ema EUROPEAN MASTER's DEGREE in HUMAN RIGHTS and DEMOCRATISATION

CATCH ME IF YOU CAN (NOT?): EU TITULAR RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS UNDER TITLE V TEU (CFSP)

Master's Thesis

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".. the extraordinary privilege of responsibility.."
(Friedrich Nietzsche, *La Généalogie de la Morale*)

or

"..the obligation of responsibility.."
(Emmanuel Levinas, *Humanisme de l'Autre Homme*)?

ABSTRACT

The motto "Catch me if you can (not?)!" epitomizes the European Union's stance in the unsuccessful attempts of third parties to hold it legally responsible for human rights violations committed in the conduct of the Common Foreign and Security Policy (Title V TEU). This work takes into account the specifics of the European Union and of the human rights law to offer an innovative optimisation of the traditional notions of international and European law shaped in a *sui generis* scheme for due redress of the aforementioned human rights violations: *the European Union's titular responsibility model*. The functionality of the model and its careful balance of the politico-legal notions of the European Union order, on the one hand, with the individual human right of access to justice, on the other hand, as reflected in the scheme and practical modalities of the model, make it the key to change the motto to "Catch me – you can!"

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0. PRELIMINARY ISSUES

A. INTRODUCTION

A.1. Work's principal thesis

"Catch me if you can!" or the slogan of "a true story of a real fake" epitomizes the European Union's stance in the attempts to hold it legally responsible for human rights violations committed in the conduct of its Common Foreign and Security Policy. The admirable creativity in smooth operations with politico-legal concepts such as "immunity", "functional autonomy of international organisations", "international legal personality" has rendered the slogan to be in fact: "Catch me – you cannot!" and thereby clashed with the imperatives of genuine and effective, rather than merely ceremonial human rights protection.

This work has not been designed to portray the European Union as inherently hostile to human rights in the conduct of the Common Foreign and Security Policy; on the contrary, the recognition that it is fully based upon the principles of human rights and asserts human rights promotion as one of its principal objectives is *bel et bien* there. However, it is this same recognition that requires complementing this proactive *animus* with an apposite reactive *modus operandi* so to comply with the exigencies of human rights in the European Union's own conduct.

In the context where there is no direct legal responsibility mechanism for human rights violations committed in the conduct of the European Union's Common Foreign and Security Policy, it is pertinent to ask: "*Quis Custodiet Ipsos Custodes?*"[1] Without the ambition to lay grounds for a comprehensive regime of responsibility for international organisations, this work takes into account the specifics of the European Union and of the human rights law to finally offer an innovative optimisation of the traditional notions of international and European law shaped in a *sui generis* scheme for due redress of human rights violations committed under the framework of the Common Foreign and Security Policy: *the European Union's titular responsibility model*. The functionality of the model and the careful balance of the politico-legal notions of the European Union order, on the one hand, with the individual human right of access to justice, on the other hand, as reflected in the scheme and practical modalities of the model, make it the key to change the aforementioned slogan to: "Catch me – you can!"

[1] *lat.* "Who is judging the watchmen?"

A.2. Work's methodology

The research addresses the legal substance of the issue by use of traditional notions of general international law (notably the law on responsibility), European law and human rights law, as well as by innovative functional interpretation of these notions as required for reinforcing the main line of argumentation undertaken in the work. The legal aspect of the research is complemented by incidental references to concepts of international relations and political science, to the extent that it is crucial to elucidate the non-legal dynamics of the European Union's setup and their implications upon its human rights commitments.

The doctrinal material for the work has been acquired in research at the libraries of the European Court of Human Rights (Strasbourg, France), of the Université Robert Schuman and Institut des Hautes Etudes Européennes (Strasbourg, France), of the College of Europe (Brugges, Belgium), of the Université Libre de Bruxelles (Brussels, Belgium), of the Legal Service of the General Secretariat of the Council of European Union (Brussels, Belgium) and of the United Nations Office in Geneva (Geneva, Switzerland). The doctrinal sources have been complemented by extensive use of various acts of international law – international conventions and their preparatory documents, case-law of the International Court of Justice, European Court of Human Rights and European Court of Justice, and, also, secondary acts and internal working documents of the European Union.

An exceptional privilege in the elaboration of this work has been the direct contribution by distinguished practical experts of the field: participation in the Research Forum on International Law by the European Society of International Law gave the chance to address the most acute questions on responsibility of international organisations, among all other specialists, to **Mr. Giorgio Gaja**, the UN ILC Special Rapporteur on Responsibility of International Organisations, and to personally participate in a Special ILC Session on the topic; the support of **Mr. Jean Paul-Jacqué**, Director at the Legal Service of the General Secretariat of the Council of the European Union, in defining the main problematic issues for research and the continuous practical advice and constructive critique by **Mr. Diego Canga Fano**, lawyer at the Legal Service of the General Secretariat of the Council of the European Union (specialised in "External relations (including CFSP, development cooperation, ACP, all questions relating to international agreements and relations with international organisations) and enlargement), was crucial to place this work in the special current context of the European Union dynamics, as well as attributed this work practical credibility; the advice of **Mr. Egils Levits**, Judge at the European Court of Justice and former Judge at the European Court of Human Rights, and of **Mr. Juris Rudevskis**, a lawyer at the European Court of Human Rights, complemented the work with practical insights into the role of

European Court of Human Rights in assuring legal responsibility of the European Union for human rights violations. **Mr. Armand Franjulien**, a Member of the European Parliament observation mission to Bosnia and Herzegovina, and **Mr. Srđan Dizdarević**, the President of the Helsinki Committee for Human Rights in Bosnia and Herzegovina, illustrated the theoretical arguments of the work with practical examples from the field. Finally, Mrs. **Florence Benoit-Rohmer**, the Director of Université Robert Schuman (Strasbourg, France) and the E.MA National Director, has to be thanked for the supervision of the work. As a result of the aforementioned contributions, not only the work has doctrinal value, but by means of specific procedural propositions attempts to leave a practical impact upon the current process of seeking the most suitable solutions to match the emerging awareness for the need to establish the European Union's responsibility for human rights violations in the field of Common Foreign and Security Policy.

Unfortunately, the final wording of the work still conceals a vast amount of additional practical and doctrinal material, as well as legal analysis of more nuanced questions, which has to be left unaddressed. Nevertheless, due to the author's profound interest in the issue and to the role of further research to render the proposed EU titular responsibility model functional not only in conceptual, but also in practical terms, the work has not been completed by drafting this thesis, and will be continued so to prepare prospective publications in journals devoted to international, European and human rights law.

B. DEFINITION OF WORK'S SCOPE

B.1. *Ratione personae*

1.1. Notion of "the European Union" as an international organisation

For the purposes of this work, the notion "European Union" (further in the text – "the EU") has its legal and political meaning as defined by the consolidated Treaty on European Union (further in the text – "TEU"). According to Article 1 TEU,

> "By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called 'the Union'.[..] The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples."

Thus the EU comprises "the Community as its 1st pillar, the Common Foreign and Security Policy (Title V TEU) as the 2nd pillar, and the provisions on Police and Judicial Cooperation in Criminal matters (Title VI TEU) as its 3rd pillar."[2] The EU is considered an international governmental organisation, a notion that, by the definition laid down in Article 2 of the United Nations International Law Commission (further in the text – "UN ILC") Draft Articles on Responsibility of International Organisations, refers to "an organisation established by a treaty or other instrument governed by international law and possessing its own legal personality"[3]. While the issue of *international* legal personality is discussed in further detail further in this work[4], for the definitional purposes here the EU legal personality is considered to be the "'core content' of legal personality – its minimum scope possessed by each international organisation" as "implicitly but necessarily resulting from the will of the founding parties to establish the international organisation as a permanent institution rather than a simple conference"[5] and reflected in possession of "a constitution and organs separate from its Member States"[6].

The legal basis of the EU Common Foreign and Security Policy (further in the text - "the CFSP") is laid down in Title V TEU (Articles 11 to 28 TEU) and in the Common Provisions

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[2] Gérard Druesne, *Droit de l'Union européenne et politiques communautaires*, Presses Universitaires de France, 2002, p. 16.
[3] *Second Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur*, International Law Commission, 55th Session (3 May – 4 June and 5 July – 6 August 2004), UNGAOR, UN doc. A/CN4/541.
[4] See *infra* Section II.A.2.1.
[5] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 593.
[6] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 4, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

of Title I TEU and the Final Provisions of Title VIII TEU. According to Article 11(1) TEU, the objectives of the CFSP are:

> "- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,
> - to strengthen the security of the Union in all ways,
> - to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders,
> - to promote international cooperation,
> - to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms."

The analysis carried out in the work presumes some preliminary knowledge of the EU legal and political setup – it does not attempt to reiterate the norms of the Treaties or to explain the functioning and decision-making rules of the CFSP. Rather – the work directly embarks upon analysis of the particular problems that these rules reveal in the focus of this work, at times manipulating with very specific provisions of the CFSP acts and the EU internal provisions when those are instrumental for illustrating the relevant problems or advancing the argument undertaken in this work, without elucidating their general background.

1.2. Notion of "the victim"

The character of the violation defines the specific type of its victim. The constituency entitled to raise the accountability of international organisations consists of all component entities of the international community at large provided their interests or rights have been or may be affected by acts, actions or activities of international organisations, that is, - "intergovernmental organisations, including their staff, member states of intergovernmental organisations, non-members of intergovernmental organisations, supervisory organs within intergovernmental organisations, domestic and international courts and tribunals, supervisory and monitoring organs within domestic systems (e.g. parliaments) and non-governmental organisations working on both the national and international level, and private parties (both legal and natural persons)" [7].

This plethora of potential claimants of responsibility is for the purposes of this work doubly limited. First, victim-hood in this work is considered external – one that is ascribable to third parties only. The term "third parties" is considered to cover victims or wrongdoers who are not members of the international organisation concerned: states, other international

[7] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 5, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

organisations, private individuals or legal persons[8], as considered in the context of the "obligations that an international organization may have [towards them] under rules that do not pertain to the rules of the organization".[9] Second, the specific relation between the parties reflected in the human rights law, and specifically the circumstance of an occurred human rights violation, implies that the potential victims of human rights violations are private parties.

Such subject-hood of private parties in *mise-en-oeuvre* of responsibility of international organisations reflects the "increasing legal *personalization* of private parties, especially in the field of human rights"[10]. It defines the nature of violation in question and thus draws the separating line between the "personal" responsibility for human rights violations and the "public" responsibility for acts of an international organisation which cause personal injury to state officials or damage to state property. Even though conceptually "private parties" comprise both natural and legal persons, for the purposes of this work a practical simplification is chosen to be made and only a natural person – an individual – considered a "victim". While such simplification excludes consideration of such relevant questions as the capacity of a legal person to possess human rights and the possibility of a collectivity of individuals to stand as the victim of a human rights violation, these debates nevertheless would not directly contribute to the achievement of the goals of this work, and therefore are left for a separate research outside the work's scope[11].

B.2. Ratione materiae

2.1. Notion of "the EU human rights obligations"

Article 3(2)b) of the International Law Commission Draft Articles on Responsibility of International Organizations defines that, in order to engage international organisation's international responsibility, the relevant act must "constitute a breach of an international obligation of that international organization." This condition can cause difficulties in attributing international responsibility to the EU, as the human rights catalogue applicable to the EU is far from determinate and unequivoque. The doctrinal and practical debate upon this

[8] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 20, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf
[9] *Third Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur*, International Law Commission, 57th Session (2 May – 3 June and 4 July – 5 August 2005), UNGAOR, UN doc. A/CN4/553.
[10] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 804.
[11] Another question that is not to be considered here for analogous reasons is one of the standing as a victim of the so-called collateral (indirect) victims of human rights violations.

question seems to accumulate all acute issues of human rights law and European law, starting from the applicability of human rights norms to non-state actors and extending to the EU pillar fusion and accession to human rights conventions (foremost the ECHR) and further on. A failure of the kind to identify the content of the applicable legal rules is truly detrimental to the individual's legal standing as it "leads to a situation where applicants are not able to effectively protect their rights"[12].

It is neither in the ambition nor in the capacity of this work to provide the magic-stick answer to these complex issues by exhaustively enlisting all the human rights obligations incumbent upon the EU and identifying their respective formal sources in international law. There have been numerous attempts to draft such catalogues, some very successful though not exhaustive, both in doctrine[13] and in the EU normative practice[14], all of which are not to be attempted to compile in this section. The basic premise of this work is that the EU is bound by human rights in the conduct of CFSP not only as a matter of a static foundational principle as laid down in Article 6(1) TEU[15], but also as a matter of a dynamic, enforceable obligation as founded on Article 6(2) TEU[16]. By means of these norms, human rights obligations, such as laid down by international treaty law[17] (such as the ECHR primarily and also the European

[12] August Reinisch and Ulf Andreas Weber, *In the Shadow of Waite and Kennedy: The Jursdictional Immunity of International Organisations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement*, in "International Organisations Law Review", vol. 1, 2004, p. 96.

[13] Allan Rosas, *The European Union and International Human Rights Instruments*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, T.M.C. Asser Press, The Hague, 2001, pp. 53-67.
See also: Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "Netherlands Quarterly of Human Rights", vol. 15, 1997, pp. 291-324; P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, pp. 111-138; E. A. Alkema, *The European Convention as a Constitution and its Court as a Constitutional Court*, in "Protection des droits de l'homme : la perspective européenne: mélanges à la mémoire de Rolv Ryssdal », pp. 41-63; P. Twomey, *The EU: Three Pillars Without a Human Rights Foundation?*, in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, 1994; Tristan Ferraro, *Le droit international humanitaire dans la politique étrangère et de sécurité commune de l'Union Européenne*, dans "Revue Internationale de la Croix-Rouge=International Review of the Red Cross", vol. 84, No. 846 (juin 2002), pp. 435-461; Dinah Shelton, *Remedies and the Charter of Fundamental Rights of the European Union*, in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy. Essays in European Law*, Hart Publishing, Oxford and Portland Oregon, 2004, pp. 349-363; etc.

[14] Principally the EU Charter of Fundamental Rights (as incorporated in the EU Constitutional Treaty) and preparatory documents.

[15] "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

[16] "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

[17] "guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories" (*Krombach v. Bamberski*, Case C-7/98, ECJ preliminary ruling, [2000] E.C.R. 1935).

Social Charter of 1961, the1951 Geneva Convention, the ICCPR and the CESCR of 1966, the International Convention on the Elimination of All Forms of Racial Discrimination, the European and global torture conventions, the Convention on the Elimination of All Forms of Discrimination against Women of 1979, etc.)[18], international customary law and *ius cogens* norms, are infiltrated in the EU legal order.

The applicability of an extensive human rights catalogue to the EU is a premise for this work. Taking into account Article 8 of the ILC Draft Articles on responsibility of international organisations:

> "Existence of a breach of an international obligation
> 1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.
> 2. The preceding paragraph also applies in principle to the breach of an obligation set by a rule of the organization,"[19]

violations of these human rights incur co-respective legal responsibility regardless if the specific right is formalised in an international act or in an EU act, such as the EU Charter of Fundamental Rights. According to Alain Pellet, the nature of the internationally wrongful act is not affected by the source of the violated obligation being conventional, customary or other.[20]

There is no limitation *ratione teritoriae* of applicability of these human rights obligations to the EU action in the framework of the CFSP, as Article 11 TEU does not lay down any territorial qualifications. Moreover, despite the recent controversial ECHR judgement in *Bankovic* case[21], the "Cause-and-Effect" notion of jurisdiction is well-established in the jurisprudence of the ECHR and the UN Human Rights Committee[22] and refers "to the relationship between the individual and the [perpetrator] in relation to a violation not to the

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[18] Allan Rosas, *The European Union and International Human Rights Instruments*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, T.M.C. Asser Press, The Hague, 2001, pp. 53-67.
See also: Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "Netherlands Quarterly of Human Rights", vol. 15, 1997, pp. 291-324.

[19] *Third Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur*, International Law Commission, 57th Session (2 May – 3 June and 4 July – 5 August 2005), UNGAOR, UN doc. A/CN4/553, p. 9.

[20] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 771.

[21] *Banković and Others v. Belgium and 16 Other Contracting States*, application no. 52207/99, European Court of Human Rights, admissibility, 19 December 2001.

[22] Kerem Altipark, *Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, in "Journal of Conflict&Security Law", vol. 9, No. 2, Summer 2004, p. 234. See also: Hurst Hannum, *Remarks on 'Bombing for Peace: Collateral Damage and human rights'*, in "ASIL Proceedings", vol. 95, 2002; Michael O'Boyle, *The ECHR and Extra-territorial jurisdiction - a comment on life after Bankovic*, in F. Coomans and M. T. Kammings (eds.), *Extra-territorial Application of Human Rights Treaties*, Intersentia, Antwerp/Oxford, 2004.

geographic location of the violation." [23] Thereby, the applicability of the EU human rights obligations is not limited to its own territory, a view that would even be nullifying of any human rights commitments of the EU taking into account that the CFSP *ipso facto* implies extraterritorial action.

The principal *ratione materiae* characteristics of the body of the EU human rights obligations are their horizontal "indivisibility, universality and interdependence", and the vertical divisibility in "rights v. principles" and in obligations "to respect v. to protect v. to fulfil" as practical criteria for their justiciability. In regard to the indivisibility, "the traditional division between the obligations not to interfere with civil and political rights on the one hand, and the obligations to provide economic, social and cultural rights, is no longer seen to represent the reality in the implementation of human rights."[24] Regardless their formal categorisation in one or another "generation", "all rights should be put on the same level and not selectively guaranteed, with some justiciable and others not." [25] The pure speculation that certain human rights would practically be more susceptible to violations as a result of the CFSP conduct and others – less, is not a legal argument to limit their scope of applicability. The EU itself has recognised that "the fact that certain [human] rights concern areas in which the EU has little or no competence to act is not in contradiction to it, given that, although the EU's *competences* are limited, it must *respect* all human rights wherever it acts and therefore avoid indirect interference also with such human rights on which it would not have the competence to legislate."[26] The EU human rights commitments can, nevertheless, in practical terms, be limited in the "vertical" aspect. Namely, first, only the "rights" *stricto sensu* as opposed to "principles" and "guidelines" are justiciable[27], and, second, the functional approach to human rights permits to differentiate the responsibility according to the character of human rights obligations "to respect" v. "to protect" v. "to fulfil", the probability of the international organisation to be held responsible for failure to comply with these levels of obligations respectively decreasing according to set legal standards[28].

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[23] Kerem Altipark, *Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, in "Journal of Conflict&Security Law", vol. 9, No. 2, Summer 2004, p. 239.
[24] Sigrun S. Skogly, *The Human Rights Obligations of the World Bank and the IMF*, in Genugtemr van Willen, Paul Hunt and Susan Hathews (eds.), *World Bank, IMF and Human Rights,* Nijmeigen, Wolf Legal Legal Publishers, 2003, p. 53.
[25] Dinah Shelton, *Remedies and the Charter of Fundamental Rights of the European Union,* in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy – Essays in European Law*, Oxford and Portland Oregon, Hart Publishing, 2004, p. 352.
[26] Final Report of Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, CONV 354/02, WG II 16, 22 October 2002, p. 5, para. 2.
[27] Florence Benoît-Rohmer, *La Charte des droits fondamentaux de l'Union européenne,* in « Le Dalloz », no. 19, 2001, p. 1485.
[28] See: UN Commission of Human Rights *Report on the Right to adequate Food as a Human Right.* 1987, Report by Asbjørn Eide, Special Rapporteur, UN Doc. E/CN.4/Sub.2,/1987/23;
Sigrun S. Skogly, *The Human Rights Obligations of the World Bank and the IMF*, in Genugtemr van Willen, Paul Hunt and Susan Hathews (eds.), *World Bank, IMF and Human Rights,* Nijmeigen, Wolf Legal Legal Publishers, 2003;

2.1. Notion of "violation"

a) "violation" v. "breach" v. "infringement"

The legal and political acts on breaches of international obligations by States or international organisations use a variety of terms to denote those – "violation", "breach", "infringement" – and an inevitable question arises if the difference in these terms mirrors a corresponding difference in their content. One might presume that there exists a certain relation of the extent of severity among them, by the connotation of the terms placing "an infringement", "a breach" and "a violation" in a sequence of increasing severity. Yet, there is no corroboration of such an approach in law.

The choice of terms merely relates to the fields of law which they refer to. Thus, the term "breach" relates to the field of contractual relations – it is used to signify the failure to fulfil a State's (or an international organisation's) contractual obligations in the Vienna Convention on the Law of Treaties between States[29] and in the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.[30] The term "infringement" is used, even though not as consistently, in the field of international torts. Tortuous liability for injurious consequences may arise from a damage that may have been caused without violation of any rule or norm of international and/ or institutional law[31], by mere infringement upon certain rights or interests[32]. In the human rights field, the term "violation" is generally used, as evidenced by the wording of the European Convention on Human Rights and Fundamental Freedoms[33] (further in the text – "ECHR"), the Charter of Fundamental Rights of the European Union[34], the United Nations International Covenant on Civil and Political Rights (further in the text – "the ICCPR")[35].

Maastricht Guidelines. Reprinted in *Economic, Social and Cultural Rights: A Compilation of Essential Documents,* Geneva: International Commission of Jurists, November 1997.

[29] See Articles 60 to 62 of the Convention.

[30] See Articles 60 to 62 of the Convention.

[31] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 28

[32] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 816.

[33] Article 13: "Everyone whose rights and freedoms as set forth in this Convention are *violated* shall have an effective remedy before a national authority notwithstanding that the *violation* has been committed by persons acting in an official capacity." Also see Articles 25, 32 and 65 ECHR.

[34] Article 47: "Everyone whose rights and freedoms guaranteed by the law of the Union are *violated* has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

[35] Article 2(3): "Each State Party to the present Covenant undertakes: a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

Thus, taking into account that this work focuses on the specific human rights aspect of internationally wrongful acts, which belongs neither to the contractual domain of international law, nor to the one of international tort, the term "violation" is chosen for use in this work to denote a state of affairs when there has been caused a "substantial adverse effect" [36] on an individual's human right so as to constitute an internationally wrongful act[37]. To set a general background, - in terms of general international public law, the substance of a breach of an international obligation is the disconformity between the conduct required of the subject of international law by that obligation and the conduct actually adopted by the subject of international law - i.e., between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example the ICJ has used such expressions as "incompatibility with the obligations"[38], "acts contrary to" or "inconsistent with" a given rule[39], and "failure to comply with treaty obligations"[40]. In the *ELSI* case, a Chamber of the ICJ asked the "question whether the requisition was in conformity with the requirements" of the relevant treaty.[41] The expression "not in conformity with what is required of it by that obligation" is the most appropriate to indicate what constitutes the essence of a breach of an international obligation.

b) the objective element of the act

A human rights violation like any other internationally wrongful act consists, by its objective part, of both a positive and a negative element. It is well-established that "the act should not necessarily consist of a positive act but can be also a simple omission" [42]. As re-affirmed by Article 3(2) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful acts, a conduct is intended to include actions and omissions; clearly, omissions are wrongful when an international organization is required to take some positive action and fails to do

[36] *The Future Role of the European Court of Justice,* House of Lords, European Union Committee, 6th Report of Session 2003-2004, 15 March 2004, p. 32-33.
[37] There is, however, one consideration of the severity of violations that raises interesting questions. In case that an act violating human rights constitutes also one of "most serious crimes of concern to the international community as a whole" (Art.5 of the Rome Statute of International Criminal Court), the act incurs individual criminal responsibility enforceable by the International Criminal Court. Even though, of course, beyond the scope of this work, the questions regarding the compatibility of various international responsibility mechanisms, their procedural co-ordination and remedial potential are worth special attention. In regard to the context of this work, it can be noted that the there is now a draft agreement to facilitate cooperation, support and assistance between the EU and the ICC in negotiations between the ICC and the European Union. The EU already has adopted a Common Position and an Action Plan to express its support for the Court.
[38] *nited States Diplomatic and Consular Staff in Tehran,* I.C.J. Reports, 1980, p. 29, para. 56.
[39] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports, 1986, p. 64, para. 115, and p. 98, para. 186, respectively.
[40] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 46, para. 57.
[41] *Elettronica Sicula S.p.A. (ELSI)*, I.C.J. Reports 1989, p. 50, para. 70.
[42] Pierre Apraxine, *Violation des droits de l'homme par une organisation internationale et responsabilité des états au regard de la Convention Européenne,* dans « Revue Trimestrielle des Droits de l'Homme », no. 21, 1995, p. 17.

so[43]. In regard to international organisations, Mr. Giorgio Gaja, the UN ILC Special Rapporteur on Responsibility of International Organisations, has pointed out that this provision on state responsibility applies also to responsibility of international organisations, yet it has to be concerted with the special provisions of the inter-state responsibility regime so as to comply with the positive horizontal obligations of States in their jurisdiction.[44]

Moreover, in establishing the occurrence of the unlawful conduct, the internal legality of the act in question is irrelevant. Even if the act was considered to be invalid under the rules of the organisation, it may entail its responsibility. The need to protect third parties requires attribution not to be limited to acts that are regarded as valid.[45]

2.2. Notion of "responsibility"

a) legal, judicially enforceable:

In this work, responsibility is perceived as a legal, judicially enforceable phenomenon. It constitutes only one form of the multifaceted, cumulative notion of accountability, alongside with "political, administrative, and financial accountability"[46]. A combination of the four forms provides the best chances for achieving the necessary degree of accountability of international organisations, yet, taking into account the legal approach of this work from the perspective of international public law and human rights law, the non-legal forms of accountability do not fall within its focus.

