-term imprisonment and the issue of human rights in Member States of the EU*,<sup>31</sup> on *Foreigners in European prisons*<sup>32</sup> as well as on *Monitoring human rights and prevention of torture in closed institutions: prisons, police cells and mental health care institutions in Baltic countries*.<sup>33</sup> The European Parliament has also contributed to the debate through a lengthy Recommendation to the Council on the rights of prisoners in the EU adopted in March 2004.<sup>34</sup> In this recommendation the European Parliament took into account all the UN, Council of Europe and EU instruments which have a relation to prisoners rights such as, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ECHR and its case-law, CPT standards or the Charter of Fundamental Rights of the European Union, showing their mutual synergies and interconnections.<sup>35</sup>

## 6. Main Findings of the Research

One of the most striking outcomes of the research has been the difficulty the researchers found to accede to any public information whatsoever on the application of human rights standards to the detainees and prisoners that are or have been held

28 OJ 2008 L 327 of 2008-12-04, p. 27-46.

29 PETROVA, V. et al.: *Compendium of EU-sponsored projects relevant to prisoner education 1995-2004*, European Commission.

30 Doc. JLS/D3/2007/01.

31 Doc. JLS/2006/AGIS/161.

32 Published by VAN KALMTHOUT, A. et al., NIMEGEN, WOLF, 2007.

33 European Commission Project accessible since 2008 at the following web page: [www.ec.europa.eu/europeaid/where/worldwide/eidhr/index\\_en.html](http://www.ec.europa.eu/europeaid/where/worldwide/eidhr/index_en.html).

34 OJ C 102E vol. 47, Recommendation of March 3rd. 2004, 2003/2188 (INI)

35 VAN ZYL SMIT, D., & SNACKEN, S.: *Principles of European prison Law and Policy*, Penology and human rights, Oxford University Press, 2009, p. 30.

under the custody of EU personnel. Because of that, many doubts remain as to whether all EU mission personnel actually follow the same rules and instructions or whether the conditions of detention may more likely depend on the nationality of the members of the troop who may carry out the arrest.<sup>36</sup> It is also doubtful whether the detention should be attributed to the contributing country or to the international organization deployed, namely the EU. The answer to this question is not straightforward as it depends on the distribution of powers between the contributing States and the EU, i.e., on who commands and has the effective control of the operation.

Information regarding the treatment deserved to apprehended persons or under detention of EU personnel and the standards applied should be made public for the sake of legitimacy of the operation and of transparency. In order to clarify any doubts, the operation OPLAN should make clear that any person under the custody or detention of EU personnel will enjoy the rights established in the European Prison Rules.<sup>37</sup> The Rules of Engagement (ROEs) should also include references as to the reasons for detention and the way a detention should take place. As far as the SOMAs and SOFAs of these operations are concerned, they should include extremely clear dispositions allocating responsibility for those members of the mission who commit human rights abuses against the population while in duty. And all these parts of the OPLANs, the ROEs, the SOMAs and the SOFAs should not be confidential, since they establish rights and means of redress for the population. Besides, they do not jeopardize the security of the deployed personnel. It is a question of human rights and of legal security.<sup>38</sup>

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36 In fact, applicable domestic law will normally include the law of the troop contributing nations. OSWALD, B.: 'Detention in military operations: some military, political and legal aspects', in *Legal Studies Research Paper: Melbourne Law School*, n° 384, p. 5.

37 In developing its role as a regional human rights international organization, the Council of Europe decided in 1973 that the UN Standard Minimum Rules for the treatment of prisoners approved the General Assembly in 1957 as an instrument that should be universally applied wherever human beings were deprived of their liberty, should be reinforced at European level. Therefore, the Council of Europe drew up its own Standard Minimum Rules for the Treatment of Prisoners, adopted by the Committee of Ministers (Resolution 73. 5). In 1987, the Council of Ministers deemed it necessary to reformulate the Standard Minimum Rules for the Treatment of Prisoners so as to take into account "significant social trends and changes in regard to prison treatment and management." These recommendations are not binding for Member States but are evidence of an awareness of the rights of prisoners. On 11 January 2006 the Committee of Ministers of the Council of Europe adopted a new version of the European Prison Rules. The recommendation recognized that the previous 1987 Rules had been revised and updated substantively. Accordingly the 2006 Rules replace their predecessors in their entirety.