Amongst the legal remedies, judicial protection occupies a prominent, even ultimate, position. As articulated in the Recommendation on justiciability in the Expert Group report "Affirming Fundamental Rights in the European Union", submitted in February 1999, "[e]fficient safeguard of fundamental rights as a rule presupposes judicial protection."[47] Even though "varying degrees of binding results may be reached by alternative forms of dispute settlement or avoidance; beyond the classic techniques of arbitration, mediation of conciliation, the more

[43] *Third Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur,* International Law Commission, 57th Session (2 May – 3 June and 4 July – 5 August 2005), UNGAOR, UN doc. A/CN4/553, p. 3.
[44] Discussion with Mr. Giorgio Gaja, the Special Rapporteur on Responsibility of International Organisations, Research Forum on International Law, 26-28 May, 2005, Geneva, Switzerland, European Society of International Law.
[45] *Draft Articles on Responsibility of International Organisations*, International Law Commission, Report on the work of its 56th Session (3 May to 4 June and 5 July to 6 august 2004), Chapter V, UNGAOR 59th Session, Supplement No. 10, UN doc. A/59/10, p. 117.
[46] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 45.
[47] Dinah Shelton, *Remedies and the Charter of Fundamental Rights of the European Union,* in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy – Essays in European Law*, Oxford and Portland Oregon, Hart Publishing, 2004, p. 353.

innovative features of non-compliance procedures, inspection panels and ombudsman institutions (which, again, reach already into the area of political means of holding someone accountable)," [48] within this work judicial protection is considered to be the paramount form of redress for a human rights violation. Nevertheless, "a procedure with certain guarantees to be conducted before a legally competent court is indispensable for the stability of the entire accountability regime" [49]. The principle of access to contentious justice is essential for an effective human rights regime, and is best assured through judiciary settlement *stricto sensu* – by institutionalised, preliminarily established permanent judicial mechanisms (as opposed to the non-institutional forms like arbitration and *ad hoc/ post hoc* tribunals) following a predetermined fair procedure[50].

b) primary rules

In terms of content, only the primary rules of responsibility are relevant for the hypothesis advanced in this work. These rules are 'primary' in a double sense: in terms of the relations they govern, and in terms of the consequences they entail.

First, it is doctrinally established that "[...] primary rules of accountability govern the relationships between the international organisation on the one hand and its member states, non-member states, staff members and non-state parties dealing with it on a voluntary or incidental basis on the other hand"[51]. Thus, in the context of this work, the rules of responsibility as primary ones concern only the relation between the responsible corporate subject – the international organisation (the EU specifically) – and the third injured party – the person. It has to be considered that "[w]hen an international organisation is called to account, a corporate body is being dealt with: remedies will have to adapt to that factor, while at the same time raising the question of the joint or concurrent accountability of the member states."[52] Thus, the subsequent secondary or residual rules, on the other hand, regulate the international organisation's "recuperative initiatives", the internal measures for precise attribution of conduct or tracing back to the ultimate subject of responsibility, and are outside the scope of this work.

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[48] August Reinisch, *International organisations before national courts,* Cambridge University Press, 2000, p. 267.
[49] E. Schmidt-Assmann and L. Harrings, *Access to Justice and Fundamental Rights*, in "European Review of Public Law", vol. 9, 1997, p. 533.
[50] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 863.
[51] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 3
[52] *ibid*, p. 22.

Secondly, the rules are 'primary' in the sense that they only lay grounds for establishing responsibility, and not for its enforcement. The issues like the remedies against international organisations, contents and enforceability of international responsibility, and others, are crucial for ensuring the real effectivity of any responsibility mechanism, yet they pose sufficiently numerous and complex independent questions of considerable doctrinal and practical controversy so as to be excluded from the scope of this work.

c) international

Article 1(1) of the ILC Draft Articles on Responsibility of International Organisations clearly define that "[t]he present draft articles apply to the international responsibility of an international organisation for an act that is wrongful under international law." Thus, the qualification of "international" in an interrelated mode refers, first, to the wrongful acts and, second, to the character of responsibility itself. The *ratione materiae* of this work is the guarantees and standards of human rights as a component of the international legal order (as opposed to fundamental rights as the counterpart in the national/ domestic constitutional systems), and the correlating responsibility for their violations is the international one; the main reasons behind the fact that "[t]he interpretation of the law defining the status and responsibilities of international organisations could not be safely left to domestic courts [are]: the law itself was still rather underdeveloped and the future development of international organisations could be restricted by domestic judicial intervention." [53]

B.3. Ratione temporae

The legal analysis performed in this work (notably as concerns the politico-legal dynamics of the relations between the EU and the ECHR) is in terms of *ratione temporae* limited to the current state – the premises are drawn from the international and European law and political affairs as they stand now. These premises lay ground for sufficiently complex speculations and propositions, even without the "what-if" considerations as regards, for instance, the entry into force of the EU Constitutional Treaty and the EU's possible accession to the ECHR. This work is neither the place for historic overviews. There are no solvable equations that contain more than one variable – and within the scope of this work, the variable is the EU titular responsibility mechanism. Other hypothetical (future) considerations are here referred to only incidentally and insofar as they coincide with or help to fortify the line of argumentation undertaken in the work.

[53] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 213.

I. GENERAL ISSUES

A. LEGAL RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS (NOTABLY THE EU) FOR HUMAN RIGHTS VIOLATIONS

A.1. Lack of a general regime

The theme of "legal responsibility of international organisations, notably the European Union in the Common Foreign and Security Policy framework, for human rights violations" is a test-glass of a curious chemical experiment: while it is possible to define the contents and character of each of the separate elements contained therein – "international legal responsibility", "international organisations (notably the European Union)" and "human rights violations", combining any of them with any of the other two has an unpredictable synthesizing effect, creating a new element that does not equal to the mere sum of its constitutive elements; thus – "international legal responsibility for human rights violations", "legal responsibility of international organisations (notably the European Union)" or "human rights violations by international organisations (notably the European Union)" are issues that are not at all well defined in international law and are either, like the first, still undergoing consolidation, or, like the two last, only being acknowledged as acute. Combining all three of them, hence, is a new experiment that the result is still to appear. Therefore, the suggestions made in this work have the theoretical potential to alter the process and leave an impact upon the final synthesis, as far as they optimise other current developments on the issue and adapt them to the specifics of the functioning of the European Union.

There is a considerable gap left in international legal regulation by the acknowledgement of the potentiality of human rights violations by international organisations and the need to grant redress for those, yet by failing to elaborate adequate norms for addressing these issues. The increasing leverage of international organisations on the international scene "has been matched by a growing awareness that they have to account for their acts, actions and omissions."[54] It has been recognized that international organisations have achieved a sufficiently solid foundation in the international legal order for private persons to be able to have their disputes with those organisations heard, when this is required by the imperatives of justice. Nevertheless, this awareness has not been coupled with a true counter-action: just like in regard to the internal legal orders of States, but only some centuries later, "although fair and irrefutable, the idea of responsibility as the corollary of a right thrusted in tardily: responsibility of the public power for a long time appeared hardly reconcilable with the inegalitarian relation between the ruler and its subjects. Of all the reigns, that of the famous

[54] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 2

maxim 'the king cannot do harm' was the most durable one."[55] To explain the rhetorical illustrations in practical terms, "[w]hereas the international political and legal order has designed and put in place a comprehensive body of primary rules governing the acts, conduct and omissions of the main actors, coupled with an evolving system of secondary rules on the consequences of state responsibility, nothing similar appears to have occurred with regard to international organisations. Even the international legal framework governing the position of the individual, in both its protective and repressive aspect, seems to be well ahead of an analogous development for international organisations."[56]

Moreover, the few advances in the right direction have so far concerned other aspects of accountability than a genuine legal responsibility. "The question of judicial remedies has generally been regarded as peripheral to the main study of international law" [57], and attention has been focused either on other levels or forms of accountability than the legal responsibility for breaches of international law[58] or on the substantive rules with little consideration given to the consequences of their violation in general or judicial remedies in particular. Already in 1957 the International Law Institute (*Institut de Droit International*) demanded that "for every decision of an international organ or organisation that affects private rights and interests, appropriate procedures should be provided in order to settle, by judicial or arbitral methods, any juridical differences that might arise from such a decision."[59] Nevertheless, almost fifty years later there still exists no universal or at least general regime of legal responsibility of international organisations, even for such significant breaches of

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[55] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 762.
[56] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 1
[57] *ibid*, p. 10
[58] "Accountability of international organisations is a multifaceted phenomenon. The form under which accountability will eventually arise will be determined by the particular circumstances surrounding the acts or omissions of an international organisation, its member States or third parties. These forms may be legal, political, administrative or financial. A combination of the four forms provides the best chances of achieving the necessary degree of accountability.
The Committee considers that accountability of international organisations consists of three levels which are interrelated and mutually supportive:
- [First level] the extent to which international organisations, in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility;
- [Second level] tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law (e.g. environmental damage as a result of lawful nuclear or space activities);
- [Third level] responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are *ultra vires* or violate the law of employment relations)."
International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 5, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf
[59] *Annuaire de l'Institut de Droit International*, vol. 47(2), 1957, p. 488.

international law as human rights violations. Lack of legal accountability is "one of the most serious deficiencies in the present remedial regime *vis-à-vis* international organisations"[60].

A.2. Sporadic developments

2.1. General: Overall responsibility regime

The first rules relating to the responsibility of international organisations were sketched in the context of developing the regime of the international responsibility of States as the primary subjects of international law. The question of the responsibility of international organizations was dealt with by the UN International Law Commission (further in the text – "UN ILC") a number of times during its study of State responsibility.[61] International Law Institute (*Institut de Droit International*) in its Lisbon session (1995) adopted a Resolution on the Legal Consequences for Member States of the Non-fulfilment by International Organisations of their Obligations toward Third Parties[62]. The Draft Articles on Responsibility of States for internationally wrongful acts[63], finally adopted by the UN ILC in 2001, contained in Article 57 a *passerelle* provision introducing the previewed development of a comparable responsibility regime for international organisations: "These articles are without prejudice to any question of the responsibility under international law of an international organisation, or of any State for the conduct of an international organisation." As argued by the authoritative specialist of international public law Alain Pellet before the ILC in favour of the inclusion of the topic in the ILC long-term agenda, "the topic is the logical and probably necessary counterpart of that of State responsibility. [..] It is therefore particularly appropriate that it should follow on from the topic of State responsibility, just as the topic of treaties between States and international organizations or between international organizations followed on from that of the law of treaties (between States) in 1969. Otherwise, the general topic of responsibility, which is, together with the law of treaties, one of the pillars of the Commission's work and probably its masterpiece, would be incomplete and unfinished".[64]

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[60] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 266.

[61] *Syllabi on topics recommended for inclusion in the long-term programme of work of the Commission*; annex to the *R*eport of the International Law Commission on the work of its 52nd session (1 May to 9 June and 10 July to 18 August 2000), UNGAOR 54th Session, UN doc. A/55/10, p. 299.

[62] *Resolution on the Legal Consequences for Member States of the Non-fulfilment by International Organisations of their Obligations toward Third Parties*, Institut de Droit International, in *Annuaire de l'Institut de Droit International*, 1995, pp. 249-469.

[63] *Draft Articles on Responsibility of States for internationally wrongful acts*, UN International Law Commission, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV, UNGAOR 56th Session, Supplement No. 10, UN doc. A/56/10.

[64] *Syllabi on topics recommended for inclusion in the long-term programme of work of the Commission*; annex to the *R*eport of the International Law Commission on the work of its 52nd session (1 May to 9 June and 10 July to 18 August 2000), UNGAOR 54th Session, UN doc. A/55/10, p. 299.

Following on to that, at its 52nd session, in 2000, the ILC decided to include the topic "Responsibility of international organizations" in its long-term programme of work and the General Assembly, in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic. At its 54th session, the Commission decided, at its 2717th meeting, held on 8 May 2002, to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic. At the same session, the Commission established a Working Group on the topic. Currently, the ILC has now drafted, adopted and approved Articles 1 to 7 of the Draft Articles on the Responsibility of International organisations; at its 57th session, the ILC has considered the third report of the Special Rapporteur on the topic, and at its 2848th meeting, it adopted on first reading the draft Articles 8 to 16. In 2006, "it is previewed to adopt articles on the circumstances precluding the wrongfulness of acts and the rules on responsibility of States for wrongful acts by international organisations". [65]

In parallel, important contribution to the topic has been made by the International Law Association, under the auspices of which twenty-seven renowned specialists in several annual conferences since the first in 1996 have worked with the mandate: "to consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international organisations to their members and to third parties, and of members and third parties to such organisations."[66] The Final Report on Accountability of International Organisations presents a set of "Recommended Rules and Practices"; these represent "a series of specific rules and guidelines derived from principles aimed at achieving effective accountability"[67]. They are intended to be "relevant, pragmatic and feasible, and to be of practical help to those interested, both professionally and academically, in the accountability of international organisations" [68]

Unfortunately the legal effect of the aforementioned provisions, both the ILC Draft Articles and the ILA "Recommended Rules and Practices", is miniscule. The former are not legally binding – they can neither be considered "international convention", nor "international custom" or "general principle of international law", and can only be distantly approximated to the status of "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law" (Article 38(1) of the Statute of the

[65] Discussion with Mr. Giorgio Gaja, the Special Rapporteur on Responsibility of International Organisations, Research Forum on International Law, 26-28 May, 2005, Geneva, Switzerland, European Society of International Law.
[66] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 6, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf
[67] *ibid*
[68] *ibid*

International Court of Justice (further in the text – "the ICJ")) among the formal sources of international law. The latter do not even have that legitimacy - the generic rubric ""Recommended Rules and Practices" was chosen by the ILA specifically so as not to prejudge whether they should be seen as "recommendations for sound internal practice or whether they were operative on a legal level, and in the latter case whether they were *de lege lata* or *de lege ferenda*". No qualification of the status of these rules under international law may be inferred from their title. Moreover, due to the lack of international courts where an international organisation would have *ius standi*, there has not been developed any judicial practice which could be used as a subsidiary means of interpretation for these rules or constitute the "general practice accepted as law" (Article 38(1)b) of the Statute of the ICJ) and thus render these provisions binding as customary. To conclude, there is still a long way to go to have a set of legally enforceable rules of international organisations' international responsibility.

2.2. Special: Internal efforts of the European Union

The CFSP, inspired by the general principle of Article 6(2) TEU that "the EU shall respect fundamental rights" and the specific CFSP objective "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms" (Article 11(1) indent 5 TEU), has traditionally concerned itself with the pro-active rather than reactive/ passive observation of international human rights standards. Truly praiseworthy, these efforts of bringing human rights to the rest of the world, however, have ignored the simple truth that even the action with such a noble goal, and sometimes even more-so because of that, can haphazardly bring about human rights violations. There have been no notable efforts on the part of the EU to uniformly regulate the conduct of the CFSP actors in such cases so as to grant the best protection of the victim's right to a due remedy. The few sporadic efforts have remained on the level of internal accountability rules, avoiding the organisation's responsibility by "holding harmless" clauses and strict immunity provisions before national judicial systems of the host states; the most prominent advance has been trapped in the yet unratified Constitution for Europe.

a) secondary acts

The first promising sign towards the EU's acquiescence to assume responsibility for misconduct of the CFSP that might have caused a human rights violation was when, at the time of adoption of Common Position 2001/931/CFSP[69] the Council declared on 18

[69] Council Common Position of 27 December 2001 on the application of specific measures to combat

December 2001 that "any error as to persons, groups or entities named therein gives the injured party the right to seek legal compensation". Nevertheless, upon the attempt of several persons thus affected to claim such compensation on the grounds of the said Common Position 2001/931/CFSP, Council Declaration and Article 6 TEU, the Court of First Instance literally crushed all the hopeful interpretations of the declaration by stating firmly:

> "According to established case-law, the declarations made in the procès-verbal have limited value, in the sense that they cannot be taken into consideration for interpretation of a disposition of Community law if the content of this declaration is not anyhow expressed in the text of the disposition at stake and, therefore, has no legal significance (the ECJ ruling of 26 February 1991, *Antonissen*, C-292/89, Rec. p. I-745, para. 18, and ruling of 29 May 1997, *VAG Sverige*, C-329/95, Rec. p. I-2675, para. 23). It must be noted that the declaration at stake identifies neither the grounds for appeal, nor, *a fortiori*, the conditions for its launch. In any case, the declaration cannot refer to an appeal before the Community jurisdictions, as it would contradict all jurisdictional system set up by the Treaty on European Union."[70]

Another attempt, this time in a formalized act of practical application in the conduct of the CFSP, that raises some primitive concerns of responsibility are the Draft Guidelines on protection of civilians in EU-led crisis management operations, elaborated by the EU Council's Committee for Civilian Aspects of Crisis Management (CIVCOM) at the end of year 2003[71]. Their objective "to ensure that special protection, rights and assistance needs of civilians are fully addressed in all EU-led crisis management operations, in full compliance with the applicable obligations of Member States under relevant international law and under relevant UN Security Council resolutions", however, also failed to institute any positive change in regard to the responsibility of the CFSP actors for potential human rights violations ensuing from their action. The provisions of the Draft Guidelines continued the traditional EU's pro-active language of "taking all appropriate measures to facilitate respect of international norms for the protection of civilians" (para. 3), and the need "to ensure monitoring and reporting of alleged violations of human rights, international humanitarian or international criminal law" (para. 7); there are no provisions on the measures to be taken in the case that these alleged human rights violations were committed by the EU Crisis Management Personnel themselves.

Consequently, the concern about the possible lacuna in the passive aspect of human rights promotion was voiced by the Working Party of Foreign Relations Counsellors in the course of

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terrorism, *OJ L 344, 28.12.2001.)*

[70] *Segi and Others v Council of the European Union*, Case T-338/02, CFI order on admissibility, 7 June 2004, para. 39. See also the Order of the Court of First Instance (Second Chamber) of 7 June 2004. *Gestoras Pro Amnistia, J.M. Olano Olano, J. Zelarain Errasti v Council of the European Union supported by the Kingdom of Spain and the United Kingdom*, Case T-333/02, CFI order on admissibility, 7 June 2004.

[71] Council of the European Union, Committee for Civilian Aspects of Crisis Management, doc. No. 14805/2003, 14 November 2003.

elaboration of the Draft Agreement between the EU and some third states establishing a framework for the participation of some third states in the EU crisis management operations (framework participation agreement): "In addition the Working Party of Foreign Relations Counsellors agreed on the need to examine as soon as possible issues related to liabilities arising from the EU civilian crisis management operations."[72] Any examination, if such, of these issues remains hidden in the corridors of the Council of the EU, but the next evidence of these concerns available to the public appears in the Generic Standards of Behaviour for ESDP Operations[73]. Even though a valuable proof of goodwill on the part of the EU, again the document fails to institute any legally binding standards for the ESDP field actors, or even to explicitly state them being bound by international human rights norms, not even to talk about any primitive form of an international judicially enforceable EU responsibility for potential violations of human rights by the ESDP operations. The only subjects of these standards of behaviour are the "personnel of ESDP operations", and the forms of responsibility for "not adhering to the required standards of behaviour [which is considered] misconduct [are] disciplinary measures; this is independent of possible criminal procedures according to the relevant national regulations." (para. 1) On the internal accountability level, important is the explicit duty for the ESDP operations to "establish a fair and unbiased complaint procedure" (para. 2 indent 3) and to assure that "serious incidents are reported through the EU chain of command" (para. 2 indent 4).

The complaint procedure was elaborated upon in more detail in the Draft Model Agreement on the Status of European Union-led forces between the European Union and a Host State[74]. Its Article 15 "Claims for death, injury, damage and loss" establishes a complaints system for "claims brought by legal or natural persons from the Host State" "for damage to or loss of civilian [or government] property, as well as claims for death of or injury to persons". These claims are subject to, first, amicable settlement procedures, then, in the case of their failure, to a claims commission constituted by the EUFOR and the representatives of the Host State, and further on, depending on the amount of the claim, either settled by diplomatic means or submitted to an arbitration tribunal. This procedure is the nearest approximate to a quasi-judicial one that can be found in the CFSP operational rules. Far from providing the claimant with all the due guarantees of fair trial, having only an *ad hoc* character in the context of the specific ESDP operation and referring merely to the claims for damage to property and death

[72] Council of the European Union, Foreign Relations Counsellors, *Draft Agreement between the EU and some third states establishing a framework for the participation of some third states in the EU crisis management operations (framework participation agreement)*, doc. No. 6040/04, 6 February 2004, para. 6.
[73] Council of the European Union, *Generic Standards of Behaviour for ESDP Operations*, doc. No. 8373/2/05, 2 May 2005.
[74] Council of the European Union, *Draft Model Agreement on the Status of European Union-led forces between the European Union and a Host State*, doc. No. 8720/05, 18 May 2005.

or personal injury and not to the wider human rights catalogue, this claims procedure nevertheless is at least a pre-historic antecedent of a possible EU legal responsibility regime for human rights violations ensuing from the conduct of the CFSP.

b) primary law

While the current provisions of primary law definitely exclude the CFSP from the ECJ jurisdiction by means of Article 46 TEU, the EU Constitutional Treaty contains a novelty contesting the monolith stance of the EU on this quasi-taboo issue. As if having learned from the negative after-tones of the CFI rulings in the previously mentioned cases of *Segi and Others v Council of the European Union* and *Gestoras Pro Amnistia, J.M. Olano Olano, J. Zelarain Errasti v Council of the European Union supported by the Kingdom of Spain and the United Kingdom*, the EU Constitutional Treaty contains a provision on the ECJ jurisdiction over economic sanctions, despite their legal grounds falling within the scope of the CFSP.

Article III-376 of the EU Constitutional Treaty in the first paragraph maintains the general exclusion of the CFSP from the jurisdiction of the ECJ, but in the second paragraph identifies two exclusions to it:

> "However, the Court shall have jurisdiction to monitor compliance with Article III-308 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V."

The first exclusion from the general rule refers to monitoring the "borderline" of the EC and the EU CFSP competencies, as already permitted, but the second exclusion is new: it enables "[a]ny natural or legal person [..] to institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her" (Article III-365(4)), even if the act is adopted in the framework of the CFSP; in fact the targeted acts are economic sanctions. This is a remarkable advance, as it pierces the formal shield of the CFSP in order to grant the individuals the same rights of judicial review of acts to direct relevance to their legal status as assured in the EC legal order. Thereby, the protection of individual right to a due remedy is prioritised over the formal argument of foreign policy being exempt from judicial review. Such an approach epitomizes the general approach of this work.

Unfortunately, there has been noted a problematic aspect even in this provision: the express grant of jurisdiction where the sanctions are taken against natural or legal persons seems to suggest that there is no jurisdiction where the sanctions are taken against countries. If that is right, the ECJ's jurisdiction under the EU Constitutional Treaty would be more limited than

presently exists under the Treaties: the ECJ at present has jurisdiction also in respect to the restrictive measures taken against one or more third countries. Professor Anthony Arnull has noted that "the EU Constitutional Treaty thus appeared to deprive persons of rights currently enjoyed to challenge any measures for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries adopted pursuant to the CFSP" [75]. In his view, "both types of restrictive measure could have adverse consequences for natural and legal persons, who ought therefore to have the right to challenge either of them"[76].

However, the paramount problem in regard to this provision lies in the murky prospects as to the potential entry into force of the EU Constitutional Treaty. Until it becomes a legally binding primary act, the progressive provision on judicial review of individual CFSP acts, and also the comparably positive considerations to grant the ECJ "jurisdiction *ex ante* in the field of Title V TEU"[77] remain in a deadlock and can be an object of mere theoretical speculations.

A.3. Potential basis for developments

These hesitant developments towards the still overly ambitious idea of an international responsibility regime for the EU in the cases of human rights violations by the conduct of the CFSP do not take place in a legal vacuum. It reflects the slow parallel advances in other fields of law – be it international or national – that regulates relations between subjects of unequal distribution of power. The parallels can be drawn both in terms of the subject of responsibility, and sectorally – similar ideas characterize the latest dynamics of the international law of environment protection and the domestic rules of consumer protection.

3.1. Analogy by subject

The responsibility regime of international organisations finds its general context not only in the state responsibility regime, but also in the increasingly actual non-State actors' doctrine. There is a global trend of shifting governance tasks from States to non-State actors on the international scene. We are thus confronted with "a simultaneously upward and downward trend of conferring upon non-state actors duties that could be traditionally described as 'governmental' while the state itself appears to be more and more on the 'retreat'" [78]. While, "downwards", more and more private for-profit and non-profit organisations step in to fill the

[75] *The Future Role of the European Court of Justice,* House of Lords, European Union Committee, 6th Report of Session 2003-2004, 15 March 2004, p. 34.
[76] *ibid*
[77] Final Report of Working Group III "Legal Personality", the European Convention, CONV 305/02, WG III 16, 1 October 2002, para. 44.
[78] August Reinisch, *Governance Without Accountability?,* in "German Yearbook of International Law", vol. 44, 2001, p. 270.

void left by states, "upwards" there is a tendency to move governance tasks to inter- and supranational entities like the UN, the World Trade Organisation, or, as notable in the context of this work, to the EU. Consequently, awareness is rising of the need to regulate responsibility issues in regard to multinational corporations, international financial institutions, and even non-governmental organisations and social movements.

The most developed doctrinally and also practically among those is the responsibility meta-regime for multinational corporations or corporate groups. It has become clear that "the globalisation of economics has facilitated the growth of *de facto* power of multinational corporations, as international trade law essentially grants [them] numerous rights and no enforceable duties"[79]. The statement on their capacity to cause human rights violations is fully attributable to international organisations as well – in regard to both "[t]here is no doubt that [they] can and do perpetrate human rights abuses, like probably all entities. The effects of [their] abuse are, however, amplified by [their] inherent power." [80] Despite the efforts to establish general guidelines for self-regulation on international level[81], "[p]resent methods of imposing accountability on multinational corporations are deficient. There is therefore a need for reform of the international human rights regime to counter [their] *de facto* impunity." [82]

Interestingly, there are some elements of the EU titular responsibility model as promoted by this work, evident in the European regulation of the allocation of responsibility in corporate groups. The disadvantage of the traditional approach to the liability of corporate groups (a parent company cannot be held liable for the conduct of other members of the corporate group) is considered to be its unpredictability. Liability of the parent there depends on *ad hoc* decisions taken by the courts and there are no straightforward criteria for allocating liability. Therefore, the European Commission has proposed a harmonisation of legislation in the EC based on a different - "enterprise" approach: a parent company would be liable for the conduct of its subsidiaries on the grounds of the corporate control exercised by the former (draft Ninth directive). Moreover, the ECJ and the European Commission are developing their own doctrine on corporate group liability when dealing with non-EC parent companies suspected of anti-competitive conduct within the common market area. According to this doctrine, the so-called enterprise approach, the mere existence of a subsidiary relationship is

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[79] Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights,* in "Netherlands International Law Review", vol. XLVI, 1999, p. 202.
[80] *ibid*, p. 173.
[81] European Commission, *Promoting a European Framework for corporate social responsibility*, Green Paper, 2001.
Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2003.12/Rev.2.
[82] Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights,* in "Netherlands International Law Review", vol. XLVI, 1999, p. 201.

sufficient to establish jurisdiction over the parent company. [83] The EU titular responsibility model, proposed by this work, is based on the same *mutatis mutandis* applicable principles, only as refers to the allocation of responsibility and attributions of conduct in the relations between the EU and the Member States and other CFSP actors.

3.2. Analogy by sector

The fragmentation of the international legal order according to the rising degree of technicality of the domains subject to legal regulation has led to a prevailing *ad hocism*[84] in the legal solutions for the hazardous consequences of the actions in these domains - "each entailing tailor-made non-compliance procedures and remedies" [85]. Nevertheless, these particular regimes fit within the overall system of international law and demonstrate some common features that can be made transversally functional.

a) environment protection

Other parallels can be drawn between the EU titular responsibility model and the international environment law. Both of these prioritise the hazardous effect of actions – either on human rights or on environment – over the subjective element of the action and the lawfulness of the action in itself in international law. Besides, both fields share the same principles which, then, are reflected in the elaboration of the relevant remedial regimes.

International environment law is specific in the sense that it contains provisions on strict liability of the actors "in regard to such ultra-hazardous activities as space activities or nuclear activities"[86]. The ILC Report of the Working Group on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law stipulates in Article 5 that "the liability arises from significant trans-boundary harm" [87]. Thus, also apart from the aforementioned ultra-hazardous actions, the international responsibility for environmental damage is largely based on the objective fact of damage merely, without obliging the victim

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[83] K. Tiedemann, *La responsabilité pénale dans l'entreprise. Vers un espace judiciaire unifié ? Rapport introductif*, dans « Revue de science criminelle et de droit pénal comparé », 1997, pp. 563-566.
[84] Andrea Bianchi, *Ad-hocism and the Rule of Law*, in "European Journal of International Law", no.1, vol. 13, 2002, p. 263.
[85] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 11.
[86] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 30, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf
[87] *Report of the Working Group on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law*, International Law Commission, Report on the work of its 48th Session (6 May – 26 July 1996), UNGAOR 51st Session, Supplement No. 10, UN doc. A/51/10, p. 270.

to establish the fault on the part of the responsible subject[88]. The EU titular responsibility model attempts to establish the fact of human rights violation as the prime formal criterion for establishing the titular responsibility on the part of the EU without the burdensome *onus probandi* for the individual to establish the precise factual elements needed for due attribution of conduct according to the general rules laid down in the ILC Draft Articles on Responsibility of international organisations. Moreover, in international environment law the responsibility can be incurred "even though the risk that [the actions] would [cause harm] was not earlier appreciated" and "even though the action causing the harm is not prohibited by international law"[89]. The EU conduct of the CFSP shares the same features – it neither previews the potentiality of causing human rights violations (as it is intended precisely to avoid those committed by third parties), nor is internationally unlawful in substance; nevertheless, even such action needs to be acknowledged as capable of causing harm (to human rights) which needs to be duly repaired under international law.

An unusual comparison, yet the general principles of international environment law and human rights law do reveal a close parallel. First, the subjacent idea of sustainable development, which implies conciliation of the exigencies of development with those of protection of environment in international environment law[90], can in terms of international human rights law be conveyed as a comparable balancing of the exigencies of the public interest in international peace and security concerns (just to mention anti-terrorism measures, peace enforcement missions etc.) with the private ones of a due protection of individual rights. The second shared principle is that of prevention and precaution[91]. And, finally, both environment and human rights protection necessitate "cooperation among states" – "a functional need due to the trans-boundary effects [of the environmental/ human rights issues], that progressively grows into a legal obligation with a more and more precise legal content".[92]

b) consumer protection

[88] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, pp. 1294-1295.
[89] *Report of the Working Group on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law*, International Law Commission, Report on the work of its 48th Session (6 May – 26 July 1996), UNGAOR 51st Session, Supplement No. 10, UN doc. A/51/10, p. 271.
[90] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 1306
[91] *Report of the Working Group on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law*, International Law Commission, Report on the work of its 48th Session (6 May – 26 July 1996), UNGAOR 51st Session, Supplement No. 10, UN doc. A/51/10, p. 270.
[92] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 1310.

The consumer protection regime shares with the EU titular responsibility model the evident favouritism of the individual in his/ her relations with subjects of superior powers of control over the factual and legal situation at stake – be it in regard to public services the corporate provider or in regard to international human rights such an international organisation as the EU. Both regimes attempt to undertake an "affirmative action" towards the individuals so as to implement the rule of equality of arms.

Thus, in Europe there has been in recent years a real determination to open up public services and to make them more responsive to their "customers". Alongside sophisticated systems of judicial review, a "bottom up" complaints culture has been developed with the objectives to raise the standards of delivery of public services and to empower the citizen when the service delivered was sub-standard. [93] The EU titular responsibility model addresses analogical concerns in the context of the international organisation's extraterritorial activity that occasionally fails to observe the same standards of protection of human rights that it promotes. If perceiving the protection of human rights and "the availability of judicial assistance to safeguard one's rights" an "international public good"[94], the international organisation's conduct can in such case be considered a sort of a "sub-standard public service" treatable by analogy to the consumer protection rules. The EC consumer law specifies that complaints systems for breaches should be: "easily accessible and well-publicized; simple to understand and use; speedy, responsive, and communicative; fair, with a full and impartial investigation; and effective in the sense of providing appropriate redress" [95]. These requirements are fully transferable to the human rights field in regard to the CFSP conduct.

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[93] Carol Harlow, *Access to Justice as a Human Righ: The European Convention and the European Union*, in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights*, Oxford University Press, 1999, pp. 206-209.

[94] August Reinisch, *International organisations before national courts*, Cambridge University Press, 2000, p. 252.

[95] Carol Harlow, *Access to Justice as a Human Righ: The European Convention and the European Union*, in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights*, Oxford University Press, 1999, pp. 206-209.

B. RATIONALE FOR ESTABLISHING THE EU HUMAN RIGHTS RESPONSIBILITY IN THE CFSP

With the EU being "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law," (Article 6(1) TEU) and carrying out its CFSP with an objective "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms," (Article 11(1) TEU), it seems almost a blasphemy to feebly raise the question of the EU being actually not only capable to "promote", "develop" and "consolidate" human rights, but .. also to violate them. Yet, the question is not at all so feeble, there are other concerned notices that "to pretend at the end of this century that human rights can be guaranteed to all those who need them by simply affirming the principle of respect for human rights, is a position which is, at best, overly complacent." [96] The cause of the human rights violation may be "a failure of individual or organisational judgment, an absence of co-ordinated international strategies, a lack of respect for human values by local parties, bad luck, or some combination of these and other factors"[97]; nevertheless, even if the violation has occurred without such purpose, even on the contrary – as a "collateral damage" to measures aiming at human rights' promotion – the violation remains just as any other human rights violation, which demands establishment of responsibility on the part of the subject and a due redress. The need for holding the EU responsible for the human rights violations that can potentially ensue from the conduct of the CFSP having grounds in factual, functional, legal and even ideological motives, it is astonishing to note how few effective advances have been made thereto.

B.1. Factual

A typical argument in the EU circles in response to the question of the lack of responsibility mechanisms is: "Why? The EU does not violate human rights." Really, international mechanisms of responsibility for human rights violations, as practice shows, have often been set up reactively – due to the pressing need to address already occurred human rights violations. The International Criminal Tribunals for Former Yugoslavia and for Rwanda are typical examples; the whole system of human rights emerged partly as a response to the atrocities of the Second World War. Nevertheless, it should not be forgotten that the EU's own emphasis on human rights' *promotion* emanates from the principle "better prevent than heal". Following this reasoning, the set up of an effective mechanism of redress for potential

[96] P. Alston and J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights,* in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 13.
[97] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 191.

human rights violations ensuing from the CFSP conduct should not be postponed until real and serious cases surface. Moreover, in the situation when it is bound to happen any moment: the increasingly frequent identification of threats upon human rights of third parties posed by agents of international organizations with overlapping *ratione teleologica* or *ratione geographica* with that of the EU under CFSP are sufficient grounds to believe that.

The doctrinal assumptions as of the potentiality of human rights violations by international organisations have been outrun by clear events. If ten years ago it was only speculated that: "In the exercise of their mission, it can not be excluded that the international organs infringe some rules guaranteeing the individuals the protection of certain fundamental rights" [98], then now it is unfortunately a reality. The recent "sex scandal" at the UN Peacekeeping Mission in the Democratic Republic of Congo, publicising the "routine" practices of sexual abuse of local women by the MONUC peace-keeping forces[99], gave new resonance to the concerns that had been already previously raised in regard to the KFOR action in Kosovo[100] and SFOR in Bosnia and Herzegovina. There, despite the "firm commitment to the rule of law", cases of arbitrary detentions, violations of the right to private life and to property, as well as other cases of abuse of power that remain unaddressed are reported.[101] In Congo, the violations reached, according to Mr. Kofi Annan's words, "'shameful' acts of gross misconduct"; he added that those involved must be held accountable. Two years ago, a UN investigation rejected similar allegations of sexual exploitation of refugees by UN staff in West Africa[102].

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[98] Pierre Apraxine, *Violation des droits de l'homme par une organisation internationale et responsabilité des états au regard de la Convention Européenne,* dans « Revue Trimestrielle des Droits de l'Homme », no. 21, 1995, p. 13.

[99] Jean-Philippe Remy, *Les Nations unies jouent leur crédibilité dans l'est du Congo,* dans « Le Monde », Dimanche 27-Lundi 28 Mars 2005, no. 18715, p. 2 ;
Corine Lesnes, *L'ONU propose des mesures radicales pour lutter contre les abus sexuels commis par les casques bleus*, dans « Le Monde », Dimanche 27-Lundi 28 Mars 2005, no. 18715, p. 2.

[100] "US Department of State, Human Rights Report for Yugoslavia, Part VI, (web bannet.org): "In January [2000] authorities accused a KFOR soldier, Sergeant Frank Ronghi, of raping and killing a 12-year old Albanian girl. A military tribunal subsequently convicted Ronghi and sentenced him to life in prison."
US Department of State, 2003 Report on Human Rights in Serbia and Montenegro: "On October 7, a former CIVPOL officer, Martin Almer, was sentenced to 3 years in prison, and two former KPS officers, Feriz Thaqi and Isa Olluri, were sentenced to 6 months in prison for causing minor injuries, forcing Gezim Curri from Gjakova to give a false statement, and for physical abuse. Almer returned to his home country immediately after the incident in February 2002 and was later sentenced in absentia."
On 8 April 2004, two Kosovo Albanians won a case for negligence and trespass to the person against the Ministry of Defence before a British Court. They had been injured by British Marines on active military service in Kosovo in July 1999 (Bici case)."
See: *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, European Commission for Democracy Through Law (Venice Commission), Opinion No. 280/2004, CLD-AD(2004)033, 11 October 2004.

[101] *The Apparent Lack of Accountability of International Peace-keeping forces in Kosovo and Bosnia – Herzegovina,* Amnesty International Report, AI index: EUR 05/002/2004, April 2004;
Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, European Commission for Democracy Through Law (Venice Commission), Opinion No. 280/2004, CLD-AD(2004)033, 11 October 2004.

[102] http://news.bbc.co.uk/2/hi/africa/4027319.stm

Embarking upon the peace-keeping and crisis management operations, the EU has entered into a sphere where the amount of control vested into its forces proportionally entails the possibility of misuse of these powers in hazard to human rights of third parties, and needs to be accompanied by apposite mechanism of responsibility. Even if there are no actual cases of human rights violations, the obvious lack of accountability by itself is frustrating. The President of the Helsinki Committee for Human Rights in Bosnia and Herzegovina, Mr. Srđan Dizdarević, is tough on these issues: "It is clear that impunity has no excuse and it is incompatible with the principles of the rule of law. In the Bosnian case, the international community was supposed to build the rule of law and to enhance the protection of human rights. Now, especially after September 11, it is violating human rights and encouraging local violators to continue with the violations."[103] Not only under the auspices of ESDP, but in the CFSP in general "increasingly the EU is adopting instruments liable directly or indirectly to affect the rights of individuals."[104] There have been other cases reported of individuals from third countries claiming EU responsibility for CFSP acts in violation of their rights: "Case of an officer who invoked Union liability for bodily injury sustained in Bosnia and Herzegovina; case of a company invoking the Union's non-contractual liability for damages sustained as a result of sanctions against FRY; case of Yugoslav citizens invoking the Union liability for damages sustained as a result of the visa ban on the basis of a Council joint action." [105]

Consequently, there is no better time than "now" to address these ever-increasing concerns of the lack of due judicially enforceable responsibility of the EU for the, if not actual, then largely potential cases of human rights violations resulting from its CFSP activities. The recognized specialist of international law on responsibility Dinah Shelton agrees: "As the powers and functions of the EU increase in quantity and quality, protection of individuals who may suffer harm as a result of misconduct or violation of protected rights is of growing importance."[106] Also confirmed by Andrew Clapham, - "the concept of an EU employee violating the rights of an individual is no longer an abstract problem".[107] The implied powers

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[103] President of the Helsinki Committee for Human Rights in Bosnia and Herzegovina, Mr. Srđan Dizdarević, in a letter to the author of the work; 7 June 2005.
[104] Final Report of Working Group III "Legal Personality", the European Convention, CONV 305/02, WG III 16, 1 October 2002, para. 43.
[105] *ibid*
See also: *Royal Olympic Cruises v. Conseil*, Case T-201/99, CFI order, 12 December 2000, ECR II-4005; Case C-49/01 P, appellation dismissed by the ECJ, 15 January 2002.
[106] Dinah Shelton, *Remedies and the Charter of Fundamental Rights of the European Union,* in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy – Essays in European Law*, Oxford and Portland Oregon, Hart Publishing, 2004, p. 363.
[107] Andrew Clapham, *Where is thee EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 675

of an international organisation "which are essential to the performance of its duties"[108] would currently include not only the power but also the duty to establish appropriate remedial mechanisms to do justice between the international organisation and third parties.[109]

B.2. Functional

As Article 11(1) indent 5 TEU states, one of the objectives of the CFSP shall be "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms"; in this context also, "[t]he Council shall ensure the unity, consistency and effectiveness of action by the Union" (Art. 13(3) TEU). The requirement of consistency - coherence and credibility – is "an essential element for the effectiveness of the EU's human rights foreign policy"[110]. There are several levels on which the requirement of consistency calls for establishing a mechanism of EU responsibility for human rights violations:

2.1. Active v. passive

The EU has de-linked the two aspects of human rights policy and assumed to be bound only by its *active* element – promotion of human rights[111] – and unconcerned by the *passive* element – assuming responsibility for human rights violations. There is a need to ensure consistency between the existing international monitoring of Member States and the EU decrying violations of human rights in third States and the absence of any international accountability for the EU. As argued by Andrew Clapham, "[t]he bigger issue is to ensure that the EU can be held internationally accountable in the same way that the EU demands that

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[108] *Reparations for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, ICJ Reports (1949), p. 182

[109] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 26

[110] Andrew Clapham, *Where is the EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?* In Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 642

[111] "The Union is a powerful and uniquely representative actor on the international scene. It has the responsibility, reinforced by the capacity and financial resources, to influence significantly the human rights policies of other States as well as those of international organisations. In recognition of this responsibility it has insisted that States seeking admission to the Union must satisfy strict human rights requirements (Art. 49 TEU). Other governments wishing to enter into co-operation agreements with the Union, or to receive aid or benefit from trade preferences, must give an undertaking to respect human rights. If that undertaking is breached, serious consequences can ensue. It has adopted a number of declarations underlining the importance of human rights in its external relations and it has given substance to this approach by funding a wide range of development co-operation initiatives with major human rights components, It has sought to strengthen the capacity of civil society in many countries to protect human rights, has funded election monitoring and human rights monitoring, and has played an active role in support of human rights in multilateral contexts."
P. Alston and J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights,* in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 7.

non-Member States submit to international procedures and reporting. [112] There is a certain irony in the fact that in relation to its external policies, the EU has, "by virtue of its emphasis upon human rights in its relations with other states and its ringing endorsements of the universality and indivisibility of human rights, highlighted the incongruity and indefensibility of combining an active external policy stance with what in some areas comes close to an abdication of internal responsibility" [113].

2.2.Internal v. external

There is a dramatic chasm between the human rights policy in the EC and in regard to the EU's external action in CFSP. In the former, the effectivity of human rights protection is conditioned upon access to judicial remedy: judicial review by the ECJ itself "reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Art. 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."[114], as well as is viewed as "one of the constitutive elements of a Community based on the rule of law"[115]. The CFSP is exempt from judicial review.

To borrow[116] from the ECJ case-law the so-called principle of parallelism between internal and external competencies, as articulated in the *A.E.T.R.* case[117], and instrumentalise it in the latter context, would enable the EU to take all measures needed for synchronising the role of responsibility regardless the domain of EU action – internal or external. It is, however, prudent to acknowledge from the outset that this approach would not easily gain acceptance – not only for the strict legal rules on application of the notions of the EC law only within its own "specific legal order", but also for the inconsistency of its underlying idea with the political reasoning: "There is an unfortunate, although perhaps inevitable, element of

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[112] Andrew Clapham, *Where is the EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?* In Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 640

[113] P. Alston and J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights,* in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 7.

[114] *P&O European Ferries (Vizcaya) v. Commission,* Joined Cases T-116/01 and T-118/01, CFI decision, 5 August 2003, [2003] ECR 000.

[115] *Philipp Morris International Inc. And Others v. Commission*, Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, CFI decision, 15 January 2003, [2003] ECR 000, also *Les Verts v. European Parliament*, Case 294/83, ECJ judgment, 23 April 1986, [1988] ECR 1339.

[116] noting the particularity of applying notions of international/ EC law to the CFSP only by transposition of their substance – *mutatis mutandis* – not directly and with the same legal content

[117] *Commission v. Council (European Road Transport Agreement - ERTA)*, Case 22/70, ECJ Judgement, 31 March 1971, [1971] *ECR* 263, pp. 263 et seq.

schizophrenia that afflicts the EU between its internal and external policies or, to put it differently, between its first, second, and third pillars."[118]

2.3. Substantive v. procedural

In order to be practically effective, human rights need not to be perceived as merely substantive primary rules laying down certain guidelines of rightful action and limits for an action to be considered wrongful. It is a well-established principle that "procedural justice is an essential precondition for substantive justice"[119], therefore secondary rules that regulate the actors' behaviour in case of violation of the primary, substantive rules, are an indispensable aspect of the human rights regime. Taking into account that "[p]rocedural rights, notably the rights of formal equality before the law and of *access to a court*, are seen as an essential buttress for substantive rights,"[120] access of the victims of human rights violations to mechanisms that can redress harm and impose accountability is vital. Procedure and substance can not be separated, and the outcome of a procedural dispute is directly influences the substantive issue.

B.3. Legal - access to justice as a human right

In order to avoid mere sloganisation of Article 6 TEU and Article 11(1) TEU, the EU cannot bluntly ignore such a well-established international legal norm as the access to justice. Moreover, with Article 47 of the EU Charter of Fundamental Rights laying down that "*everyone* whose *rights and freedoms guaranteed by the law of the Union* are violated [..] is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law", it remains unclear why the formal placement of some EU action in the CFSP "pillar" would constitute sufficient grounds for excluding it from any judicial scrutiny even in the cases of human rights violations. Ultimately, "it would be quite ironic to negate the rights of individuals on the assumption that they might be incompatible with the functions of international organisations'[121]; the functional needs of an international organisation should always be subordinated to basic international human rights standards,

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[118] P. Alston and J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights,* in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 9.

[119] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 63.

[120] Carol Harlow, *Access to Justice as a Human Right: The European Convention and the European Union*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 188.

[121] M. Arsajani, *Claims against International organisations: Quis Custodiet Ipsos Custodes?,* in "Yale Journal of World Public Order", Vol. 7, 1980-1, p. 175

such as the right to adequate means of redress in the case of violations of one's rights.[122] The ICJ has ruled that not to afford judicial remedy would "hardly be consistent with the expressed aim of the [UN] Charter to promote freedom for individuals and with the constant preoccupation of the UN to promote this."[123] This principle applies to all international organisations.[124] The access to justice is not just a matter of "political correctness", it is a human right which needs to be enforced, notably in the functioning of the EU itself.

As to the grounds of this right in international law, it derives from the right to a remedy and the right to free trial, well established norms of customary international law, which "include both the 'procedural right of effective access' and 'the substantive right to a remedy'"[125]. Though most human rights instruments do not expressly comprise a right of access to court, it is clear from the interpretation of the texts that the fair trial guarantees contained in such documents as the Universal Declaration of Human Rights,[126] the International Covenant on Civil and Political Rights (further in the text – "the ICCPR"),[127] the European Convention of Human Rights (further in the text – "the ECHR"),[128] and others[129] include a right of access to court. For the ECHR this was expressly acknowledged in a number of judgments where the European Court of Human Rights (further in the text – "the ECtHR") held that Article 6 (1) ECHR "embodie[d] the right to a court" because it "secure[d] to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal";[130] "the right of access [to court] constitutes an element which is inherent in the right stated by Article 6(1) ECHR"[131]. That the fair trial guarantee includes a right of access to court is also

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[122] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 15

[123] *Effects of awards of compensation made by the UN Administrative Tribunal*, Advisory Opinion of 13 July 1954, ICJ Reports, 1954, p. 57.

[124] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 33, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

[125] Dinah Shelton, *Remedies in International Human Rights Law*, Oxford, Oxford University Press, 1999, p. 14-15.

[126] Art. 10, Universal Declaration of Human Rights, provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[127] Art. 14, para. 1, International Covenant on Civil and Political Rights, provides, *inter alia*, that "[a]ll persons are equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

[128] Art. 6, para 1, European Convention on Human Rights, states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[129] In the *Rubio* Case the ILOAT seemed to acknowledge "that refusal to entertain [the applicant's] case would be denial of due process and contrary to general principles, to the Universal Declaration of Human Rights and to the American Convention on Human Rights of 22 November 1969." See: *Rubio* v. *Universal Postal Union*, ILO Administrative Tribunal, Judgment No. 1644, 10 July 1997.