38 All this information is considered politically sensitive. Therefore, the researchers have not had access to the "presumed" parts of the CONOPs, ROEs, SOMAs, SOFAs, SOPs and OPLANs which probably establish who could be arrested or captured and in what way, on what grounds, for how long, what rights assist the person deprived of liberty, what mechanisms of review he has against the detention or internment order, who is accountable for abuses and where, etc. Having said this, in some of the missions it has been possible to find some indirect information which could be of help for the task of researching the human rights component of these operations.

### 6.1. The Transfer of Persons

For what concerns the transfer and handling of detainees and prisoners by peace operations, many doubts still remain. In practice, European States usually conclude bilateral agreements with local authorities or with third States or Memorandums of Understanding (MOUs) in the context of particular operations. A partial solution to this confusing environment could be the generalization of the Standard Operating Procedures (SOP), with the objective of standardizing the handling and transfer of detainees. Generally speaking, SOPs cover the handling of detainees, the treatment they should receive, the procedures for detention, the review of detention, the commanders' responsibility and the investigation of complaints and abuses. They establish the obligation of releasing or of transferring a detainee to local authorities after 96 hours of liberty deprivation. Since the mere existence of this kind of document on minimum standards for detention is usually confidential, it has been impossible to prove whether SOPs have been drafted in EU operations or not.<sup>39</sup>

### 6.2. Main Applicable Principles

Some basic principles should govern the detention policy of EU-led missions:<sup>40</sup> the first one is the principle of human treatment, according to which every detained person should be treated with dignity and as a human being; the principle of lawfulness, according to which the reasons for detention, the detention conditions and the handling of detainees should be provided by law and should be made public; the principle of necessity, according to which a detainee must be released with the shortest possible delay as the reason for detention disappears; the principle of status, according to which every detainee must have his status determined by law and last, the principle of accountability according to which individuals, international organizations and States involved in all the aspects of detention policy must be all accountable for their actions and omissions. If we take into account all the previous principles, the most striking result of the comparative analysis of the human rights component of EU-led missions is the lack of public information on the procedures, the rights or review mechanisms of decisions that could be taken and could have an impact on human rights in general, and on the rights and status of people deprived of their liberty by members of the EU mission.

## 7. Recommendations

During the last decades, the EU has made a great effort to deploy its own peace operations. EU operations have evolved and their legal basis now incorporate rule

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39 SOPs exist in NATO operations in Kosovo and Afghanistan, STEWART, D., *op.cit.*, p. 16.

40 OSWALD, B.: 'Detention of civilians on military operations: Reasons for and challenges to developing a special law of detention', *Melbourne University Law Review*, vol. 32(2), 2008, p. 524.

of law, humanitarian and human rights issues to a greater extent than before. At its inception, EU-led operations did not take into account any of these elements. However, there is still a lot of work ahead, especially concerning the design of these operations and the need of a comprehensive approach. An added concern regards the confidentiality of many of the operative documents whose analysis would be necessary in order to assess whether EU operations are human rights based and, in particular, if the rights of the detainees are adequately addressed. The EU should change its policy of not providing public information on this topic as long as security concerns are guaranteed. Most of the information on detention policy and penitentiary policy in EU-led missions is classified. It should be studied what information should remain classified in a case-by-case-basis. In this respect, some of the aspects to be improved are the following.

### **7.1. Improving the Transparency Policy**

Periodic reports by the EU Heads of mission should be made public on the integration of the IHL and IHRL component in CSDP missions, in particular concerning the following issues: 1) number and location of detention centres managed by EU mission personnel (to guarantee that there are no secret places of detention); 2) type of training received by prison authorities and detention centres on IHL and IHRL; 3) domestic law applied to detention centres under the control of EU mission personnel; 4) international norms and standards applied by the authorities of prisons and detention facilities under the control of EU mission personnel; legal reasons for detention and arrests of local population; 5) means of redress and procedures for complaint available for local population held in custody against abuses; 6) type of public inspections that these centres undergo from international neutral authorities and relation and type of monitoring exercised by EU mission personnel on prison and detention centres controlled by local authorities (if any).