[130] *Waite and Kennedy* v. *Germany*, Application No. 26083/94, European Court of Human Rights, merits, February 18, 1999; and *Osman* v. *United Kingdom*, application No. 23452/94, European Court of Human Rights, merits, 28 October 1998.

[131] *Golder* v. *United Kingdom*, application No. 4451/70, European Court of Human Rights, merits, 21

true for the other human rights documents.[132] In addition there is a strong argument in favour of the existence of unwritten international law, be it a general principle of law or a customary rule, which demands the availability of judicial or quasi-judicial remedies.[133] Such demands underlie the traditional rules prohibiting a denial of justice[134].

B.4. Ideological

To slightly dilute this discourse based on a concentration of legal norms with more general arguments, a sequence of eloquent principles can be called in its support. Establishment of a judicial mechanism for holding the EU responsible for human rights violations ensuing from its action in the CFSP would enhance its political credibility, avoid accusations of "double standards", reinstate its commitment to the principle of rule of law (and, after all, human rights themselves), as well as correspond to the EU ambition of "leading by example".

It is suggested that the success of any EU human rights foreign policy will be partly dependent on the ability of the EU to discuss and remain accountable for its own record. Only this sort of self-critical coherent approach can build that sort of credibility needed to ensure that the EU's position in multilateral fora is taken seriously and has some impact: "Paying attention to coherence and credibility can help to ensure that the EU can protect itself from accusations of selectivity, arbitrariness and double standards." [135] A credible human rights policy must assiduously avoid inconsistency and double standards. At the end of the day, "the EU can only achieve the leadership role to which it aspires through the example it sets to its

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February 1975, para. 36.

[132] For the UDHR this is confirmed by the draft language of its Art. 10 which originally provided that "[e]very one *shall have access* to independent and impartial tribunals in the determination of any criminal charge against him, and of his rights and obligations." Report of the UN Human Rights Commission, (ECOSOC) Official Records, 3rd year, 6th Session, E/600, Annex A (emphasis added). With regard to the ICCPR, the UN Human Rights Committee in its General Comment No. 13 apparently viewed access to court as an inherent part of the rights under Article 14 of the Covenant when it spoke of "equality before the courts, including equal access to courts." General Comment No. 13, *Equality before the courts and the right to a fair and public hearing by an independent court established by law*, UN doc. A/39/40 (1984) Annex VI (pp. 143-147) ; CCPR/C/21/Rev.1, (pp. 12-16), 13 April 1984, para. 3.
See also: Manfred Nowak, *U. N. Covenant on Civil and Political Rights: CCPR Commentary,* 1993, p. 239.

[133] August Reinisch and Ulf Andreas Weber, *In the Shadow of Waite and Kennedy: The Jursdictional Immunity of International Organisations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement*, in "International Organisations Law Review", vol. 1, 2004, p. 67.

[134] In this context, it is interesting to legally analyse the question if the lack of any international or EU judicial venue for claiming redress for human rights violations caused by the conduct of the CFSP could constitute material grounds for deeming the EU being in violation of the human right of access to justice.

[135] Andrew Clapham, *Where is the EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Fora?,* in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 643

partners and other States. Leading by example should become the *Leitmotif* of a new European Union human rights policy." [136]

It is a fundamental misconception to perceive establishment of responsibility mechanisms as a concession; to the contrary, it is another affirmation of the international organisation's powers and in the long run serves its strategic interests. First, the argument that "the EU does not violate human rights" seems to support not the *status quo* of relative impunity, but rather raises suspicion as to why the EU would not be ready or willing to confirm this statement before a duly constituted international court according to a due procedure. It has been argued similarly: "There is a reason to believe that international organisations may consider it a matter of self-interest to have these accusations tested and rejected by the UN's principal judicial organ at the earliest convenience." [137] Thus, if there is nothing for the EU to fear from surfacing, why then avoid instituting appropriate venues from that and thereby provoke anxious reactions as the one of the President of the Helsinki Committee for Human Rights in Bosnia and Herzegovina, Mr. Srđan Dizdarević, as quoted above?

Finally, institutionalisation of responsibility is an assertion of the international organisation's public power, and thus enhances its credibility on the international scene rather than diminishes it. It is in the broader interest of the international organisation "to exercise jurisdiction as a manifestation of public authority" [138]. The availability of judicial assistance to safeguard one's human rights can be viewed "as a 'public good' sought not only by individuals against international organisations, but also by international organisations in asserting their powers against individuals."[139]

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[136] P. Alston and J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights,* in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 7.

[137] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 231.

[138] Pierre Apraxine, *Violation des droits de l'homme par une organisation internationale et responsabilité des états au regard de la Convention Européenne,* dans « Revue Trimestrielle des Droits de l'Homme », no. 21, 1995, p. 13.

[139] August Reinisch, *International organisations before national courts,* Cambridge University Press, 2000, p. 252.

II. LEX LATA: DISSECTING THE OBSTACLES FOR ESTABLISHING EU RESPONSIBILITY IN CFSP

A. MATERIAL OBSTACLES – IDENTIFICATION AND VENUES FOR CIRCUMVENTION

To circumvent the obstacles posed by the traditional perceptions of the substance and scope of international organisations' responsibility, the design of the proposed responsibility model has to accommodate various legal constructions which at the first glance might seem complex, but, upon closer look, merely reflect an innovative approach to the inflexible established concepts and optimize their use consistently with the imperatives of human rights protection. Article 3 of the International Law Commission Draft Articles on Responsibility of International Organizations outlines the material grounds for establishing the EU responsibility for human rights violations:

> "1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
>
> 2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
>
> (a) is attributable to the international organization under international law, and
>
> (b) constitutes a breach of an international obligation of that international organization."

Thus, the international responsibility of the EU is conditional upon two qualifications of its conduct under the auspices of the CFSP. In terms of *ratione personae,* first, the EU must possess the quality to be a potential subject of responsibility (a capacity normally implicit in the notion of international legal personality) and, second, its conduct must be proper to it: based on the EU CFSP decisions and carried out by its means. Also, in terms of *ratione materiae*, the conduct must infringe an established international legal commitment of the organisation: violate a human right of a third party that the organisation is bound by[140]. Aiming at high functionality rather than at establishing a static doctrinal imperative, the EU titular responsibility model derogates from the general rule of responsibility by distinguishing the attribution of responsibility (*de iure* act) from the attribution of conduct (*de facto* act), which infers instrumental perception of both international legal personality and the acts "proper" to the CFSP. The scheme of this model attempts to accommodate the focal concern of the general regime of responsibility of international organisations – the need for a careful balance of "the tensions existing between the importance of the independent responsibility of

[140] See *supra* Section O.B.2.1.

international organisations on the one hand, and the need to protect third parties dealing with such international organisations, on the other hand"[141].

A.1. Surmounting the "constitutional" limits to judicial review

In defining the *ratione materiae* scope of the EU potential responsibility under the CFSP, even before embarking upon the "classical" questions of the EU's international legal personality and the precise content and character of the EU human rights obligations, a "meta-"question arises: one where the domains of law and politics collide, juxtaposing notions of the doctrine of separation of powers with those of constitutionalism and the principle of rule of law. Namely, the question to be considered preliminarily is whether the CFSP as a foreign policy carried out by a quasi-sovereign subject can at all be bound by legal constraints and subject to judicial scrutiny in regard to their observation. As precisely put by Wilfred Jenks, "the extent to which executive authority should be subject to judicial control may prove to be the most difficult and the most important of all the outstanding dilemmas." [142]

1.1. Specifics of foreign policy as an executive function "justifying" judicial abstention

The EU has suavely adopted a chameleonic attitude to the notions of "classical" constitutional law – embracing the principles and notions of this field of law when those assist to promote its whimsical interests, and then again shielding itself from those by claiming the euphemistic *sui generis* character of the EU when they seem a hindrance thereto. Likewise, setting the skewed analogy of the CFSP as the EU counterpart of the national "executive-controlled foreign policy" *prima facie* justifies the exclusion of the CFSP from judicial control.

Up to very recently, the foreign and security policy has been conventionally regarded, according to the wording of Martti Koskenniemi, "as a realm of sovereign wills and national interests *par excellence*"[143]. The essentially political character of this "realm of wills" seems to exclude the role of law therein: the latter has been either completely contradicted to the exigencies of foreign policy by saying that "[t]he need to maintain the balance of power, to react rapidly to unforeseen contingencies, requires maximal freedom of action and is thus

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[141] *Resolution on the Legal Consequences for Member States of the Non-fulfilment by International Organisations of their Obligations toward Third Parties*, Institut de Droit International, in *Annuaire de l'Institut de Droit International*, 1995, Preamble.
[142] C. W. Jenks, *The Proper Law of International Organisations*, London and New York, Stevens, Dobbs Ferry and Oceana, 1962, p. 129
[143] Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, p. 28.

contrary to legal regulation," [144] or instrumentalised by the reasoning that "[i]f law should play a role in it, it is only as an instrument for the expression and realization of those wills and interests, a handmaid of the diplomat of the politician, providing a language and institutional arrangements that sometimes facilitate the attainment of consensus, a coordinative regulation of inter-sovereign relations." [145] The general acceptance of the low degree of legal control and the ensuing impossibility of judicial review of foreign policy by traditional constitutional theory and practice[146] is mirrored also in the CFSP. First, "[t]he formal emptiness of the Articles on the CFSP [in the TEU] is thoroughly expressive of the view of law as a facilitative instrument of foreign and security policy." [147] Secondly, the relatively weak role of law in the CFSP becomes more discernible in comparison with the other two pillars of the EU edifice: "Generally, a far lesser degree of juridification can be diagnosed in the field of the CFSP than in Community law or even the field of co-operation in criminal matters."[148]

Thus, it is apparent that the CFSP suffers (or in the eyes of policymakers interested in avoiding accountability – "merits") from a double - horizontal and vertical – discharge from legal responsibility. First, the horizontal discharge flows from the "separation of powers" doctrine, where the judicial branch is not authorised to overview the executive in regard to foreign policy decisions, as "the constitutional system would deteriorate if the respect of the obligations of Member States would be subject to judicial control." [149] Namely, "democratic control and judicial review of foreign policy are typical issues of the horizontal perspective, which concerns the functions and competencies of different government organs."[150] Second, the vertical discharge is the consequence of elevating this prerogative of conducting foreign affairs from a national to an international level. In such a manner the CFSP is exempt of the possible review by even those national courts which have such authority in the relevant national legal system (see further in this section). Concern has been voiced by the experts of EU foreign policy in the Third Plenary Meeting of FORNET (European Foreign Policy Research Network) in Brussels, April 22-23, 2005, by a statement that "foreign policy is the

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[144] Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, p. 27.
[145] *ibid*, p. 28.
[146] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 436.
[147] Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, p. 29.
[148] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 452.
[149] Elizabeth Zoller, *Droit des Relations Extérieures*, Paris, Presses Universitaires de France, 1992, p. 148.
[150] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 436.

area on which the executives have been traditionally most reluctant to accept democratic accountability. Even the transfer of foreign policy responsibilities to a supra-national level has been seen as motivated, among other things, by the desire of national governments to reduce the level of control exercised by the national parliaments on controversial policy decisions. As a matter of fact, the growing role of the EU in the foreign policy field - its "Brusselisation" as it has been called - has not been coupled by the establishment of effective instruments to ensure its accountability at the European level."[151]

Profusion of the traditionalist arguments in favour of exclusion of the CFSP from the realm of the rule of law is nevertheless an unupdated, quasi-leviathanic oversimplification of the issue. Upon more nuanced research, the contemporary constitutional theory and practice provides sufficient arguments for establishment of a certain juridical control of the foreign policy, be it on a national or international level. As unflatteringly put by Markus Krajewski, "in this respect the CFSP more resembles the foreign policy of eighteenth century absolute monarchies than the requirements of democratic constitutional systems in the twenty-first century."[152]

1.2. Grounds for subjecting the CFSP to judicial review

Rather than, as might *prima facie* seem, reflecting the traditional notions of the constitutional setup of (quasi-)sovereign entities, the complete lack of judicial review of the CFSP in the contemporary system of international dynamics constitutes a severe constitutional problem of European foreign policy. Since Hobbes, Hegel and Montesquieu, the theory and practice of constitutionalism have undergone changes and "[t]he traditional approach to foreign policy and constitutional law is based on an inadequate perception of foreign policy in our times, if it ever was appropriate. A higher degree of constitutionalisation of foreign policy seems more suitable for foreign policy in a post-national context."[153] This law-based approach to foreign policy is clearly reflected in the Council of Europe Venice Commission Report on the Legal Foundations for Foreign Policy: "Foreign policy unquestionably serves the national interest in the broadest sense. However, [..] it has ceased to be uncontrollable. On the contrary, it obeys certain legal rules which are in a sense its foundations and which act as curbs on States' freedom of action in the interests of the international community."[154] First and foremost, it has

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[151] Ettore Greco (in co-operation with Michele Cornelli and Flavia Zanon), *The Democratic Accountability of CFSP and the Role of the European Parliament*, in the Third Plenary Meeting of FORNET (Brussels, April 22-23, 2005).
[152] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 446.
[153] *Ibid*, p. 436.
[154] *Report on the Legal Foundations for Foreign Policy*, European Commission for Democracy Through Law (Venice Commission), CDL-DI (1998)003e-rev-restr, 11 June 1998, para. 3.

to be stated from the point of view of international law that, first, European Court of Human Rights does not exclude foreign policy as such from judicial review[155]; second, Article 3 of the ILC Draft Articles on Responsibility of international organisations does not limit the scope of application by any sectoral argument – it clearly lays down a comprehensive rule that "*[e]very* internationally wrongful act of an international organization entails the international responsibility of the international organization". Thus, from purely legal perspective the reference to foreign policy so as to exclude a wrongful act from judicial review is a purely formal denomination, with no relevance in establishing the international organisation's international responsibility. To be straightforward, "looking at the matter juristically, and not politically, the jurisdiction of the courts should not automatically be excluded by the words 'foreign policy' or the initials 'CFSP'"[156]. Nevertheless, the EU being not only a legal, but also a political subject, another set of arguments has to be reviewed here.

a) general: Constitutionalist doctrine

In a constitutional system, government power must be bound by the constitution. Despite this generally accepted standard foreign affairs have often been excluded from strict constitutional limitations, both in theory and practice. European political thought is characterized by a long tradition of holding foreign policy beyond the reach of legal restraints. The constitutionalist doctrine of international dynamics (as opposed to the prevailing functionalist doctrine) has re-activated the issue of the role of law in the action by international organisations in this "post-national context". [157]

In the process of international integration, constitutionalists prioritise a solid legal basis over the dynamics of spill-over. Part of this legal framework would be legal rules concerning the relationship between the organisation and third parties. In an ideal case, not only accountability but also enforceability would be guaranteed, i.e., the legal rights and obligations resulting from such rules should also give rise to adjudication in competent fora plus provide for effective enforcement mechanisms, While functionalism underlines the "positive" aspect of the tasks of international organisations and their contribution to a shared exercise of functions traditionally carried out by individual states, the debate among constitutionalists focuses more on the consequential issues of accountability, the other, indispensable, side of the same coin. Precisely, constitutionalism looks for legal restraints to the activities of international organisations. Primarily, these restraints result from the legal

[155] *The Future Role of the European Court of Justice,* House of Lords, European Union Committee, 6th Report of Session 2003-2004, 15 March 2004, p. 31.
[156] *ibid,* p. 32-33.
[157] Markus Krajewski, *Foreign Policy and the European Constitution,* in "Yearbook of European Law", vol. 22, 2003, p. 442.

position and rights of member states. However, an increasing awareness emerges that the rights of individuals might also be negatively affected by activities of international organisations.[158]

The doctrine of this international constitutionalism has even may be gone beyond the traditional notions of State constitutionalism. First, in the sense that the highly politicised aspect of decision-making in foreign affairs is considered not an obstacle but rather a reinforcing argument for the need of a correlating enforcement of accountability: "The more controversial or political the functions and purposes of an international organisation are, the stronger are the requirements embedded in a well-functioning accountability regime." [159] Second, in the sense that the international dynamics are meant to compensate for the gaps in the national judicial control of foreign policy rather than to duplicate and thus exacerbate those. As formulated by Markus Krajewski, "the increased judicialisation of international law through the proliferation of the jurisprudence of international courts and tribunals is meant to partly outweigh the lower level of judicial control of foreign policy by national courts."[160]

b) special: Rationale behind the EU pillar structure

Interestingly enough, it is not only the almost "magic-stick" (read – "serve for addressing all human rights concerns in the EU") argument of the envisaged fusion of the EU pillar system, but, unexpectedly, even the argument of the existence of a separate non-Community pillar for the CFSP that favours substantially raising the role of law in the conduct of EU foreign policy.

To start with the latter, least popular, argument, - the distinction of the CFSP from the Community method directly submits it to general public international law and thus to the principles of rule of law, access to justice and responsibility for internationally wrongful acts without intermediary regard to the complexities of the Union's internal constitutional order. After exposing that, "[a]s is well-known, Community law imagines itself as a separate legal order or what international lawyers prefer to call a 'self-contained regime', containing in addition to primary rules also specific secondary rules, rules on the interpretation and application of primary rules as well as rules on reaction to breach," Martti Koskenniemi clearly states that while "[r]esponses under general law such as unilateral countermeasures or

[158] August Reinisch, *International organisations before national courts*, Cambridge University Press, 2000, p. 319.
[159] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 219.
[160] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 444.

going to the International Court of Justice have been excluded [for the Community][161], these exclusions are not applicable to Title V of the Maastricht Treaty. The CFSP remains intergovernmental, subject to international law, not Community law. Its product is instruments governed by international law, not Community legislation"[162]. Thus, having directly submitted the CFSP to international law, the EU is bound to conduct its foreign policy with due regard for and in full compliance with the principles that it entails: "the rule of law and protection of human rights and individual freedoms. These objectives are not just pursued and developed within the States' national legal systems *under the supervision of the judiciary*, but also increasingly at an international level, above all in the context of European integration"[163]; the arguments of *sui generis* character of the EU do not exempt it from applicability of international law and, thereof, the established role of judiciary in the oversight of fulfilment of international legal obligations.

Secondly, the decreasing fragmentation of the EU foreign policy and the envisaged pillar merger likewise fortify the stand for a substantially increased role of judiciary in the CFSP, at least approaching the one accorded to it in the Community domain. The relatively comprehensive judicial control of EC external relations must be contrasted with the complete lack of judicial control of the CFSP according to Article 46 TEU, which excludes the second pillar from the jurisdiction of the ECJ. Simultaneously, the line separating the substance of the judiciary-controlled field of the Community and the absolute vacuum of judicature in the CFSP is more and more blurred in terms of substance: "in the context of constitutional law, the term 'European foreign policy' is best understood from a functional perspective including elements of the second pillar of the EU *and* external relations of the EC."[164] Truly, it becomes increasingly difficult to distinguish between the EC and the EU external policies from a functional perspective. A clear tendency towards a progressive fusion of the Community and the Union is observed : "one assists, indeed, on the one hand, a communautarisation of certain components of the Union, such as the 'third pillar', and, on the other hand, a transformation of the Union into a true pole of absorption of its various elements, including thus the Community. It becomes also increasingly artificial to maintain a clear line of demarcation

[161] C *Commission v. the Grand Duchy of Luxembourg and Kingdom of Belgium,* C-90 and 91/63, ECJ judgment, [1964] ECR 631; *Commission v. the French Republic ("Mutton and Lamb"),* C-232/78, ECJ judgment, 23 October 1979, [1979] ECR 2739.
[162] Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, p. 30.
[163] *Report on the Legal Foundations for Foreign Policy*, European Commission for Democracy Through Law (Venice Commission), CDL-DI (1998)003e-rev-restr, 11 June 1998, para. 6.
[164] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 436.

clear between the Community and the Union."[165] A question of coherence arises in this regard – with the substance of the two formally separated aspects of EU foreign policy approaching, and in some cases even overlapping, the dramatic chasm between the role of the judiciary in one and the other seems unjustified. Attribution of powers of scrutiny over the CFSP to ECJ would be an essential element in a functional and holistic approach to European foreign policy, also justified in light of the suggestion of the European Convention to "merge the EC and the EU, which would create a single European external policy."[166]

c) empiric: Examples of existing practice

After all, proposing the extension of judicial control over foreign policy is not revolutionary. Examples exist of constitutions – such as the German Constitution – which do provide for judicial control over foreign policy. By excluding the ECJ from matters falling within the remit of Title V, the TEU follows the example of the constitutions of France and Great Britain, which do not give their courts the power of supervision over foreign policy decisions.[167] An overall comparative study by the Council of Europe on the constitutional legal traditions of its Member States in conduct of their foreign policy demonstrates "the existence of higher legal principles binding on the public authorities, which lead them to define foreign policy not only with regard to political considerations but also in the light of legal restraints."[168]

Examination of the legal foundations of foreign policy displays a dual trend of "legalisation" and "humanisation". Firstly, regarding the role of law in foreign policy:

> "[T]here are a growing number of increasingly tangible rules governing who is responsible for foreign policy, how it is implemented and the options taken. At the same time, a certain tendency to enforce compliance with the rules in question is becoming perceptible. [..] Certain constitutional courts have established precedents for reviewing not only whether decision-makers acted within the bounds of their authority, but also the very substance of the decision itself."[169]

Secondly, regarding rendering the foreign policy consequences pierceable to individuals:

> "as a corollary to the emergence of legal rules governing foreign policy and its supervision, there is a move towards a degree of democratisation

[165] Antonio Bultrini, *La Responsabilité des Etats Membres de l' Union Européenne pour les Violations de la Convention Européenne des Droits de l'Homme Imputables au Système Communautaire*, dans: « Revue Trimestrielle des Droits de l'Homme », no. 51, 2002, p. 6.
[166] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 437.
[167] Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "The Netherlands Quarterly of Human Rights", vol. 15, No. 3, 1997, pp. 291-324, at p. 294.
[168] *Report on the Legal Foundations for Foreign Policy*, European Commission for Democracy Through Law (Venice Commission), CDL-DI (1998)003e-rev-restr, 11 June 1998, para. 7.
[169] *ibid*, paras. 9-10.

> and decentralisation of the conduct of foreign affairs. [..] Nowadays, conduct of foreign policy sometimes has direct, immediate repercussions on the lives of ordinary citizens and can hence no longer be left to the executive's sole discretion." [170]

Likewise, the EU Committee of the House of Lords, UK, has concluded in their Report on the Future Status of the EU Charter of Fundamental Rights that "in principle the actions of the Union in giving effect to the CFSP should be subject to judicial review/supervision in both the ECJ and the Strasbourg Court. Recent events, including the detention of individuals at Guantanamo Bay, show that the rights of the individual may be seriously affected in the execution of foreign policy. The Union is becoming increasingly involved in peacekeeping operations and the possibility cannot be ruled out that challenges may be brought on human rights grounds in relation to the particular conduct of those acting in the name of the Union"[171].

Such observations reflect the aforementioned priority of legal norms and principles over the traditional, yet not consistently substantiated considerations of the political character of foreign policy. Such developments in national constitutional setup can provide a sound basis for analogous advances in the dynamics of international organisations, notably the EU CFSP. The argument that

> "post-national constitutional law of foreign affairs depends not only on national standards, such as democratic legitimacy and the rule of law, but also on general principles and rules of public international law. Like national constitutional law, they too impose limitations on political power and can therefore serve 'constitutional functions' or can be seen as a 'complementary constitution' (*völkerrrechtliche Nebenverfassung*),"[172]

inextricably interrelates the national and international layers of law as the basis for a proper conduct of the activities of the EU, with no derogation in regard to the CFSP.

1.3. Propositions

In the light of the elucidated arguments and considerations, several eloquent propositions have been voiced in the doctrine and practice of international law. According to the Venice Commission, "[t]he judiciary, especially the higher courts, shall enforce compliance with the above-mentioned essential principles of foreign policy, in particular as regards the application of international law." [173] Doctrinally, it has been put forward that:

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170 *Report on the Legal Foundations for Foreign Policy*, European Commission for Democracy Through Law (Venice Commission), CDL-DI (1998)003e-rev-restr, 11 June 1998, para. 11.
171 *The Future Role of the European Court of Justice,* House of Lords, European Union Committee, 6th Report of Session 2003-2004, 15 March 2004, p. 33.
172 Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 443.
173 *Report on the Legal Foundations for Foreign Policy*, European Commission for Democracy

> "in order to address these constitutional deficiencies of European foreign policy two complementary approaches to a constitutional reform of European foreign policy are suggested. The first calls for a full application of the constitutional standards of democracy and the rule of law to European foreign policy. The second conceptualizes the EU as an 'Open Constitutional Union' and considers public international law as a part of European constitutional law. [..] A Union founded on the principles of 'liberty, democracy, respect of human rights and fundamental freedoms, and the rule of law' as stipulated in Article 6(1) TEU can be conceived as a constitutional union only if these principles also apply to foreign affairs." [174]

This understanding of the rule of law in the EU has a strong basis in the EU constitutional law: "characterizing *all* institutional acts which have some effect in the multi-level system formed by the Union and its Member States as *law* and subjecting them to the applicable constitutional requirements (competence, fundamental rights etc.), is consonant with the fundamental conceptualization of the Union as a community of *law*."[175] A necessary consequence of such submission to international law is the increased role of judicial review, regardless the formal classification of the spheres of public action into foreign policy or not.

However, such propositions are not but a part of the response – they necessitate correlating practical – structural, procedural, methodological – arrangements that would prove to be functional in international affairs so as to render the ideas contained therein effective. From the normative point of view, subjection of external relations to legal rules is hardly doubtful. It has been established that "a State and thereon – an international organisation that the former is a member of – is subject to international law, and it is not less certain that the State could lead foreign politics which would renounce its own constitutional principles. It can thus be well said along with Carré de Malberg that diplomatic activity is not in any absolute way *legibus solute*, nor in any way placed above the laws." [176] But, from the institutional point of view, one has to follow Paul Reuter's words that "the hierarchy of norms is one thing, but the sanction of this hierarchy is another one, because it makes use of power." [177] The use of power in this respect finds expression in the institutional and procedural modalities of the judicial power, namely in the attribution of jurisdiction to a judge/tribunal, its scope and effect. These issues are fundamental in rendering the doctrinal speculations empirically effective.

Through Law (Venice Commission), CDL-DI (1998)003e-rev-restr, 11 June 1998, conclusion III.

[174] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 450.

[175] Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", Vol. 23, 2004, p. 111.

[176] Elizabeth Zoller, *Droit des Relations Extérieures*, Paris, Presses Universitaires de France, 1992, p. 257.

[177] *Ibid*

This is essential to note in the context of this section, as its aim was neither to prove any claimed imperative of absolute judicial control over foreign affairs, nor to define its practical modalities. Instead, the aim was to demonstrate that judicial review of foreign policy is legally and politically conceivable, that foreign policy like any other public prerogative carried out in international realm is bound by international law and, by implication, upon adequate constitutional regulation, subject to control of courts. The issue at stake within the scope of this work is not generically submitting the whole process of EU foreign policy-making to judicial control, rather – and what is in substance quite different – acknowledging the need for judicial review of EU conduct – acts or omissions - causing specific violations of human rights regardless the formal fact of the grounds of this conduct being in the CFSP domain.

A.2. Attribution: ratione personae

A set of material obstacles to establishing the EU responsibility arises in regard to the identification whether its specific conduct "constitutes a breach of an international obligation of that international organisation", as required by Art. 3(2)b of the ILC Draft Articles on Responsibility of International Organisations.

2.1. Functional relativisation of the requirement of international legal personality

It is a well-established rule that "the possession of international legal personality by international organisations constitutes the paramount precondition for the establishment of any liability or responsibility on their part."[178] Attribution or recognition of international legal personality is thus traditionally a preliminary, *sine qua non* element of all responsibility schemes – to be held responsible for the violations of human rights caused by the conduct of the CFSP, the EU must fulfil this criterion. However, the TEU does not explicitly confer international legal personality upon the EU. Yet, "it is not very clear what it means with respect to the Union's international legal personality,"[179] as "the silence of the constitutive act or of any other convention does not allow concluding an absence of international legal personality"[180]. Such lack of clarity has given raise to endless doctrinal and practical debates

[178] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 119.
[179] Jan Klabbers, *Presumptive Personality: The European Union in International Law*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague, London, Boston, 1998, p. 231.
[180] Emmanuelle Bribosia et Anne Weyembergh, *La personnalité juridique de l'Union européenne*, dans Marianne Dony, *L'Union Européenne et le monde après Amsterdam,* Etudes Européennes, Editions de l'Université de Bruxelles, 1999, p. 39.

with radically opposite conclusions[181], to multiple theories of international legal personality (objective theory, will theory, presumptive theory[182]) and to further doubts as to the implications of such ambiguous state upon the EU capacities in international affairs[183].

Such a "pre-Genesial" normative chaos appears to legitimise the innovative dynamic approach to the concept of international legal personality that is embedded in the EU titular responsibility model. It suffices to think of Koskenniemi's criticism of liberal theory as applied to international law to realize that the extreme use of dichotomous categories are hardly conducive to a constructive analysis and to an accurate representation of contemporary legal processes[184]. Moreover, the nature of the EU context, "classically" claimed to be "unique", "substantially different" and "inimitable" as compared to that of other international organisations allows a search for *sui generis* solutions comparable to the specificity of the EU constitutional setup in itself. As said by Paul Reuter: "There is no precise meaning in saying that international organisations possess legal personality, because each one of them has a personality of own different content."[185]

Even though there are numerous arguments in favour of and also normative and practical developments towards the recognition of the EU international legal personality, those are not established well-enough to base upon them the weighty edifice of responsibility. It has been established by thorough analysis of the specific powers of the EU on international plane that

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[181] See in favour of existence of international legal personality of the EU: G. Ress , *Ist Die EU eine Juristische Person,* in « Europa », Heft 4, 1995, p. 334 et s. ; Chr. True, *Verleihung von Rechtspersonlichkeit an die Europaische Union und Verschmeldung zu einer Einzigen Organisation – Deklaratorisch oder Konstitutiv ?,* Institut d'Etudes européennes de la Sarre, 1997, No. 357, p. 63 ; J. Rideau, *Droit Institutionnel de l'Union et des Communautés européennes,* Paris, LGDJ, 1994, p. 211 à 213.

See against existence of international legal personality of the EU : A. Pliakos, *La nature juridique de l'Union Européenne,* RTDE, 1993, p. 210 ; J.-V. Louis, *L'Union Européenne et l'avenir de ses institutions,* Bruxelles, Presses interuniversitaires européennes, 1996, p. 104 ; M. Pechstein, *Rechtssubjektivitat fur die Europaische Union ?,* in « Europa », Heft 2, 1996, p. 137 et s. ; D. McGoldrick, *International Relations Law of the European Union,* Longman, New York, 1997, chapter 2 ; M. Eaton, *Common Foreign and Security Policy,* in D. O'Keeffe and P.M. Twomey (Eds.), *Legal Issues of the Maastricht Treaty,* 1996, p. 224.

[182] Jan Klabbers, *Presumptive Personality: The European Union in International Law,* in Martti Koskenniemi (ed.), *International Law Aspects of the European Union,* Kluwer Law International, The Hague, London, Boston, 1998.

[183] Emmanuelle Bribosia et Anne Weyembergh, *La personnalité juridique de l'Union européenne,* dans Marianne Dony, *L'Union Européenne et le monde après Amsterdam,* Etudes Européennes, Editions de l'Université de Bruxelles, 1999, pp. 39-44; Jan Klabbers, *Presumptive Personality: The European Union in International Law,* in Martti Koskenniemi (ed.), *International Law Aspects of the European Union,* Kluwer Law International, The Hague, London, Boston, 1998, pp. 233 et seq.

[184] Andrea Bianchi, *Ad-hocism and the Rule of Law,* in "European Journal of International Law", no.1, vol. 13, 2002, p. 265.

[185] Emmanuelle Bribosia et Anne Weyembergh, *La personnalité juridique de l'Union européenne,* dans Marianne Dony, *L'Union Européenne et le monde après Amsterdam,* Etudes Européennes, Editions de l'Université de Bruxelles, 1999, p. 41.

the EU possesses "at least a limited form of legal personality."[186] The work of the European Convention Working Group III on Legal Personality reflected the broad consensus that the Union should in future have its own explicit international legal personality[187] and that "[t]he Union thus would become a subject of international law [..] and would as a result be able to avail itself of all means of international action (right to conclude treaties, right of legation, right to submit claims or to act before an international court or judge, right to become a member of an international organisation or become party to international conventions, right to enjoy immunities)." [188] The practical EU contribution to shaping the international dynamics reinforces the claim for a corresponding legal recognition of its capacities – it is argued that "the more the EU acts internationally the more established its legal personality will become."[189] Positive advances without doubt, these constatations nevertheless imply that currently EU does not fully enjoy all these capacities.

Upon closer analysis of the debate on the issue of EU international legal personality, it appears that the main source of disaccord is the confusion of its two aspects: the formal (standing as a subject in external affairs) and the substantive (the division of competences between the EU and its Member States and European Institutions involved in the CFSP decision-making). International Law Association has recognised that a separate legal personality "is a necessary precondition for an international organisation to be liable for its own obligations, but it does not necessarily determine whether member states have a concurrent or residual liability." [190] There are hints at this problem as lying at the heart of the impossibility to reach a consensus in the debate: Martti Koskenniemi expresses concern that "[a]lthough from the perspective of external activities, Union personality would seem desirable, it is not clear if in fact the problems relative to the division of competences inside the Union are thereby resolved"[191]; Jan Klabbers points at the mélange of the two aspects by explaining that "the three pillar structure appears to have been conceived as a pragmatic response to fears on the parts of certain Member States of surrendering their 'international sovereignty', but such fears relate to modalities of decision-making and the distribution of

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[186] Nanette A.E.M. Neuwahl, *Legal Personality of the European Union – International and Institutional Aspects*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Dicord or Harmony?*, T.M.C. Asser Press, The Hague, 2002, p. 21.
[187] Final Report of Working Group III "Legal Personality", the European Convention, CONV 305/02, WG III 16, 1 October 2002, para. 2.
[188] *ibid*, para. 19.
[189] Inger Österdahl, *The EU and Its Member States, Other States, and International Organizations – The Common European Security and Defence Policy after Nice*, in "Nordic Journal of International Law", no. 3, vol. 70, 2001, p. 349.
[190] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 26, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf
[191] Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, p. 42.

powers, not to personality as such."[192] The notions of personality and capacity in international law need to be distinguished one from each other. It appears justified to conclude that "specific consequences do not flow from the quality of legal personality but from the grant of powers to the entity concerned. It is a mistake to suppose that merely by describing an entity as a 'person' one is formulating his capacities in law."[193] Therefore, a new approach has to be found to functionally accommodate both these aspects without embarking upon daring speculations that would neither outrun the course of European integration nor disregard the theory of international public law.

Functional relativisation of the concept of international legal personality, even though creating one more legal fiction, nevertheless simplifies the density of the doctrinal debate on capacities of the EU and the distribution of powers within it, a debate which does not seem to be approaching consensus, at least not in any near future. Recognition of a nominal, presumptive EU legal personality for procedural standing in suits for human rights violations ensuing from the conduct of the CFSP corresponds to the "primary v. residual" scheme of the proposed EU titular responsibility model. It leaves the sensitive issues of distribution of powers unaddressed in substance – in attribution of responsibility -, yet, importantly enough, confines them procedurally to the internal sphere of the EU as regards attribution of conduct and thus discharges the individual third party from any negative consequences of this inclarity on his/ her status. Relativisation of the concept creates a structural framework for rendering these doctrinal debates practically functional for the protection of individual rights that is so essential for any credibility of human rights imperatives.

The authoritative theoretician of international law Hans Kelsen sets the premise for the relativisation of the concept of international legal personality by characterising it as "nothing more than a thoroughly formal concept, a heuristic device devoid of normativity;"[194] according to him, it "is not a reality of positive or natural law, it is an auxiliary concept, [..] an instrument of theory intended to simplify the description of the legal phenomena."[195] Thus, this concept is by nature rather a tool for optimisation of the international dynamics rather than for scholarly confinement of those to inflexible doctrinal categories. There are certain

[192] Jan Klabbers, *Presumptive Personality: The European Union in International Law*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague, London, Boston, 1998. p. 239.

[193] Nanette A.E.M. Neuwahl, *Legal Personality of the European Union – International and Institutional Aspects*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Dicord or Harmony?*, T.M.C. Asser Press, The Hague, 2002, p. 5.

[194] Jan Klabbers, *Presumptive Personality: The European Union in International Law*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague, London, Boston, 1998. p. 244.

[195] Emmanuelle Bribosia et Anne Weyembergh, *La personnalité juridique de l'Union européenne*, dans Marianne Dony (ed.), *L'Union Européenne et le monde après Amsterdam,* Etudes Européennes, Editions de l'Université de Bruxelles, 1999, p. 41.

hints in the debate upon the EU legal personality that the concept is not monolith. Its contents are flexible, to take over the notion used in the general context of the EU integration – of a "variable geometry". This variability could be, for instance, sectoral:

> "One question with respect to the issue of the legal personality of the EU is whether the EU may acquire legal personality in certain fields, but not in others, or at least not simultaneously with respect to all fields of activity within the EU. Hypothetically, if, for instance, the EU becomes more active within the field of the CFSP and starts concluding international agreements on a considerable scale, it may be that the EU will establish itself as a legal person in that particular field, whereas in the field of police and judicial cooperation in criminal matters the activities undertaken will not be of such an importance. Probably once the EU has acquired legal personality with respect to parts of its field of activity, the EU in its entirety becomes a legal person and not only "EU-CFSP", for instance." [196]

Also, it has been noted in the context of humanitarian law that "the EU becomes a subject of international humanitarian law described by a 'variable geometry', its level of submission to the legal instruments of Geneva depending on the nature of its action."[197] Thus it is the exigencies of the EU functionality on the international scene that define the precise character and scope of its legal personality. The formal designations retain less strictness in the face of the functionality, as "the will of the founders is not instrumental in establishing the legal personality of the organisation, but rather in determining the precise *scope* of that personality, a point also present in the famous ruling that 'the rights and duties of an entity such as the organisation must depend upon its purposes and function as specified or implied in its constituent documents and developed in practice.'" [198] . If in the light of the purposes and functional needs of the international organisation the international legal personality is conceptually subject to such sectoral (horizontal) fragmentation, it can be as well fragmented schematically (vertically). Thus, upon the due functional necessities, "the organisation may have *prima facie* responsibility."[199]

To render the proposed EU titular responsibility model operative, it is not critical to come up with a firm slogan that the EU is a full-fledged international legal personality with all the powers, capacities, rights and duties that lay ground for (according to the "objective theory") and/ or flow from (according to the "will theory") that. The strength of the model lies

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[196] Inger Österdahl, *The EU and Its Member States, Other States, and International Organizations – The Common European Security and Defence Policy after Nice*, in "Nordic Journal of International Law", no. 3, vol. 70, 2001, p. 352.

[197] Tristan Ferraro, *Le droit international humanitaire dans la politique étrangère et de décurité commune de l'Union européenne*, dans « Revue internationale de la Croix-Rouge=international Review of the Red Cross », vol. 84, No. 846, juin 2002, p. 460.

[198] Jan Klabbers, *Presumptive Personality: The European Union in International Law*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague, London, Boston, 1998. p. 245.

[199] C.F. Amerasinghe, *Principles of the Institutional Law of International Organisations*, Cambridge University Press, Cambridge, 1996, p. 91.

precisely in the fact that it is not dependant on the shaky doctrinal "proofs" of or against the acknowledgement of the EU as an international legal personality, and does not necessitate adherence to one or another theory on the internal logic of the concept. The objective of human rights promotion as fixed in Article 6(2) TEU and the functional need to bring some clarity in the issue for the sake of an effective protection of the individual right to redress for human rights violations endorses a kelsenian flexibility in approach to the doctrinal category of international legal personality: the EU must be recognized having the legal capacity to stand as a titular subject of responsibility – a formal consolidated representative of all the CFSP actors in regard to human rights violations ensuing from the conduct of the CFSP, assuming the primary responsibility in the external relation to the victim. Such formulation relativises the concept of international legal personality so as to assure effective protection of the victim of a human rights violation and to enhance legal security in the relations between him/ her and the international organisation.

Internally, the advocated scheme of the EU titular primary responsibility permits secondary attribution of conduct and consequent recuperation of the ultimate responsibility; thus it effectively reconciles the duality of integrationist and sovereignist views on the right balance of the EU and Member State obligations in the CFSP. The former maintain that "in a sense automatic and direct liability of Member States could deprive the international organisation [EU] of any independent international personality"[200], and, no matter what arguments are raised against the recognition of the international personality of the EU, such complete denial would go much too far even for stark contemporary sovereignist perception. The latter worry that "the legal fiction that an international organisation [EU] is, as such, separate and distinct from its Member States cannot be carried to the extreme by stating that the Member States as such have absolutely nothing to do with the obligations of the organisation to which they belong."[201] The model of the EU titular responsibility and the inherent secondary internal retracing of the factually responsible CFSP actor synthesizes the shared values of both camps without embracing these problematic aspects. Namely, the EU is acknowledged to have a sufficiently separate personality to stand formally as the representative shield for the negative implications of the CFSP measures, but simultaneously not claimed to have an undisputable supra-national substantive international legal personality analogous to that of the EC.

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[200] Martin Bjorklund, *Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?*, in "Nordic Journal of International Law. Acta Scandinavica juris gentium", vol. 70, no. 3, p. 382.

[201] *Ibid*, p. 397.

2.2. Acts "proper" to the CFSP – a "circumscriptive" approach

A breach of international law can be attributed to an international organisation in the sense of Article 3(2)a) of the International Law Commission Draft Articles on Responsibility of International Organizations if the relevant act causing the breach is "carried out according to the decisions and by the means" – personnel and finances – of the international organisation. This condition might seem redundant, pre-defined by the fact of the source of action laying in the international organisation, yet in the inter-governmental (as opposed to the EC's supranational) context it raises a valid question, just like in regard to other "co-operation" rather than "integration" international organisations[202]. Implementation of the EU action and the decision-making, even to a lesser and lesser degree, in the CFSP is still largely dependent on the Member States, their discretion, personnel and financial resources. The at times very complex rules of relations between the EU and its Member States in the CFSP, dictated by the need for a compromise in this field that lies close to the nucleus of the traditional concept of sovereignty, pose in attribution of conduct to a specific CFSP actor, as required by heavy *onus probandi* on the individual victim of a human rights violation. By *de iure* acknowledging the EU the titular subject of responsibility, the subsequent internal responsibility of a CFSP actor is not in essence excluded, it is only deemed secondary. Therefore it is not crucial to define the precise *de facto* authorship of the human rights violation in dispute with the external individual claimant, as long as the ultimate authorship refers to actors belonging to the EU internal order rather than to external subjects (third states, other international organisations, etc.). The proposed model of the EU titular responsibility circumscribes the former subjects within the cumulative title of "the EU", and necessitates only a sufficiently clear distinction between those and the external subjects, leaving the regressive identification of the ultimate subject of responsibility to be carried out *a posteriori* within this circumscription, without direct concern to the victim remedied by "the EU".

Treaty on European Union precisely enumerates the instruments by which the EU conducts the CFSP: according to Article 12 TEU, the EU "shall pursue the objectives [of CFSP] set out in Article 11 by:

- defining the principles of and general guidelines for the common foreign and security policy,
- deciding on common strategies,
- adopting joint actions,
- adopting common positions,

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202 Jan Klabbers, *Presumptive Personality: The European Union in International Law*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague, London, Boston, 1998, p. 238.

- strengthening systematic cooperation between Member States in the conduct of policy."

Besides, the EU may express itself in the CFSP through decisions, the conclusion of international agreements, declarations, contacts with third countries and in multi-lateral cooperation (statements by the EU Presidency and Commission during human rights debates at the United Nations; resolutions on country situations by the UN HR Commission and the EU role; negotiating international texts together in international fora; EU assistance to the UN HR field operations, etc.)[203].

Thus Title V of the TEU grants EU economic, diplomatic, military, police and other tools for the conduct of the CFSP. Despite the ostensibly clear provision that these instruments and tools are possessed by the EU, the practical conduct of the CFSP always surfaces questions as to their authorship, mirroring the latent background questions of the distribution of powers. The CFSP decision-making, still largely dependent on Member State unanimity, and the practical implementation of the CFSP measures, largely still by means allocated by the Member States[204], highlight the role of States in these processes and seem to demand, by the traditional methodology of international public law, a corresponding attribution of responsibility to those rather than to the EU as a secondary subject of international law – "an aggregate of the wills and prerogatives of the primary subjects (States)"[205].

A sequence of theoretical and factual questions needs to be clarified by special know-how in order to correctly attribute the wrongful conduct to a specific CFSP actor. Considerations of the role of institutions and each participating Member State, of "chains of command", financing, *ultra vires* actions, "effective control" and other considerations create a conundrum unsolvable to the "regular" individual, more-so extra-EU one. Firstly, difficulties arise in determining the authorship of the formal acts of the CFSP like joint actions, common positions. Almost to the same extent than in the Community law, "the lack of correlation between a specific instrument and a specific institution contributes to this difficulty, as well as the lack of hierarchical relationships between the different law-making institutions"[206]. European legal order differs significantly from most national legal orders in this respect. In the latter, a strict assignment of instruments to certain institutions and a hierarchy of institutions fulfil essential structuring functions.[207] The CFSP, however, is not based on any

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[203] Martine Fouwels. The European Union's Common Foreign and Security Policy and Human Rights, in: The Netherlands Quarterly of Human Rights, Vol. 15, No. 3, 1997, pp. 292-294.
[204] *ibid*, pp. 297-301.
[205] Ian Brownlie, *Principles of Public International Law*, Oxford, Oxford University Press, 1998, p. 230.
[206] Jean-Paul Jacqué, *Le Labyrinthe Décisionnel*, dans « Pouvoirs », no. 69, 1994, p. 23.
[207] Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", vol. 23,

specific legislative process (consultation, co-operation, assent, co-decision) and hence the policy process cannot be easily analysed. Then, the analysis of concrete policy implementation in, for instance, European Security and Defence Policy field can bring into play also considerations like the nationality of the specific agent inflicting harm upon the victim, the former's (non-) compliance with the operative directions of superior agents, or with the chain of command; participation of certain Member States in the measure and constructive abstention of others, the sources of financing of the measure and so on. These nuances are beyond any reasonable expectations as to the level of knowledge of an individual victim of human rights violation. "Attribution of authorship is a complex juridical operation, it is not identical to the idea of responsibility in the common political perception or in actor-centred analyses of political science" [208] therefore for the sake of individual's procedural equality he/ she should be exempt from the duty to carry it out.

To establish the EU titular responsibility, it is not essential to define the precise authorship of the CFSP act at stake, nevertheless a strict line must be drawn between the action by the EU and the action by third parties – non-Member States, other international organisations, multinational corporations or other. According to the scheme of this proposed model, the potential subsequent responsibility of the ultimate *de facto* author of the wrongful act in the EU constitutional order does not preclude establishing the EU titular responsibility (according to ILA Recommended Rules and Procedure: "The responsibility of an international organisation does not preclude any separate or concurrent responsibility of a state or of another international organisation which participated in the performance of the wrongful act or which has failed to comply with its own obligations concerning the prevention of that wrongful act."[209]); the responsibility of a third party – does so. Therefore it is essential to draw a clear line of distinction between the conduct imputable to actors within the EU order on the one hand and one imputable to other international actors. For instance, the EU implements the CFSP in collaboration with various international actors. In addition to NATO, which plays an important role in executing the Petersberg tasks, the main bodies concerned are the Organisation for Security and Cooperation in Europe (OSCE) and the United Nations (UN). The relation between the EU and these actors can be a complex one (to mention just the question of the legal consequences of basing an EU CFSP act on the grounds of a UN Security Council Resolution under Chapter VII of the UN Charter, as regards the imputability

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2004, p. 121.

[208] Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", vol. 23, 2004, p. 121.

[209] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 28, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf.

of an ensuing human rights violation[210]), but the EU responsibility, even the titular one, can only be invoked when there are no grounds for a responsibility of a third subject[211].

That is, the positive rules of attribution are complemented by negative rules which identify cases in which the wrongful act cannot be attributed to the international organisation or actors belonging to it. For instance, "the Draft Articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations."[212] Responsibility of third parties is, as a general principle (unless special other arrangements are made) exclusive of the EU responsibility.

On the other hand, to establish the EU titular responsibility, the claimant must have reasonable grounds to *bona fide* establish that the relevant act *prima facie* originates in the EU: that the specific formal act is one adopted by the EU or that the operational activity is carried out under the EU guidance, by its personal or financial means. Such observation on the part of the claimant necessitates two cumulative elements: an objective one – that the EU in acting in the CFSP framework is posing itself as such, - and a subjective one, - that the claimant has perceived the action as such imputable to the EU legal order. It is difficult to formalize a generic method for establishing these elements, taking into account the large variety of the CFSP acts and their implementation. Yet, some examples show how these elements display practically.

a) objective element

[210] See the judgement of the Court of First Instance of 28.4.1998, in: *Dorsch Consult v. Council and Commission*, Case C-237/98, ECJ appeal judgement, 15 June 2000, [2000] ECR I-4549. The claimant was a German engineering enterprise which had established trade relations with Iraq. Following a UN Security Council Resolution establishing a trade embargo on Iraq, the Council adopted a regulation which froze all trade relations with Iraq; the claimant unsuccessfully claimed damages and interest from the Council before the CFI and the ECJ. *Grosso-modo* the CFI and the ECJ pronounced that the Council is bound to execute a UN Security Council Resolution as a primary source of international law, therefore the Council cannot be held responsible for its consequences.
Concerning the direct link between a UN Security Council Resolution and a CFSP act, judgements in the "terrorism" cases are soon expected to be rendered by the CFI.
Also see:
Third Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur, International Law Commission, 57th Session (2 May – 3 June and 4 July – 5 August 2005), UNGAOR, UN doc. A/CN4/553, pp. 15-19.