### **7.2. Clarification of the Legal Framework**

IHL and IHRL do not address and solve all the legal problems that arise when the personnel of EU-led operations detain people and hold them in custody. Therefore, the setting up of a general and clear legal regime for dealing with detainees in EU-led operations, based on the Bulletin of the UN Secretary General, would be an important achievement for the EU human rights policy. Such an instrument could take the form of an EU SG/HR Code of Conduct for deprivation of liberty cases in the context of EU-led operations and should not be confined to situations of armed conflict and thus should also extend its framework to civil missions. The adoption of an instrument in this field would permit to systematize the main rules and guidelines concerning detention, the treatment of detainees as well as the consequences of abuses in a unique text.

With this aim, the Copenhagen Process on the handling of detainees in international military operations of October 2007 constitutes a good basis for developing a legal framework that is both clear and in full conformity with international human rights standards. Since the present situation, where the handling of detainees is left to a large extent to *ad hoc* solutions of the troop contributing States is not satisfactory,<sup>41</sup> the new instrument should be made public and be compulsory for both the EU and its Member States. In this way the EU policy and standards in relation to liberty deprivation would be clarified in avoiding, at the same time, the current legal uncertainty for both the EU personnel and the persons held under their custody.

### **7.3. Integration of Specialized Personnel**

There is a need to establish an adviser within large military operations on penitentiary and detention policy as well as a need to train all EU CSDP personnel on human rights applicable standards in relation to penitentiary and detention issues. A large number of EU missions have been deployed under-qualified personnel in the field of human rights without the necessary training. Even if the quality of pre-deployment training varies from country to country, in some cases human rights issues have not been incorporated at all. A weak pre-deployment training is a problem difficult to overcome. It should be maybe compensated by an obligatory joint in-mission training program. However, in-mission training programs are not always the case either, as most deployed operations do not contemplate that kind of activity.

### **7.4. Improving Cooperation with International Organizations and NGO's**

Cooperation of the EU mission personnel and other international organizations and NGOs should be encouraged. In some of the missions, lack of communication has been reported between the EU mission and other international organizations, agencies and NGOs working in the field. EU missions should coordinate their activities with other entities and actors working in the field of human rights in the same area. Regular exchanges of views between all of them should be a must for EU personnel. The role of NGOs, international organizations and agencies such as the UN High Commissioner for Human Rights (UNHCHR), the UN High Commissioner for Refugees (UNHCR), the OSCE or the Council of Europe is critical to avoid overlapping, inconsistencies and contradictions in the implementation of the different programs. Because of their expertise, NGOs and civil society organizations are also crucial in terms of human

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41 WINKLER, T.: 'The Copenhagen process on the handling of detainees in international military operations', in *Proceeding of the Bruges Colloquium: Transfer of Persons in Situations of Armed Conflict*, College of Europe, 2008, Brussels, pp. 95-100, p. 98.

rights accountability. Thus, EU deployed personnel should always act in connection with the various organizations and entities which have a role to play in relation to people deprived of their liberty (UNHCR, UNHCHR, ICRC, Amnesty International, etc.). Mutual information between the EU mission's personnel and those institutions should be promoted on a regular basis.

### **7.5. Setting Up of Mechanisms of Control and Accountability Procedures**

Privileges and immunities should never constitute an excuse for human rights abuses. EU personnel should be aware of the fact that being deployed in a foreign country for humanitarian or help purposes does not give them impunity for human rights abuses against the local people they may capture in the performance of their duty. To date, most EU operations do not officially foresee a mechanism for the sanction of human rights abuses committed by international forces. Thus, there is a need to make sure that clear norms of proportional sanction compared to the injured caused also apply to EU-led personnel in case of human rights abuses. EU personnel should be aware of the consequences of possible abuses. They have to know that they are accountable not only for their acts but also for their omissions.