[211] According to the ILC Draft Articles on Responsibility of international organizations, there can be also a joint or several responsibility of more than one international organization or an international organization and a State or several States. This is a special case, however, with special rules governing the attribution of conduct and responsibility, and remains outsides the scope of this work, open for further more detailed research.

[212] *Draft Articles on Responsibility of International Organisations*, International Law Commission, Report on the work of its 56th Session (3 May to 4 June and 5 July to 6 august 2004), Chapter V, UNGAOR 59th Session, Supplement No. 10, UN doc. A/59/10, p. 102.

First, the course of consolidation of the CFSP has shown an ever-increasing will on the part of EU for this policy to be associated with the EU rather than the collective undertaking of the Member States – and materialized in the external representation of the CFSP by the Presidency and the Secretary General/ High Representative for the CFSP (Article 18 TEU) and the envisaged post of the EU Foreign Minister[213]. Then, in regard to the formalized CFSP acts, "this is illustrated by the fact that legal acts refer to the author in their title, preamble, and signatory clause."[214] Finally, in regard to operative action, ostensible signs demonstrate such positioning:

> "Article 3 – Identification
> 2. EUFOR vehicles, aircraft, vessels and other means of transport shall carry distinctive EUFOR identification markings and/ or registration plates.
> 3. EUFOR shall display the flag of the European Union and markings such as military insignia, titles and official symbols, on its facilities, vehicles and other means of transport. The uniforms of EUFOR personnel shall carry a distinctive EUFOR emblem."[215]

Such appearances constitute sufficient grounds for a third person to reasonably believe that the action is imputable to the EU, without further inquiry in the precise internal relation between the EU and its constitutive elements. Taking into account that "when acting under the CFSP the Institutions and Member States were posing as the EU and that this has become accepted,"[216] by pure logic a correlating titular responsibility can be attached to this "objective appearance".

b) subjective element

To borrow the words from Mr. Giorgio Gaja, the UN ILC Special Rapporteur on Responsibility of International Organisations, the subjective element is "the extent to which a third party is *led to believe* that the relevant international organisation is responsible"[217]. The subjective element is not constitutive of the human rights violation by the EU in substance, namely, "[w]hether or not third parties have somehow recognized the EU cannot be decisive

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213 Giovanni Grevi, Daniela Manca, Gerrard Quille, *A Foreign Minister for the EU – Past, Present and Future*, FORNET Working Paper 7, http://www.fornet.info/documents/Working%20Paper%20no%207.pdf

214 Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", Vol. 23, 2004, p. 121.

215 Council of the European Union, *Draft Model Agreement on the Status of European Union-led forces between the European Union and a Host State*, doc. No. 8720/05, 18 May 2005, p. 2.

216 Nanette A.E.M. Neuwahl, *Legal Personality of the European Union – International and Institutional Aspects*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Dicord or Harmony?*, T.M.C. Asser Press, The Hague, 2002, p. 21.

217 Discussion with Mr. Giorgio Gaja, the Special Rapporteur on Responsibility of International Organisations, Research Forum on International Law, 26-28 May, 2005, Geneva, Switzerland, European Society of International Law.

in answering whether or not the EU has engaged in an internationally wrongful act."[218] However, for a titular imputation of the violation to the EU despite the potential ultimate responsibility of its internal actors, a *bona fide* perception of the EU as the author of the act or omission at stake is essential; it is the precondition for individual's legitimate expectations to receive redress from this same subject.

Such subjective perception of the EU authorship of specific CFSP acts only reflects the general public view that "the EU is a well-established presence on the international plane. So much on international diplomacy involves the EU as a major power block that it is *de facto* recognised by all" [219]. There is considerable force in the proposition that the existence of this diplomatic power block has to lead by necessity to the emergence of a public personality. It has to be made clear that in the popular perception the intricacies of the CFSP decision-making are shielded by the much more evident EU policy-making. "What is intergovernmental in the CFSP is its decision-making and not policy-making. Authors like George Modelski, Lincoln Bloomfield, Philip Zelikow, among others, have clearly shown that decision-making and policy-making in foreign policy are not the same function. [..]. Besides, those who think that the CFSP is intergovernmental must recognise the fact that CSFP policy-making as opposed to the decision-making is not the result State action, *per se*, but a collective effort put in by a group of States, in a collective, institutionalised capacity and under the aegis of a highly complex and institutionalised supranational organisation, i.e., the EU."[220] The individual as a third party can legitimately rely on this external appearance of the EU activity. In order to attribute titular responsibility, it is sufficient that the basis for attribution is equally titular. What concerns the individual, is the formal appearance – that the decisions *are* taken in the CFSP framework, and not what kind of interstate/interinstitution relation this forum represents, that there *is* a chain of command of military actions stemming from the EU, not whether it brings down to a specific state to be blamed, that the police forces *do* distinguish themselves with EU symbols, not that in fact they do retain their national status.

To finalize, this relativising approach to the definition of acts "proper" which lay grounds for *ratione personae* attribution of responsibility to the EU is justified by the functional imperative of effective human rights protection of the procedurally inferior individual victim

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218 Jan Klabbers, *Presumptive Personality: The European Union in International Law*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague, London, Boston, 1998, p. 238.

219 Nanette A.E.M. Neuwahl, *Legal Personality of the European Union – International and Institutional Aspects*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Dicord or Harmony?*, T.M.C. Asser Press, The Hague, 2002, p. 21.

220 Joybroto Sanyal, doctoral researcher at Austrian National University, FORNET discussion: Working Group on Theories and Approaches on CFSP: Policy-making and CFSP, at: http://fornet.info/workinggroupdiscus/index.html

and the need to procedurally optimize the victim's access to the remedial mechanisms. It is clear that in terms of substance "[e]xclusive responsibility on the part of an international organisation for the peacekeeping or peace-enforcement operations would, however, require a *degree of internationalisation* of the forces involved which as yet has not been achieved"[221], and that this constatation applies even more-so to other foreign policy measures. Nevertheless, the insufficiency of *de* facto *grounds* to attribute exclusive and ultimate responsibility to the relevant international organisation does not preclude to functionalize the specificity of the EU order (which is at least in terms of external perception approaching the level of supra-nationality) so as to attribute to the EU a standing as the titular subject of responsibility. As precisely said in regard to the need for a clear regime of judicial review for the diversity of EC legal acts, and thus even more-so applicable to the complexities of the CFSP acts: "The schematic assignment of authorship allows for a reliable attribution of legal responsibility and prevents a plethora of potential defendants which would be hardly reconcilable with the rule of law." [222] Creating a scheme of responsibility that does not in external perception fragment the EU personality corresponds to the fundamental principle of solidarity laid down in Article 11(2) TEU, as "[l]aw-making is already exercised in national systems by several constitutional institutions acting co-operatively, at least in most cases. This is even more marked in EU law, whose law-making procedures consistently require an interaction of institutions. The Treaties do not prescribe a separation of powers but rather an intense co-operation." [223] The EU titular responsibility model assures the unity of the international representation of the EU[224] without embarking upon daring speculations as to the extent of supranationality of the EU.

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[221] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 100.

[222] Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", Vol. 23, 2004, p. 123.

[223] *Ibid*, p. 122.

[224] Opinion of the European Court of Justice of 15 November 1994, Opinion 1/94, pursuant to article 228(6) of the EC Treaty, [1994] ECR I-5267, para. 108.

B. PROCEDURAL OBSTACLES

It is difficult to really know the number and the potential content of cases of human rights violations that could or would have been brought against international organisations before international courts, as only a minor amount of those surfaces in the (in-)admissibility judgments, many are not even attempted to be submitted. The modest number of the cases that do surface poses a question: is there no significant problem of human rights protection against wrongful acts of international organisations in the international legal order, or is there a lacuna in access to justice and there is a vast mass of hidden human rights issues which the legal system fails to account for?[225]

Although it is difficult to provide the "negative proof" that cases would be brought to international courts if it were not for the restrictions in the system of remedies, a starting point for the evaluation could be a crude quantitative observation: the role of, for instance, the ECJ, in the field of human rights protection is incomparably more limited than that of national constitutional courts in countries such as Germany, Italy, or Spain.[226] Even despite the massive procedural obstacles in the form of immunities, lack of legal personality in domestic law, invocations of exemptions from wrongfulness, and others, the national courts have a stronger record in deciding upon cases involving misconduct by international organisations.[227] The conclusion can be made that the current international judicial procedures do not allow for human rights to be raised in all cases where that would be appropriate, because standing to sue is too limited or because of insufficient control over the totality of the international organisation's (namely - the EU's) activity (in the CFSP field).[228]

B.1. "Internal": Procedural inaccessibility of the ECJ[229]

By means of Article 46 TEU[230], the CFSP was from the outset of the EU excluded from the ECJ jurisdiction. Although the inclusion of a commitment to human rights in several sections

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[225] Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights,* in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 882
[226] *ibid*, p. 869
[227] August Reinisch, *International organisations before national courts,* Cambridge University Press, 2000, p. 267.
[228] Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights,* in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 870
[229] The generic term ECJ includes the ECJ properly speaking as well as the Court of First Instance. The latter is not a separate institution but rather a new judicial body which, in the words of Article 225 TEC, is "attached" to the ECJ.
[230] "The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy

of the TEU, and especially in its Title V, by the Treaty of Amsterdam was an improvement compared to the previous arrangements of the Treaty of Maastricht, it did not alter the role of the ECJ in regard to the conduct of the CFSP.[231] Also the EU Constitutional Treaty, despite bringing other positive advances in regard to the ECJ jurisdiction (the ECJ's powers are extended in relation to police and judicial co-operation in criminal matters), would not alter this situation. The ECJ's jurisdiction over Article 6(2) TEU might seem to provide a secret passage to the ECJ's role in assuring respect for human rights regardless their positioning in the EU pillar structure, yet in vain. The qualifying clause in Article 46(d) TEU ("insofar as the Court has jurisdiction under the Treaties establishing the EC and under this Treaty"), has a precise meaning: it is intended to confirm that the ECJ will have to apply Article 6 TEU in the framework of the existing procedures and that this article does not, as such, allow the ECJ to review measures under the second and third pillars that fall generally outside the jurisdiction of the ECJ. [232] Thus, the CFSP has been as a sector excluded from the judicial review by the ECJ. Given the prominent role the ECJ has already played in promoting the respect for human rights within the EC and given the role it could by analogy play in encouraging the respect for human rights by the EU during the conduct of its foreign policy, the absence of a supervisory role for the ECJ over the second pillar is "a serious shortcoming of the TEU"[233].

In the abundance of issues raised in this regard in doctrinal debate, two of those merit closer attention in the context of this work. First, the indirect judicial scrutiny of questions related to the CFSP by the ECJ that it has embarked upon *via* the existing procedures and, second, the claim of the EU being in violation of the human right of access to justice, indicate possible venues for circumventing the present unsatisfactory legal situation. The former indicates the practical *de facto* capacity of the ECJ to undertake sufficiently delicate and, at the same time,

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Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty:
(a) provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community;
(b) provisions of Title VI, under the conditions provided for by Article 35;
(c) provisions of Title VII, under the conditions provided for by Articles 11 and 11a of the Treaty establishing the European Community and Article 40 of this Treaty;
(d) Article 6(2) with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty;
(e) the purely procedural stipulations in Article 7, with the Court acting at the request of the Member State concerned within one month from the date of the determination by the Council provided for in that Article;
(f) Articles 46 to 53.

[231] Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "The Netherlands Quarterly of Human Rights", vol. 15, No. 3, 1997, p. 294.

[232] Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 885.

[233] Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "The Netherlands Quarterly of Human Rights", vol. 15, No. 3, 1997, p. 295.

effective judicial review of the CFSP if the necessary enabling *de iure* adjustments were to take place, and the latter, when juxtaposed with the EU's overall commitment to "human rights and rule of law", might provide a sufficient pressure to stimulate the political commitment to undertake such *de iure* adjustments. Such a synthesis of the capacity and willingness could lead to an extension of the ECJ's jurisdiction over human rights violations ensuing from the conduct of the CFSP.

1.1. Practice of indirect scrutiny of foreign policy/ the CFSP by the ECJ

The formal obstacle to the ECJ control over the CFSP in Article 46 TEU is coupled in discussions on the issue with a material claim of incapacity of the ECJ to carry out such control duly. Not only the ECJ jurisdiction is already on the formal borderline of the CFSP and thus has enabled it to indirectly decide certain matters if not *in* the field then *related to* it, but also the material claim seems unsubstantiated. Despite the allegation that the aptitude of the ECJ scrutiny over the CFSP matters is limited due to the specific character of its acts and the lack of due legal standards for the appreciation of those, the ECJ has in practice carried out analysis of analogous matters raised under the Community law.

ECJ has jurisdiction over matters that both relate to the CFSP in terms of substance, and touch upon delineation between the EC and the CFSP. According to Article 47 TEU, the CFSP cannot affect the competencies established in the EC Treaty. Therefore if a decision taken in the context of the CFSP would infringe a decision taken in the context of EC external relations, the Court would have jurisdiction over this issue and thus play the role of "policing" the borderline between the EC and the CFSP. Furthermore, the ECJ also has jurisdiction over areas where EC external policies and the CFSP overlap, concerning the EC part of such a matter[234]. Thus, the ECJ can in some cases have a say on the extent to which the EU honours its commitment to human rights during the conduct of its foreign policy. This would, for example, be the case if the ECJ would be asked to pronounce on the legitimacy of use, by the EU, of trade instruments for foreign policy purposes. It is imaginable that the ECJ would annul a Council Regulation imposing sanctions on a developing country on the grounds of infringement of human rights, with the result that a joint action taken under CFSP and containing the decision to impose the sanction would remain ineffective. On the basis of its jurisdiction on matters falling within the sphere of the EC Treaty, therefore, the ECJ could in some very specific situations measure the foreign policy actions taken by the EU against its human rights commitments. The same could be the case in some instances where the EU would use the EC budget for foreign policy purposes, a possibility which is laid down in

[234] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 449.

Article 28 TEU. The EU has already decided in some cases, in a joint action, to back up its foreign policy actions with positive economic measures. The EU is, of course, more likely to infringe human rights by disrupting its trade relations with a third country than by providing it with economic aid. However, it is in theory possible that the EU would, through the provision of economic aid, back a repressive regime and this contribute to the continuation of human rights infringements in the country concerned. The ECJ could in such a case declare the economic measures to be in contradiction with the human rights commitments of the EU, in which case the joint action providing for the economic aid would remain meaningless.[235]

Also, decisions of the EC organs in the context of external relations are subject to the judicial review of the ECJ within its jurisdiction according to Article 230 TEC. The compatibility of international agreements with primary EC law may be subject to a specific advisory proceeding before the court according to Article 300(6) TEC. ECJ also examines the legal basis of EC acts in external affairs in other proceedings. Thus ECJ has already a rather significant role in control of external action, even only so in the EC context.

Moreover, despite the alleged incapacity to duly carry out legal control of the complex issues of foreign affairs, there is no evidence of a general reluctance of the ECJ to adjudicate on external affairs measures. AG Jacobs argued in the *Greek Embargo on Macedonia* case that "[t]he scope and intensity of the review that can be exercised by the Court is however severely limited on account of the nature of the issues raised. There is a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious tensions exist and whether such tensions constitutes a threat of war. [..] The decision to take such action [i.e., the trade embargo] is essentially of a political nature."[236] Nevertheless, even in cases concerning such highly political decisions as the embargo against Iraq[237] or the suspension of the co-operation agreement with Yugoslavia in 1991[238] the Court did not shy away from considering the legal questions involved both under EC and international law.[239]

Such practice indicates that it is neither the matter of the foreign policy being absolutely *legibus solute*, nor that of the courts lacking the framework of and the methodology for judicial scrutiny of the domain that justify the complete lack of jurisdiction over these

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[235] Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "The Netherlands Quarterly of Human Rights", vol. 15, No. 3, 1997, pp. 294-295.
[236] Case C-120/94, [1996] ECR I, p. 1526 (para. 47) and p. 1531 (para. 63)
[237] *Dorsch Consult v. Council and Commission*, Case C-237/98, ECJ appeal judgement, 15 June 2000, [2000] ECR I-4549.
[238] *Racke v. Hauptzollant Mainz*, Case 162/96, ECJ judgment, [1998] ECR I-3655.
[239] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 448.

matters. As contended by professor Eileen Denza (University College London), "the special character of the CFSP as based on public international law should be clarified and it should be opened to the supervision of the ECJ"; she expressed confidence in the ECJ being able to appreciate the differences between the EC law and public international law and to clarify rather than obscure these differences. [240] Thereby, it is clear that it is rather the negative *animus* than the capacity of *modus operandi* of the relevant actors of international law that defines the existing unsatisfactory situation.

1.2. Violation of the right of access to justice?

Paradoxically, the routine argument against the need to establish a responsibility mechanism for potential human rights violations ensuing from the conduct of the CFSP that "the EU does not violate human rights" may itself lead to a human rights violation: one of the human right of access to justice. A "denial of justice" which results from "a total lack of internal remedies" is considered "a separate ground for organisational responsibility." [241] Taking into account the jurisdictional immunity of international organisations before domestic courts and the lack of *locus standi* before international courts, the absence of adequate alternative internal mechanisms within the international organisation easily amount to a denial of justice. It has been explicitly argued for in regard to the lack of the ECJ jurisdiction over the CFSP: "The absence of a facility, in the hands of private parties, to challenge *directly* before the Court of First Instance measures [..] promulgated under the CFSP, may also be problematic. It could breach the requirement of access to effective judicial remedies, as protected by both the case law of the ECJ[242], and the ECtHR."[243] While the foreign policy actions of the EU acting under the Title V TEU cannot be scrutinized by any outside body, judicial supervision by the ECJ over the actions engaged in by the EU under Title V would therefore form "a minimum guarantee that the EU take human rights considerations into account during the conduct of CFSP." [244]

The argument of denial of justice has not remained a doctrinal speculation, but emerges in the ECJ jurisprudence. Reasoning based on this argument was undertaken by the plaintiffs in the

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[240] *The Future Role of the European Court of Justice,* House of Lords, European Union Committee, 6th Report of Session 2003-2004, 15 March 2004, p. 31.
[241] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 67.
[242] *Johnston v. RUC,* application No. 222/84, European Court of Human Rights, merits, [1986] ECR 1651.
[243] Angela Ward, *Access to Justice*, in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy – Essays in European Law*, Oxford and Portland Oregon, Hart Publishing, 2004, p. 124.
[244] Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "The Netherlands Quarterly of Human Rights", vol. 15, No. 3, 1997, p. 295.

SEDI case and *Gestoras Pro Amnistia* case. First, they claimed that: "In a Community of law, in application of fundamental rights, especially those laid down in the ECHR, [the applicants] must have access to a court in order to recognize the violation of their [fundamental] rights and to obtain reparation. In the opposite case, they would be in a situation of a *denial of justice*, which means that the Institutions, as soon as they intervene in the [European] Union framework, would be acting in the highest arbitrariness."[245] Having stated that the current judicial architecture of the EU constitutes in regard to their situation, which falls under the CFSP, a denial of justice, they went on to demonstrate the bad faith of the EU in (ab-)using the lack of jurisdiction of the ECJ over the CFSP in the political interest of the EU. In the appeal of the order of inadmissibility of their claims before the CFI, they argue: "The Council has fraudulently exploited the division into three pillars of European Union activities. In its choice of legal basis, the Council was guided by considerations of expediency such as the wish to avoid the scrutiny of the Parliament, the Ombudsman and the Court of Justice and therefore to deprive the persons concerned of the right to an effective remedy and in particular of the right to an action seeking compensation for the harm suffered. That behaviour constitutes an abuse of process."[246] To take as a background for assessing these statements the interpretations on denial of justice by the UN Human Rights Committee, "[a]ny attempt by a state party to the Optional Protocol of the ICCPR to impede access by its citizens to the Human Rights Committee constitutes a grave violation of its obligations,"[247] and a separate grounds for international responsibility. While the situation here is not identical, nevertheless it is clear that any institutional manipulations on the part of the international organisation with the express aim or with the practical effect to deprive the individual claiming redress for an alleged human rights violation from access to justice, is an internationally wrongful act in breach of the human rights imperatives and the principle of rule of law. To come back to the aforementioned cases before the ECJ, it is highly improbable to receive a positive ruling on the plaintiffs' claims; however, these statements will nevertheless require due legal analysis

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[245] *Segi and Others v Council of the European Union*, Case T-338/02, CFI order on admissibility, 7 June 2004, para. 39. See also: *Gestoras Pro Amnistia, J.M. Olano Olano, J. Zelarain Errasti v Council of the European Union supported by the Kingdom of Spain and the United Kingdom*, Case T-333/02, CFI order on admissibility, 7 June 2004.

[246] Appeal brought on 17 August 2004 by Pro Amnistia, J.M. Olano Olano, J. Zelarain Errasti against the order delivered on 7 June 2004 by the Second Chamber of the Court of First Instance of the European Communities in Case T-333/02 between Gestoras Pro Amnistia, J.M. Olano Olano, J. Zelarain Errasti and the Council of the European Union, supported by the Kingdom of Spain and the United Kingdom (Case C-354/04 P) *[OJ C 251 9.10.2004. p. 9]* and
Appeal brought on 17 August 2004 by SEGI, A. Zubimendi Izaga, A. Gallaraga against the order delivered on 7 June 2004 by the Second Chamber of the Court of First Instance of the European Communities in Case T-338/02 between SEGI, A. Zubimendi Izaga, A. Gallaraga and the Council of the European Union, supported by the Kingdom of Spain and the United Kingdom (Case C-355/04 P) *[OJ C 251 9.10.2004. p. 10]*

[247] *Ashby v. Trinidad and Tobago*, UN Human Rights Committee, views, 21 March 2002, *Report of the Human Rights Committee*, 2002, UN Doc. A/57/40, p. 94, para. 134.

and reasoned reply by the ECJ itself and thus stimulate the necessary legal and political debate on the issue among the EU decision-makers.

B.2. "External": Procedural inaccessibility of international courts

Human rights by their very nature have been an international legal and political phenomenon in the sense that they have pierced the sacred veil of national sovereignty and exempt human rights issues from the domain of "matters essentially within the domestic jurisdiction of any state" in the meaning of Article 2(7) of the UN Charter. As such, human rights violations by states have been opened to judicial review by international courts in special procedures. Despite the role of international organisations on the international scene and their increasing capacity to cause human rights violations in their relations with individual third parties, no comparable advances to ensure their responsibility on procedural level have been made[248]: "There does not currently exist any international court which can fulfil a judicial advisory function in matters relating to the CFSP or which can hear claims on behalf or against the EU."[249]

The human rights disputes between an international organisation and an individual are doubly doomed: first, the accessibility of international jurisdictions is limited by the criterion of "competent forum" and, second, again in a bi-fold manner, by the criterion of *locus standi*: the one of the international organisation on the one hand and the one of the individual on the other. If to construe a schematic pyramid of the standing for international remedial action, "[t]he lowest ranking is that for non-state third-party entities. […] Major problem in terms of a total lack of or inadequate standing arise in situations where private parties are seeking effective and appropriate remedies against an international organisation." [250] Thereby, the potential venues for circumventing these obstacles have to be searched for in regard to these two criteria principally.

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[248] The analysed inaccessibility of international courts creates a situation which would seem peculiar from the traditional legal theory – one when there are rights, but no venues for their enforcement. When this situation refers to the right of access to justice, the lack of courts seems to go directly against the very core of this right, and deprive it of substance.
However, in the context of international law, the relevance of legal norms cannot be weighed by their potential to generate international litigation. International commitments are frequently deprived of enforcement measures other than reciprocity and countermeasures. The absence of a proper, general tort law of international organisations is a fact which has nothing to do with the procedural issues of remedies against international organisations. The question of the applicable law and of the appropriate mechanisms to enforce it should, as always, be clearly distinguished.

[249] Nanette A.E.M. Neuwahl, *Legal Personality of the European Union – International and Institutional Aspects*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, T.M.C. Asser Press, The Hague, 2002, p. 21.

[250] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p.339.

2.1. Competent forum

International society is marked by an increasing degree of decentralisation, not to say evnen *ad hoc*-isation. To the contrary to the internal legal system of States, there does not exist a central authority to carry out the "pursuit" of a State or an international organisation for establishing its international responsibility[251]. Among the diverse more or less institutionalised mechanisms, the subject-matter of the potential disputes (human rights) and the scope of this work are the first factor limiting the array of international courts that could *prima facie* have jurisdiction *ratione materiae* over disputes on human rights between an individual and the EU.

2.2. Locus standi

The procedural accessibility of the international courts identified as competent in adjudication of human rights violations is further definitely denied by the double *locus standi* criterion: there does not exist an international court which would according to the *status quo* have jurisdiction to directly rule upon the responsibility of an international organisation for human rights violations, not even to talk about granting a corresponding and, it would be utopian, an enforceable remedy.

a) the UN system

- the ICJ

Article 34(1) of the ICJ Statute is categorical: "Only states may be parties in cases before the Court." The article is double-edged, because thereby neither an international organisation can in principle be brought before the ICJ as a respondent, nor injured individuals or other non-state entities have standing as an applicant. Not even the UN member states or UN organs have the opportunity to sue the UN itself[252], or any other international organisation before the ICJ since the ICJ Statute limits contentious proceedings to inter-state disputes.

Although the ICJ has jurisdiction "in all legal disputes concerning [..] any question of international law" and although the subject-matter of disputes brought before the ICJ has occasionally touched upon questions on individual rights by the reason of inter-state disputes

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[251] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 805.

[252] Reinisch, August, *Governance Without Accountability?*, in "German Yearbook of International Law", vol. 44, 2001, p. 283.

brought by a State that has undertaken the protection of its citizen's rights against another State, direct access to the ICJ has remained unavailable for individual plaintiffs.

There does exist an indirect remedial opportunity against an international organisation in an inter-state dispute before the ICJ. The legal validity, scope and interpretation of an act adopted by an international organisation may play a role in an inter-state dispute before the ICJ[253]. Parties may challenge the legal validity of such an act: if their argument is upheld by the ICJ, they may thus obtain an indirect remedial ruling against the international organisation. Also, states appearing before the ICJ may also themselves create an indirect remedial opportunity under Article 51 of the ICJ Statute when calling officials of an international organisation as witnesses to answer relevant questions during the oral hearings.[254] An indirect remedial benefit will, of course, depend upon the subsequent use of this material by the ICJ, in reaching its decision. In the situations contemplated under article 34(2) and (3) of the Statute, international organisations could be indirectly involved in an inter-state dispute where a decision of the international organisation is implicated or constitutes one of the aspects of the case: international organisation have, indeed, " an *amicus curiae* function and responsibility in cases related to their activities"[255]. Information provided by an international organisation pursuant to Article 34(2) and (3) of the ICJ Statute or contained in the report of an inquiry or in an expert opinion carried out under Article 50 of the Statute, may touch upon issues and questions of operational activities of an international organisation that may eventually bring to the fore aspects of the international organisation's non-contractual liability and/or responsibility. Nevertheless, these limited forms of procedural involvement cannot be interpreted extensively so as to grant the international organisation standing as a party to the litigation[256].

Thereby the only jurisdiction that the ICJ could provide over the CFSP matters would be that over inter-state disputes arising in this context, as their obligations in the CFSP context are "actually binding international legal obligations and theoretically 'justiciable' before the ICJ"[257].

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[253] P. Couvreur, *Développements récents concernant l'accès des organisations intergouvernementales à la procédure contentieuse devant la CIJ,* in E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Mohammed Bedjaoui,* The Hague, Boston and London, Kluwer Law International, 1999, p. 299.

[254] International Law Association, *Accountability of International Organisations,* Final Report, Berlin Conference, 2004, pp. 51-52, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

[255] P. Couvreur, *Développements récents concernant l'accès des organisations intergouvernementales à la procédure contentieuse devant la CIJ,* in E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Mohammed Bedjaoui,* The Hague, Boston and London, Kluwer Law International, 1999, p. 303.

[256] Patrick Daillier et Alain Pellet, *Droit International Public,* Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 894.

[257] R. Dehousse and J.H.H. Weiler, *EPC and the Single Act: From Soft Law to Hard LAw?,* EUI Working Paper EPU No. 90/1, 1990, p. 17

- Human rights treaty bodies

Four of the human rights treaty bodies (Human Rights Committee, Committee on the Elimination of Racial Discrimination, Committee against Torture and the United Nations Committee on the Elimination of Discrimination against Women) may, under certain circumstances, consider individual complaints or communications from individuals. The Human Rights Committee may consider individual communications relating to States parties to the First Optional Protocol to the ICCPR; the Committee on the Elimination of Discrimination against Women may consider individual communications relating to States parties to the Optional Protocol to the Convention on the Elimination of Discrimination against Women ; the Committee against Torture may consider individual communications relating to States parties who have made the necessary declaration under article 22 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ; and the Committee on the Elimination of Racial Discrimination may consider individual communications relating to States parties who have made the necessary declaration under article 14 of International Convention on the Elimination of All Forms of Racial Discrimination . The Convention on Migrant Workers also contains provision for allowing individual communications to be considered by the Committee on Migrant Workers; these provisions will become operative when 10 states parties have made the necessary declaration under Article 77 of the Convention on Migrant Workers.

The optimistic enlisting of the mechanisms of redress has to stop short right there, first, taking into account that neither of the aforementioned procedures grants any procedural standing to international organisations; second, it is disputable if the quasi-judicial procedures of the treaty bodies can be regarded judicial *stricto sensu* as required by the framework of this work, and therefore relevant for consideration.

b) the International Criminal Court

Even though the ICC's jurisdiction *ratione materiae* is relevant, as "the most serious crimes of international concern"[258] have direct implications on human rights and are in themselves

[258] Article 5 of the Rome Statute of the International Criminal Court:
"Crimes within the jurisdiction of the Court
1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;

"gross violations of human rights"[259], the *ratione personae* (international criminal responsibility of individuals) excludes this court from any consideration for the purposes of this work.

c) the ECtHR

To open the question on the relations between the ECtHR on the one hand and the EU Member States, the EU and the EC on the other hand might seem just like to enter Frank Baum's Marvelous Land of Oz: full of *sui generis* politico-juridical creatures, labyrinthic paths to solutions for balanced interaction of all these subjects of international law, and with an unclear timing and result of "the way out" as proposed by the EU Constitutional Treaty envisaging the EU's accession to the ECHR[260]. To avoid immersion in the plurality of polemic issues as regards the coherence of the two European systems (or – the ECHR system, and the EU/EC proto-system) of human rights protection, the considerations of the procedural (in)accessibility of the ECHR have to be limited, first, to the *status quo*, and, second, to the EU (as opposed to both the EC and the collectivity of its Member States). With such premises

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(d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

[259] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 769.

[260] Allan Rosas, *The European Union and International Human Rights Instruments*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, T.M.C. Asser Press, The Hague, 2001, pp. 53-67; Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "Netherlands Quarterly of Human Rights", vol. 15, 1997, pp. 291-324; P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, pp. 111-138; E. A. Alkema, *The European Convention as a Constitution and its Court as a Constitutional Court*, in "Protection des droits de l'homme : la perspective européenne: mélanges à la mémoire de Rolv Ryssdal », pp. 41-63; P. Twomey, *The EU: Three Pillars Without a Human Rights Foundation?*, in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, 1994; Tristan Ferraro, *Le droit international humanitaire dans la politique étrangère et de sécurité commune de l'Union Européenne*, dans "Revue Internationale de la Croix-Rouge=International Review of the Red Cross", vol. 84, No. 846 (juin 2002), pp. 435-461; Dinah Shelton, *Remedies and the Charter of Fundamental Rights of the European Union*, in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy. Essays in European Law*, Hart Publishing, Oxford and Portland Oregon, 2004, pp. 349-363; etc.

Discussion paper on the Charter/ECHR, Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, CONV 116/02, WG II 1, 18 June 2002; Paper by Mr António Vitorino "The question of effective judicial remedies and access of individuals to the European Court of Justice", Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, WD 21, WG II, 1 Octobre 2002; Paper by Mr António Vitorino, "Study carried out within the Council of Europe of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights", Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, WD 08, WG II, 12 July 2002; Final Report of Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, CONV 354/02, WG II 16, 22 October 2002; Final Report of Working Group III "Legal Personality", the European Convention, CONV 305/02, WG III 16, 1 October 2002; etc.

clarified, the verdict is clear: while the relevant ECHR norms on the jurisdiction of the ECtHR do not limit the standing of a respondent to States *expressis verbis*[261], since the EU is not a Contracting Party to the ECHR, it does not have the standing to be a party in a dispute brought before it.

As regards the substance of the CFSP measures, the ECHR has just reaffirmed its stance that the matters of foreign policy are not *ipso facto* excluded from the scope of its review. In the Grand Chamber judgment of 30 June 2005 in the case *Bosphorus Airways v. Ireland,* the ECtHR pronounced that the EC system of human rights protection was "equal" (reference to the "equal protection" doctrine established in evaluation of the compatibility of the ECHR and the EC human rights standards[262]) to the ECHR system[263]; this statement, however, does not refer to the human rights protection in the EU - in the CFSP. This judgment follows the line of argumentation taken by the ECHR in the case *Matthews v. United Kingdom,* where the ECHR abrogated to itself the rights to review State Party compliance with the ECHR with respect to "EU acts which the ECJ cannot review"[264] However, the types of measures which might be viewed as instruments which the ECJ "cannot" review is far from clear, especially given the complex regime for judicial review under Title IV TEC (on visa, asylum and immigration policy) and Title VI TEU (on Police and Judicial cooperation in criminal matters) [265]; the fact that the ECJ has no authority to review compatibility of CFSP measures with the human rights norms of the ECHR and thus to assure the "equal protection" criterion, could lead to the conclusion that the ECHR is in substance competent to review a CFSP measure if it fails to respect third party's human right as guaranteed by the ECHR.[266] Such an

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[261] Article 33
Inter-State cases
"Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party."
Article 34
Individual applications
"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

[262] *M. & Co. v. Germany,* application no. 13258/87, European Commission of Human Rights, merits, 9 February 1990, p. 138.

[263] *Bosphorus Airways v. Ireland,* application no. 45036/98, European Court of Human Rights (Grand Chamber), merits, 30 June 2005, para. 72.

[264] *Matthews v. the United Kingdom,* application No. 24833/94, European Court of Human Rights, merits, ECHR 1999-I, 18 February 1999, para. 32.

[265] Angela Ward, *Access to Justice,* in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy – Essays in European Law,* Oxford and Portland Oregon, Hart Publishing, 2004, p. 138.

[266] Another case (*Senator Lines v. the 15 EU member States*, application No. 56672/00, European Court of Human Rights (Grand Chamber), admissibility, 10 March 2004) raises the issue of individual and collective responsibility of EU member states for human rights violations resulting from a Community act.
See on the responsibility of EU Member States for human rights violations caused by their

approach attempts to address the "vacuum of legal protection"[267] that issues from the inaccessibility of both national and international judicial mechanisms due to the lack of *locus standi* of the EU.

Even though the aforementioned jurisprudence does not solve the problem of the inability to claim legal responsibility for human rights resulting from the CFSP conduct directly from the EU, it consolidates the rule that the subject-matter of the CFSP is not in any manner exempt from review as to its compatibility with human rights, as well as drafts a procedural venue how to assure that the violation does not remain unaddressed for the pure reason of belonging to the "quasi-sacred" EU/EC realm of activity.

implementation of Community acts:
Matthews v. the United Kingdom, application No. 24833/94, European Court of Human Rights, merits, ECHR 1999-I, 18 February 1999; *CFDT v. the European Communities and their Member States*, application no. 8030/77, European Commission of Human Rights, merits, DR 13, 10 July 1978, p. 231; *Segi and Gestoras Pro-Amnistia and Others v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain,Sweden and the United Kingdom* (dec.), nos. 6422/02 and 9916/02, ECHR 2002-V; all with further refereces.

[267] Kerem Altipark, *Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, in "Journal of Conflict&Security Law", vol. 9, No. 2, Summer 2004, p. 242.

III. DE LEGE FERENDA: EU TITULAR RESPONSIBILITY MODEL

A. SCHEME AND GROUNDS OF THE MODEL

The outlined synthesis of the factual, functional, legal and ideological considerations behind the need for a design of a responsibility mechanism conceptually more fitting to the human rights aspect of the CFSP dynamics than the available ones, leads to the inevitable question of the proposed scheme and grounds of such a mechanism. The EU titular responsibility model synchronizes with the current state of the EU on its foreign and internal facets; rather than merely criticising, the model functionalizes the latter's dubiety so as to assure the optimal protection of the individual – the victim of a human rights violation ensuing from the conduct of the CFSP – as required by the subjacent general imperative of human rights law at the same time remaining in full compliance with the traditional notions of international public law on responsibility.

The EU titular responsibility model combines two methods of international responsibility: on the formal level, the one that is relevant for third parties (externally), - the EU assuming international responsibility for human rights violations and standing as the defendant in the relevant legal disputes; on the substantive level, the one that is relevant for the EU internal order (its relations with the Member States, institutions, organs, agents), - the EU being entitled to a right of recovery from the subject ultimately responsible for the violation, as identifiable according to the traditional rules on attribution of conduct (Art. 3, Art. 16 of the ILC Draft Articles on Responsibility of international organisations). Thus, the EU responsibility can be best described as "titular" [268] – having a particular formulation as such, but not possessing the contents usually associated with this formulation.

Thereto, the EU titular responsibility model can be described as "primary": it is built on a scheme of "primary vs. residual" in the categorisation of relations established between it and the other existing mechanisms of redress. Its characterisation as a "primary" one - first, main, basic – emphasizes, at the outset, its systemic belonging to the system of diverse other mechanisms rather than uniqueness or unpierceable supremacy, but, then, also its functional role in consolidation and optimization of those latter ones - diffuse, fragmented, residual.

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[268] "titular: 1. holding or constituting a purely formal position or title without any real authority [queen is titular head of the govermnment]; 2. relating to or denoted by a title [titular song]. Origin - late 16th century from French titulaire or modern latin titularis from titulus
Oxford Dictionary of English, Oxford University Press, 2nd edition, 2003

Drawing upon the principles like legal security, equality of arms and *pacta tertiis* rule, on the one hand, and upon the notions of subsidiarity, political economy and *effet utile* in international integration, on the other hand, this model reflects the specifics of the asymmetrical power relation of individuals and international organisations and fits in the teleology of human rights. International public law accommodates the model through the notion of delinking the attribution of responsibility from the attribution of conduct, as laid down in Article 7 of the ILC Draft Articles on Responsibility of international organisations, as well as in the apposite consolidating practice in the international dynamics of various international organisations, notably the EC.

- specifics of human rights context

To understand the perceptible favouritism of the individual in the interpretation of the relevant international rules and practices laying ground for the design of the EU titular responsibility model, it is worthy to recall that this discourse is not taking place in an abstraction, but rather in the particular context of the branch of international law that is human rights law. According to Article 31(3)c) of Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (21 March 1986), "any relevant rules of international law applicable in the relations between the parties" should be taken into account in the interpretation of the international rights and obligations incumbent upon the parties. Human rights law is that what most directly interrelates individuals and international organisations in the context of this work. As put by the International Law Association in its Final Report on the Accountability of International Organisations, "[t]here is no reason why the imperative of the protection of human rights should not permeate both primary and secondary rules of international organisation responsibility."[269] It has been explicitly stated in Article 11(1) TEU that one of the objectives of the CFSP is "to develop and consolidate [..] respect for human rights and fundamental freedoms". Thus, human rights are the *lex specialis* to be employed for interpreting rules on treatment of the cases of human rights violations in the conduct of the CFSP.

The human rights context dictates some alterations in the use of traditional international law concepts, rendering those more liberal and flexible so as to approach the maxim of the protection of individuals in the unequal power relation between them and international organisations. Taking into account the teleology of human rights, "[i]t might be wrong to transfer the ordinary meaning [of concepts] under general international law to human rights

[269] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 33, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

law. International human rights law is a specialized branch of the law on responsibility." [270] Only by means of an adequate adjustment – by a *mutatis mutandis* conversion in "appropriate [ones] given the interests they are aiming to protect or restore"[271], the remedies can be effective. As convincingly summed up by Karel Wellens, - "[t]he importance of interests at stake in international proceedings [on human rights violations] precludes excessive or decisive reliance upon formal and technical rules. The absence of sovereign equality between the parties involved in proceedings against international organisations would require flexibility: the requirements and standards imposed upon the claimant should not be unduly or utterly stringent."[272] The authoritative international law specialist Andrew Clapham shares this stance in regard to the EU specifically: "the ECJ should take a victim-oriented approach to the questions of [human] rights." [273] Thus the imperatives of human rights protection not only lay down the substantive basis for claims of responsibility for specific infringements, but, in a more general manner, serve as an overarching standard of interpretation.

- specifics of the EU

Another contextual specificity to be taken into account in assessing the foundations of the EU titular responsibility model is that of the EU. The peculiarity of the EU character is bi-fold: to be regarded, first, in relation to other "traditional" or "cooperation" international organisations like the OSCE, Council of Europe or other, amd, second, in relation to the EC as a supranational international organisation possessing a well-established international legal personality and a proper *sui generis* legal order.

Taking into account the large diversity of international organisations, it seems naïve to attempt establishing a universally applicable responsibility regime of international organisations without such dilution of rules that would suffice with the lowest common denominator shared by them all and thereby risk rendering the rules purely euphemist. International organisations differ one from another "as regards the volume and type of international activities or instruments in which they participate" [274]. All such legal or factual aspects determine the problematics that the international organisation faces or is likely to face

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[270] Kerem Altipark, *Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, in "Journal of Conflict&Security Law", vol. 9, No. 2, Summer 2004, p. 224.

[271] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 28.

[272] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 126.

[273] Pavlos Z. Eleftheriadis, *The Future of Environmental Rights*, in Philip Alston, Mara Bustelo and James Heenan (eds.), *The European Union and Human Rights*, Oxford University Press, 1999, p. 547.

[274] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 137.

in regard to responsibility, and, to go on from there, what kind of responsibility model would best address these problems. The EU, even though in regard to the "traditional" international organisations on a very high stage of integration, now even faced with a dilemma of formal constitutionalisation, on the other hand, in regard to the supranational EC is regarded as "a classical intergovernmental organisation with problems similar to the UN in respect of peace-keeping and police action, whereas the Community has very specific features and problems"[275]. The EU titular responsibility model adapts to this particularity. It has to be seen as a tailor-made special arrangement to effectively deal with the external and internal dimensions of responsibility, rather than a model to extract a comprehensive fit-all regime of responsibility of international organisations therefrom. The proposed model is as specific as the problematics accentuating the need for such a response.

A.1. The labyrinth of responsibility mechanisms

The development of the powers and prerogatives of international organisations has not been ignored from the corresponding responsibility point of view; however, the attempts to establish a matching system of redress for the violations of third parties' rights which are committed by international organisations have remained diffuse and sporadic. Thus, while it would be false to claim a vacuum of legal responsibility, nevertheless the factual ability of victims to obtain redress has been significantly encumbered by the intricacy and fragmentation of the various mechanisms put in place thereto.

It is not the objective of this section to provide an extensive overview of the means that individual victims of human rights violations by the CFSP conduct may attempt (not necessarily "can") to resort to in order to claim some form of accountability for the violation and, *ultima ratio*, a due remedy. Incidentally, the alternative forms of responsibility/ accountability, as well as the variety of actors (individual officers, (EU Member) States, European Institutions, EU, EC) involved in the perpetration of human rights violations, and the corresponding fora of redress (international tribunals, diplomatic protection, ombudspersons, arbitration, etc.) have been showed in the parts of this work devoted to defining its scope[276], as well as the (in-)accessibility of redress for individual victims[277]. For one, it is sure that "[a] visible feature is a plethora of autonomous and quasi-autonomous, non-judicial, quasi-judicial and judicial organs, some of them endowed with competence to deal with either a particular category of claims potentially originating from all kinds of

[275] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 3
[276] See *supra* Sections O.B.2. and I.A.2.
[277] See *supra* Chapter II.B.

requesters or claimants; others having a more or less open-ended competence to deal with requests or claims which will only be considered if put forward by a rather restricted range of entities or persons."[278] Thus there is a discernible lack of a clear, general and institutionalised framework for redress. As argued in regard to the failure of the UN Security Council to assure legal responsibility of the UN peace-keepers and *a fortiori* applicable to the general setting of international organisations' responsibility, - by providing *ad hoc* solutions, not grounded on any discernible principle of general application, the Security Council has failed to bring this processs into an institutionalized framework: "The prevailing *ad hocism* [..] prevents the development and subsequent enforcement of consistent patterns of normative standards and policies and makes it difficult to exercise scrutiny over the conduct of international actors."[279] Eventually, the lack of consistency, predictability and fairness undermines the credibility of the international legal system and puts into doubt whether international organisations are truly participating in defining the contours of an international legal order based on respect for the rule of law and the consistent enforcement of shared values and common interests.[280]

The setup of the CFSP makes sure that this general inclarity is topped with the minutiae of the EU quasi-constitutional (dis-)order. For instance, the decision-making rules of the CFSP make sure that Member States can abstain without preventing decisions from being taken (Art. 23(1) TEU), for instance, on crisis management operations. An abstaining EU member does not even have to apply the decision although all members have to accept that the decision is binding for the EU. Or, also, "[n]o agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally" (Article 24(5) TEU). Provisions of such kind do not seem to function as clear guidelines for establishing the exact status of Member States in regard to the particular CFSP act. If such and many other provisions on the setup of the CFSP cause heated doctrinal debates without clear conclusions among specialist of European law, an individual without a special background in EU constitutional affairs and, moreover, residing outside EU whereto the measures of the CFSP are by definition aimed, would be clearly not in a position to understand these labyrinths. Martti Koskenniemi takes a tragi-comically precise viewpoint of the latter point by a statement that "[i]f a Martian were to read Title V of the Maastricht Treaty – and an international lawyer examining the activities of the

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278 Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 41.

279 Andrea Bianchi, *Ad-hocism and the Rule of Law*, in "European Journal of International Law", no. 1, vol. 13, 2002, p. 263.

280 Andrea Bianchi, *Ad-hocism and the Rule of Law*, in "European Journal of International Law", no. 1, vol. 13, 2002, p. 263.

Union often feels like that – and try to determine on that basis what kind of political life communities in Europe have been established, he would be at a loss." [281]

The variety of potential defendants, fora and procedures, most of the time also coupled with restrictive rules of immunities, admissibility and *locus standi*, and resulting in remedies of not necessarily enforceable character, raise legitimate doubts as of the adequacy of such situation in the individual-favouring human rights context. Not the mere formal existence of the various fora for redress, but rather "whether the available mechanisms assure the accountability of international organisations in an effective and proportional way" [282] is the crucial issue. It has been acknowledged that "the establishment and refinement of an accountability mechanism for international organisations may require the development of innovative procedures to allow non-state entities actually or potentially affected by the actions or omissions of an international organisation to bring complaints directly against the international organisation concerned."[283] Following this incitement to innovation, the EU titular responsibility model attempts to build upon traditional notions of international and European law so as to circumvent the convolution of the potential defendants and fora, as well as to optimize the types of redress *prima facie* available for an individual whose human rights have allegedly been violated by the EU conduct. As emphasized by the International Law Association, "unambiguous legal regulation of these processes is of central relevance to a comprehensive accountability regime: unfortunate gaps may result from a lack of *clarity* in this area."[284]

A.2. EU as a titular subject of responsibility

The most clear and understandable solution for an individual would be claiming the responsibility of the EU, - after all, if it is the EU under whose framework the activity that has haphazardly given rise to the human rights violation is carried out, why should any other subject be held responsible? Such a simplistic statement would immediately provoke animated counter-reaction by the European law specialists, analysts of the dynamics of European integration and even the aficionados of national sovereignty. Nevertheless, there is a valuable part of truth in such a simplification – with the due adjustments arising from the specific nature of the EU, it provides the façade of the EU titular responsibility model, as is fitting the exigencies of human rights field. Namely, the EU is, according to this idea,

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281 Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, p. 29.

282 International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 32, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

283 *Ibid*

284 *Ibid*, p. 31.

acknowledged the *primary titular* of responsibility for breaches of human rights triggered by the CFSP; retracing of the agent, institution or Member State to which the wrongful conduct can be attributed and who is thus ultimately responsible for the human rights violation, thus remains a secondary process to be carried out subsequently and internally, with no direct and immediate concern to the individual claimant.

2.1. From the individual's perspective: Protection of legal security

The EU titular responsibility model is justified, from the victim's perspective, by the individual's procedural weakness as compared with the EU and the presumption of individual's good faith that discharges him/ her from the obligation of detailed knowledge of the internal construction of the EU. In order to repair the encumbrances upon the individual's position in the international system of responsibility, the individual in this model obtains a relatively (not absolutely) privileged procedural standing. Not only such approach is founded on the doctrine that "[t]he right to a remedy may be seen as a norm of customary international law, one of the essential features of which is that the parties are treated as *equal*,"[285] it is also affirmed in the practice of ECJ, as, "in the context of human rights, ECJ has historically developed a special 'user friendly' approach."[286]

a) "equality of arms" argument

The relative privileges of the individual are justified by the concerns that "the victim is the passive side of this relation [of responsibility]"[287] and that the right to adequate means of redress, in case of violation of human rights, is "in itself a basic international human rights standard, which should always prevail over the functional needs of an international organisation"[288]. In order to ensure that this human rights standard is met, the "inherent imbalance of power between international organisations and non-state claimants has to be taken into account; otherwise the remedial action would not come within the parameters of adequate settlement mechanisms."[289]

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[285] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 33, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf.

[286] P. Alston and J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 52.