Clarification of the applicable law to people deprived of their liberty in the hands of EU-led mission is needed. The States that constitute the EU still have a variety of different traditions of imprisonment and detention policy and different ways to understand what are the basic elements of it. Therefore, it is recommended that the EU clarify, by means of a code of conduct, what the exact rules are—and the human rights rules, as well- that have to be observed by all the personnel under the orders of an EU mission who are in charge of persons held in custody or deprived of their liberty. This code of conduct or guidelines should be made clear in the OPLAN, SOMA, SOFA and ROEs of each operation. Moreover, there is a need to clarify in a case-by-case basis if local law concerning both the treatment of persons deprived of liberty and the treatment of abusers from the EU-led mission could be applied.

### **7.6. Standardizing the Agreements with Third States**

A general EU agreement with the host State should be concluded concerning the handling and transfer of detainees. A unique EU agreement should be a better solution than the multiplication of bilateral agreements. Whenever bilateral agreements with third States are concluded on the transfer of detainees, they should be published and special attention should be paid to the guarantees that third States should provide of the human treatment that transferred persons will enjoy. These bilateral agreements should be unambiguous and should not leave any *lacunae* for the sake of the protection

of human rights. If there is a risk of ill-treatment, the transfer should be prevented.<sup>42</sup> The principle of *non-refoulement* should also apply to the transfer of persons who, as they are being transferred from foreign forces to the authorities of the host country, do not cross an international border. In other words, foreign troops should refrain from transferring detainees to local authorities if, in so doing, the transferred person is at risk of ill-treatment. Transfer agreements should include assurances against ill-treatment.<sup>43</sup>

EU missions with the mandate to hold detainees have to undergo regular and thorough inspections of all detention establishments by neutral institutions. It is suggested that the European Committee on the Prevention of Torture should have access to these centres in accordance with Article 5 of the ECHR in relation with Article 1. In fact, there is a need of independent inspection not only of detention centres controlled by EU members in the deployed State but also of those controlled by local authorities.

Concerning detention by EU-led missions, one of the biggest obstacles remains the reluctance of troop contributing States to be monitored by an external and impartial review mechanism for detention cases. In cases where an EU-led military operation is present in a country in the same territory as an EU rule of law mission, maybe one of the officers of the latter (preferably a judge or a prosecutor) could act as that independent review organ for detention decisions. Be it as it may, it would be of interest that the EU establishes a unique and general mechanism of review applicable to detentions taking place in the framework of EU-led operations.

## 8. Conclusion

It should not be assumed that human rights will always be protected because CSDP operations and missions are launched under the umbrella of the EU. It is not so evident that this will always be done. European standards are based on the assumption that all persons deprived of their liberty shall be treated with respect for their human rights and that to deprive someone of his liberty entails a moral duty of care. The setting up of competent and independent monitoring is also crucial a key element for the EU policy. Closed institutions such as internment camps, prisons or detention centres should accept regular visits of independent bodies. But the documents available to the

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42 BALWIN, C.: 'Transfer, International Law and Non-refoulement principle' in *Proceeding of the Bruges Colloquium: Transfer of Persons in Situations of Armed Conflict*, College of Europe, 2008, Brussels, pp. 37-45, p. 42, and DEEKS, A.: 'Use of diplomatic assurances to protect detainees', in *Proceeding of the Bruges Colloquium: Transfer of Persons in Situations of Armed Conflict*, College of Europe, 2008, Brussels, pp. 71-80, p. 71; HEENAN, J., *op.cit.*, pp. 81-93.

43 DROEGE, C., *op.cit.*, p. 61.

general public regarding EU operations do not provide evidence of these aspects of detention.

There is a growing conviction that human rights can only be ensured through a consistent policy of institution building and through training programs. In the future, within its CSDP, the EU will have to deal more and more with tasks such as training police forces in foreign countries, instructing penitentiary staff, developing an independent judiciary, reviewing local legislation, establishing national monitoring systems, assisting democratic processes, promoting multiparty systems and fostering gender equality in society.<sup>44</sup> It will also have to make sure that the EU personnel act in an exquisite way from a human rights perspective, especially with regards to those who are more vulnerable, such as people deprived of their liberty. In order to achieve all these “rule of law goals”, EU peace operations and missions -both military and civil-, have an important role to play.

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44 HAMMARBERG, T.: *Human Rights in Europe: Mission Unaccomplished*, Council of Europe ed., 2007, p. 7.