[287] Kerem Altipark, *Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, in "Journal of Conflict&Security Law", vol. 9, No. 2, Summer 2004, p. 224.

[288] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 34, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf.

[289] Angela Ward, *Access to Justice*, in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy – Essays in European Law*, Oxford and Portland Oregon, Hart Publishing, 2004, p. 135.

This acknowledgement of the basic inequality of power and juridical status between the individual and the international organisation does not remain a static proclamation; it assumes functional significance in the way that it affects the design of rules for the implementation of international organisations' responsibility. With the concern in mind that "caution must be called for as the submission of private parties to settlement mechanisms has to be assessed against the overall context and background of the fundamental inequality in power between the international organisation and its non-state counterpart," [290] the *equality of arms* principle "affects the procedures and the perceived role of the defendant in affording remedies"[291]. Those must be amended so as to ensure the individual's equal possibility to protect his/ her stand in the dispute, and, for that, to clearly identify the subject for addressing the claim to. While it has been traditionally supposed that:

> "In the process of selecting the appropriate forum for a possible legal action it will be particularly relevant for claimants to consider, obviously on a *prima facie* basis, if, how and under what circumstances (the) member states can be held liable/ responsible and to what extent may direct concurrent or subsidiary recourse be had to (the) member states. In any scenario the corporate veil erected by the organisation's legal personality - which is essential for its independent functioning – would have to be pierced at either the domestic or international level,"[292]

the argument of this work is the opposite – that actually the "corporate veil" should remain intact.

By identifying a single cumulative defendant for potentially holding responsible before an international jurisdiction, the proposed model of the EU primary titular responsibility effectively addresses these concerns. It is an emblematic example of how "in the sphere of remedies the pre-existing inequality between non-state parties and the international organisation may come into play to adjust the balance by maintaining a reasonable degree of respect for the organisation's continuous well-functioning, while providing adequate redress for the claimants. This balancing act should permeate the debate concerning remedies against international organisations, both in its procedural and substantive aspects"[293]. Taking into account that "the existing mechanisms have revealed deficiencies, inadequacies and an insufficient degree of remedial potential,"[294] it superposes itself to those formally, meanwhile

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[290] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 18.

[291] Dinah Shelton, *Remedies in International Human Rights Law*, Oxford, Oxford University Press, 1999, p. 2.

[292] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 44.

[293] *ibid*, p. 25.

[294] Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "The Netherlands Quarterly of Human Rights", vol. 15, No. 3, 1997, p. 294.

not in any way eliminating the latters' advantage which lies in their faculty to precisely attribute the wrongful conduct and thus trace back to the factually responsible subject.

b) *pacta tertiis* rule

Pacta tertiis doctrine (*Pacta tertiis nec nocent nec prosunt)* [295] reflects the general rule that international agreements bind only the parties to them. In the framework of international treaty law, the principle *pacta sunt servanda,* not only carries the idea that treaties are binding, but also that they are binding, under international law, only on those who are formally the parties to a treaty (the so-called concept of privity).[296] Traditionally developed in the inter-state context and extended to international organisations, as reflected in Article 34 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (21 March 1986): "A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization", this rule can be *mutatis mutandis* stretched also to non-state parties. Third parties cannot be required to be familiar with "all the ins and outs, all the 'nitty-gritty' of the [internal] document when they are required to interpret it. If the document is only very implicit as to legal competencies, this cannot be held against the third party acting in good faith."[297] Thus, the internal arrangements of the EU become of no relevance to the individuals negatively affected by the EU action under the auspices of the CFSP in the sense that they do not give rise to an individual's obligation of the knowledge of the detailed provisions of the distribution of powers and responsibilities within the EU. For the extra-EU individual victim, "[t]he CFSP is formally a *res inter alios acta.*" [298] International law acknowledges that internal legal arrangements for other subjects of international law are only facts. [299]

The aforementioned effects of the *pacta tertiis* rule are not only reactive, but also pro-active. As argued by Karel Wellens, "[f]rom a pre-remedial point of view, third parties should know exactly with whom they are dealing, and from whom they can expect compensation in case of

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[295] Martin Bjorklund, *Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?*, in "Nordic Journal of International Law. Acta Scandinavica juris gentium", vol. 70, no. 3, p. 398.

[296] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 6.

[297] Nanette A.E.M. Neuwahl, *Legal Personality of the European Union – International and Institutional Aspects*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, T.M.C. Asser Press, The Hague, 2002, p. 8.

[298] Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, p. 39.

[299] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 773.

breach or failure to perform. International organisations, for their part, should not conduct themselves in such a way as to leave these questions vague or open in their dealings with third parties." [300] Thus there is a positive obligation of the international organisation to ensure that these clarifications are duly formalised, according to Article 9(1) of the 1995 Resolution of the Institute of International Law (*Institut de Droit International*) on The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties:

> "(a) in its rules and contracts;
> (b) in communications made to the third party prior to the event or transaction leading to liability;
> (c) in response to any specific request by any third party for information on the matter."[301]

The same obligation of the EU can be by analogy extrapolated from the doctrine of delimitation of responsibility between the Member States and the EC in regard to EC mixed agreements[302], to the extent that its principles are transposable to the non-EC European dynamics. It has been authoritatively established by Giorgio Gaja, currently also the UN ILC Special Rapporteur on Responsibility of International Organisations, that "[w]hen it is not provided, directly or indirectly, for distinction between the Community's and the Member State's rights and obligations, or when the criteria set out for the distinction cannot lead to a solution, the Community's and the Member State's rights must be taken with regard to the non-member states as an undivided whole."[303] Thus, as the result of the inclarity, such as described in the previous section of this work, of the demarcation line between the areas of jurisdiction and responsibilities inside EU *vis-à-vis* third parties, the third parties "have a wide margin for mistakes made in good faith"[304] and "cannot be expected to make the necessary inquiries themselves." [305] The fine details of any division of power can be "only held against the organisation and its Member States, not against third parties."[306]

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[300] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 48-49.

[301] *Resolution on the Legal Consequences for Member States of the Non-fulfilment by International Organisations of their Obligations toward Third Parties*, Institut de Droit International, in *Annuaire de l'Institut de Droit International*, 1995; at: http://www.idi-iil.org/idiE/navig_chon1993.html

[302] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 5.

[303] Martin Bjorklund, *Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?*, in "Nordic Journal of International Law. Acta Scandinavica juris gentium", Vol. 70, No. 3, p. 382.

[304] *Ibid*, p. 401 .

[305] *Ibid*, p. 382.

[306] Nanette A.E.M. Neuwahl, *Legal Personality of the European Union – International and Institutional Aspects*, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order- Discord or Harmony?*, T.M.C. Asser Press, The Hague, 2002, p. 8.

The proscription to resort to internal rules so as to redirect the *prima facie* responsibility to the internal EU subjects is another element of the *pacta sunt servanda* principle besides the *pacta tertiis* rule. If construing the human rights obligations of the EU towards individuals as a quasi-contractual relation, the principle enshrined in Article 27(2) of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (21 March 1986): "An international organization [..] may not invoke the rules of the organization as justification for its failure to perform" applies thereto.[307] For the individual, "the differences between member states and organs should be considered to be constitutional issues" [308] and the internal division of competences, rights and obligations laid down therein "is much less relevant than the effect their use might have on [his/ her] legal position."[309] To sum up, the *pacta sunt servanda* principle – by the means of *pacta tertiis* rule and the inadmissibility of the claim of internal legal order – dually protects the individual victim from procedural and material obstacles to claiming international organisation's responsibility – neither the individual as the third party is required to be familiar with the organisation's constitutional rules indicating the internally responsible subject, nor the organisation is entitled to invoke these rules so as to avoid the claim addressed to it.

This individual's exemption from the duty to be familiar with the internal constitutional system of the EU and to duly dispose of this knowledge in responsibility proceedings, as well as the correlating positive obligation of the international organisation to provide for a clear delimitation of its scope of responsibility *vis-à-vis* third parties lies upon the general principle of legal security[310]. In this specific context, the consideration of legal security entitles third parties to have unambiguous guidelines of available remedial venues so as to be able to freely and in advance choose their course of action. The protective function of any remedial action is "partly based on a sufficient degree of predictability, irrespective of the chances of a successful outcome. "[311] This goal is effectively advanced by the proposed "primary vs. residual" scheme of the EU titular responsibility model for human rights violations by the CFSP. The attribution of titular responsibility to the EU as a formal primary subject serves as a "shield" for the complexity of the CFSP by distinguishing its matter in a "façade" which is

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307 Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 774.

308 Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 217.

309 Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, p. 39.

310 Angela Ward, *Access to Justice*, in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy – Essays in European Law*, Oxford and Portland Oregon, Hart Publishing, 2004, p. 125.

311 Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 43.

relevant externally and in "internal constructions" for regressive attribution of th wrongful conduct. The latter aspects concerns the EU itself and only subsequently and secondarily – after and subject to the acknowledgement of the EU titular responsibility for an individual human rights breach *vis-à-vis* third party. To repair the procedural underprivilege of the individual extra-EU victim in relation to the EU, a legal fiction of "the EU as the sole subject of responsibility" is created to unambiguously superpose to the plethora of the EU actors to whom the wrongful conduct might be attributed in fact.

2.2. From the EU perspective: Considerations of subsidiarity, solidarity and autonomy

The proposed model of the EU as the titular subject of responsibility not only lies well upon the human rights imperative of protecting the individual, but also fits in the rationale of international integration, as reflected by the notions of political economy or subsidiarity. International Law Association has explicitly noted that "[t]he remedial regime has to reflect the lack of reciprocity in the relationship between the international organisation and third parties and also the corporate character of the international organisation." [312] It would be a misconception to consider that the proposed model in the quasi-altruistic pro-individual stance goes straight against the character and the interests of the EU. The opposite - , first, its "shield" formalizes the relation of the CFSP and thus – of the EU – *vis-à-vis* third parties according to the traditional notions of subsidiarity and solidarity in the EU action. Moreover, it confines to the internal realm the interpretations of the EU institutional setup, policy-making and decision-making rules that need to be assessed in order to precisely attribute the wrongful conduct. Thereby it assures that this process can be carried out with the due know-how and synchronising the interpretations with the relevant "highs and lows" of the EU quasi-constitutionalist dynamics.

Titulation of the EU as the primary subject of responsibility serves, among others, the purpose of shielding the internal intricacies of the CFSP policy-making and implementation from direct scrutiny by third parties. The CFSP is not just a sum of the individual foreign and security policies of the Member States, it is a *sui generis* synthesis of those, with already own particular features: "Indeed, the whole idea of lifting foreign and security policy into a common structure, however rudimentary and confused, implies that the drafters must be viewed as to have intended to create a 'corporate' will, as opposed to a mere 'aggregate' of the wills of the Member States."[313] This "corporate" aspect of the CFSP serves the interests of

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[312] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 33, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf.

[313] Jan Klabbers, *Presumptive Personality: The European Union in International Law*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The

the EU and of the Member States by that what Weiler and Clapham have called 'the shield effect' of the CFSP[314]. Member States in some cases prefer to hide behind this shield "in order to prevent criticism or countermeasures from abroad. In other words, the political costs are lower if concerted action can be taken by several States at once."[315] Also, it is "shielding its agent from third-party claims, [..] as in cases of organisational responsibility, their global interests are engaged in disputes arising out of the activities of their functionaries"[316]. Thus, by means of this "corporate shield", the EU can restrain to its internal order the attribution of conduct and thus – the ultimate responsibility, including the choice of the most appropriate punitive measures.

Such "shield" protects the EU's interests of assuring the autonomy in the interpretation of its internal order, and thereby maintaining its flexibility. If a third party is "piercing the corporate veil" by deciding upon the attribution of conduct to the EU internal subjects, he/ she is concurrently deciding about the international responsibility of the EU and hence implicitly about the interpretation of its external and internal powers. This can be done best with the proper EU know-how, as "with respect to the function of authorship for judicial protection, it can be noted that the ECJ has developed a system of judicial review that convincingly deals with the plurality of law-making subjects: a clear rule applies who has to answer for the organisation's actions." [317] This concern that third parties would interfere with the internal division of power in the external relations field also inspires an approach that "attribution be near-coterminous with apportionment. Hence there is a need for responsibility without attribution or one must arrive at a rule of attribution which requires less *de facto* but relies on strong *de iure* criteria" [318].

Moreover, the room left for the EU for authentic interpretation of its internal order permits the EU to set up and alter the secondary rules for the attribution of conduct, so that they correlate with the EU's own perception of the extent of its intergovernmentalism or supranationalism. Thus, the EU could establish the ultimately responsible subject by attribution of conduct either according to the general rules of the ILC Draft Articles on Responsibility of international organisations or by elaborating special, less constraining rules of recovery in

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Hague, London, Boston, 1998. p. 243.

[314] Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, in "The Netherlands Quarterly of Human Rights", vol. 15, No. 3, 1997, p. 310.

[315] *ibid.*

[316] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 24.

[317] Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", Vol. 23, 2004, pp. 121-122.

[318] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 138.

cases of "gross negligence or wilful misconduct" (as practiced by the UN in regard to damage caused in the course of their peace-keeping activity[319]) or, hypothetically in future perhaps even assuming the substance of international responsibility as a whole (as dome in certain cases of exclusive competence by the EC[320]). By the setup of the EU titular responsibility model the EU would have sufficient room for flexible approach to its internal dynamics, without the adjacent harm of unpredictability and legal uncertainty that these processes of integration pose to third parties.

The decision to recognize the "corporate veil" or not, is indirectly one of distribution of powers, a question "as old as the European integration project itself"[321]. This question can be addressed by the methodology inherent in the "political economy" concept of international integration, as well as by transposition of the EC concept of subsidiarity to the EU context. The latter proposition, despite *prima facie* appearance, is not recalcitrant, as the concept is acknowledged to be "a rather vague guideline expressing beforehand a political orientation than a legal limitation"[322] and, despite the lack of an *expressis verbis* mention in TEU, "a well-established jurisprudential creation, based on some precise dispositions of the Treaties as well as on the very logic underlying the Treaties." [323]

The idea of political economy stems from the economic analysis of federal systems. Based on the assumptions and models of constitutional political economy, recent contributions developed economic arguments for (or against) European competence in certain policy areas. It is suggested that this approach can be used to study the appropriate allocation of foreign policy powers within the Union[324]. According to this approach a particular field of policy should come within the competence of the Union if the following conditions are fulfilled:

"(a) there are significant spill-overs between Member States as long as competence remains at the national level;
(b) inefficiencies resulting from those spill-overs cannot be removed through intergovernmental bargaining and market mechanisms;

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[319] *Draft Articles on Responsibility of International Organisations*, International Law Commission, Report on the work of its 56th Session (3 May to 4 June and 5 July to 6 august 2004), Chapter V, UNGAOR 59th Session, Supplement No. 10, UN doc. A/59/10, p. 110.
[320] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 137.
[321] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, pp. 458-459.
[322] D. Simon, *Article 3B*, in V. Constantinesco, R. Kovar et D. Simon (éds.), *Traité sur l'Union Européenne, commentaire artcle par article*, Paris, Economica, 1995, p. 66.
[323] Juris Rudevskis, *L'application du principe de subsidiarité par les Cours européennes de Luxembourg et de Strasbourg : une comparaison générale*, dans « Baltic Yearbook of International Law », vol. 4, 2004, p. 135.
[324] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, pp. 458-459.

(c) policy functions can be performed more efficiently at the central level."[325]

This economic approach resembles in its consequences the legal principle of subsidiarity, which holds that a competence should be exercised (or allocated) at a higher level if and in so far as the objectives of that policy cannot be sufficiently exercised at a lower level of government and the goals can, by reason of the scale or effects of the proposed action be better achieved at the higher level (see Article 5 TEC and Article I-11 of the Constitution for Europe). The subsidiarity principle has been attempted to be explicitly put in the EU (as distinguished from the EC) realm by Article 12(2) of the draft Treaty on European Union.[326]

According to the contents of the principles of subsidiarity and political economy, the proposed responsibility scheme ensures the most effective distribution of responsibility within the EU, so as to concurrently provide a duly clear target of remedial action for the individuals whose human rights have been put at stake by the CFSP. The diffusion and inefficiency of the existing responsibility mechanisms to ensure an adequate and accessible remedy for the individual claimants provide sufficient grounds for considering the need to place this prerogative at the central level, even if just formally; the problematics caused by the infringement upon individual human rights as the result of the CFSP conduct, by definition transgress national and EU borders, and thus necessitate a corresponding external point of reference for imposing responsibility. By means of Article 11(2) TEU, which stipulates that the Member States are under a positive obligation to support the EU's external and security policy "unreservedly in a spirit of mutual solidarity" and under a negative obligation to "refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations," the EU is bound to take the necessary measures to address such a gap. This could be done best by the means of the EU titular responsibility model, especially taking into account that its scheme epitomizes the gist of the principle of subsidiarity as a dynamic notion: "Subsidiarity is far from being a unilateral movement. Quite to the contrary, it ensures the equilibrium between two diametrically opposite objectives: on the one hand, the preservation of national sovereignty and national pluralisms (centrifugal movement), and, on the other hand, supranational integration in order to carry out most perfectly the objectives of the system (centripetal movement)."[327] On the centrifugal aspect, the EU titular primary responsibility does not exclude the significant inter-state and inter-institutional dynamics subsequently to the establishment of the fact of violation and the corresponding responsibility: as laid down by

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[325] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, pp. 458-459.

[326] Juris Rudevskis, *L'application du principe de subsidiarité par les Cours européennes de Luxembourg et de Strasbourg : une comparaison générale*, dans « Baltic Yearbook of International Law », vol. 4, 2004, p. 132.

[327] *Ibid*, p. 138.

Article 5(a) of the 1995 Resolution of the Institute of International Law (*Institut de Droit International*) on The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties, "[t]he question of the liability of the members of an international organisation for its obligations is determined by reference to the Rules of the Organisation" which is best done within and by the means of the organisation itself; on the centripetal aspect, the EU is recognized as a standalone, even though just formally and primarily (titular), subject of responsibility. This serves everybody's interest: third parties are certain to be "indicated the proper interlocutor for operational purposes, including eventual claims of responsibility"[328] and the EU can be assured that the "rules of the organisation" are scrupulously respected.

2.3. Grounds in international law

The multifaceted considerations on effective balancing of both the victim's and international organisation's interests in the scheme of the EU titular responsibility model find their express international legal grounds in Article 7 of the ILC Draft Articles on Responsibility of international organisations on "Conduct acknowledged and adopted by an international organization as its own":

> "Conduct which is not attributable to an international organization under the preceding articles shall nevertheless be considered an act of that international organisation under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own."

This article derogates from the general principle of attribution of responsibility contained in Article 3 of the ILC Draft Articles on Responsibility of international organisations, which, as already demonstrated in this work[329], poses hardly surmountable obstacles to the establishment of the EU responsibility for the CFSP conduct that violates human rights. It is based on a conceptual distinction between the attribution of conduct and attribution of responsibility, and delinking the two as necessarily cumulative in establishing an international organisation's responsibility for an internationally wrongful act. As affirmed by the ILC, "[r]esponsibility of an international organisation may in certain cases arise also when conduct is not attributable to that international organisation."[330] In such case, the basis for attribution of responsibility is not the *de facto,* but the *de iure* criteria, namely the will of the

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328 P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 120.

329 See *infra* Chapter II.A.

330 *Draft Articles on Responsibility of International Organisations*, International Law Commission, Report on the work of its 56th Session (3 May to 4 June and 5 July to 6 august 2004), Chapter V, UNGAOR 59th Session, Supplement No. 10, UN doc. A/59/10, p. 101.

international organisation to acknowledge and adopt the legal consequences of the internationally wrongful act conducted by another subject as ones incumbent upon the international organisation itself.

The superiority of the sovereign will of the subjects of international law over the factual considerations is inherent in their lawmaking capacity, and was first developed in the context of State responsibility. Article 7 of the ILC Draft Articles on Responsibility of international organisations mirrors the content of Article 11 of the Draft Articles on Responsibility of States for internationally wrongful acts, which is identically worded but for the reference to a State instead of an international organisation. As the commentary to Article 11 explains, attribution can be based on acknowledgement and adoption of conduct also when that conduct 'may not have been attributable'. In other words, "the criterion of attribution now under consideration may be effected on the basis of other criteria"[331] – namely, on the basis of attitude taken by the organisation with regard to a certain conduct. Such attitude, when duly expressed, prevents third parties from the need to resort to the *de facto* considerations of the attribution of conduct as required by the general principle of responsibility in Article 3 of the ILC Draft Articles on Responsibility of international organisations. The phase of establishing the authorship of a conduct is bypassed by immediate identification of the responsible subject by purely formal, yet equally valid, rule.

The practice of international organisations demonstrates some advances towards such approach to establishing responsibility irrespective of the attribution of conduct, and thus the EU titular responsibility model would not be a revolutionary, rather - evolutionary advance in consolidating the application of this principle in international legal practice. On universal level, the Annex IX to the United Nations Convention on the Law of the Sea[332] provides one example of an approach which is focused on attribution of responsibility rather than on attribution of conduct. Also, the model contribution agreements that are concluded between the United Nations and the contributing State for UN peace-keeping operations assert the liability of the United Nations towards third parties and only provides for a right of recovery of the United Nations under circumstances such as "loss, damage, death or injury [arising]

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[331] UN International Law Commission, *State Responsibility*, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV; OR 56th Session, Supplement No. 10, UN doc. A/56/10, p. 120.

[332] Annex IX of the United Nations Convention on the Law of the Sea; Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof; including Annex II: The European Community's instrument of formal ratification including the Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the sea of in accordance 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention.

from gross negligence or wilful misconduct of the personnel provided by the Government"[333]. Also, in European context, the EC has also followed similar approach in several cases. In the oral pleadings to the WTO panel on *European Communities — Customs Classification of Certain Computer Equipment*, the EC asserted that responsibility for infringements, if any, was entirely its own and not of the two member States involved: "the EC is ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States" [334]; this view was not based, at least explicitly, on the argument that conduct of State customs authorities had to be attributed to the EC.[335] Further, more and more frequently special "declarations of competence" are envisaged when the EC enters into multilateral international agreements. The EC declarations, made pursuant to specific treaty requirements, describe the competencies in the fields relevant to the agreement concerned.[336] These rules are only applicable under the EC law, even though the issues at stake may by analogy also relate to the implementation of international obligations of the EU.[337] Of course, one must take into account that EU CFSP is not in terms of the development of legal order comparable to the EC, and it does not possess supra-national and exclusive powers in the field of the CFSP. Yet, the EU titular responsibility model's scheme permits to mitigate the modalities of such a statement so as to allow its *mutatis mutandis* extension to the CFSP; first, the EU would not assume "the entire international responsibility", only the standing as its

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[333] Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex) appears to intend a right of recourse. A later report by the Secretary-General (A/51/389, para. 43, pp. 10-11) refers to this text under the heading "Recovery from States contributing contingents: concurrent responsibility". A similar text is contained in the model agreement used by the United Nations to obtain gratis personnel (ST/AI/1999/6, annex).

[334] *Second Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur*, International Law Commission, 55th Session (3 May – 4 June and 5 July – 6 August 2004), UNGAOR, UN doc. A/CN4/541, p. 27.

[335] Information note dated 7 March 2003, attached to a letter from the Director-General of the Legal Service of the European Commission, Mr. Michel Petite, addressed to the United Nations Legal Counsel, Mr. Hans Corell, p. 2.

[336] Some examples:
- Council Decision 2002/628/EC of 25 June 2002 concerning the Conclusion, on behalf of the European Community, of the Cartagena Protocol on Biosafety, including Annex B: Declaration by the European Community in accordance with article 34(3) of the Convention on Biological Diversity;
- Council Decision 98/685/EC of 23 March 1998 concerning the conclusion of the Convention on Transboundary Effects of Industrial Accidents, including as Annex II: Declaration by the European Community pursuant to article 29(4) of the Convention on the transboundary effects of industrial accidents, concerning competence;
- Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of their obligation thereunder, including as Annex III: Declaration by the European Community made in accordance with article 24(3) of the Kyoto Protocol;
- Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change, including as Annex B the Declaration by the European Economic Community made in accordance with article 22(3) of the Framework Convention on Climate Change; and many others.

[337] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 136.

formal subject with further prerogative to redirect the substance of responsibility to the CFSP actor to whom the conduct and thus the ultimate responsibility can be attributed according to the general rules of responsibility. Finally, even the EU itself has introduced a comparable regulation of responsibility in regard to ATHENA – the CFSP mechanism to administer the financing of the common costs of the EU operations having military or defence implications:

> "any damage caused by the operation, headquarters, force headquarters and component headquarters of the crisis structure, the composition of which shall be approved by the operation commander, or by their staff in the course of their duties *shall be covered through ATHENA* by the contributing States, in accordance with the general principles common to the laws of the Member States and the with the general principles common to the laws of the Member States and the Staff Regulations of the forces, applicable in the theatre of operations."[338]

Thus ATHENA is acknowledged as "the intermediary of responsibility" – the subject that assumes it towards the claimant third parties and subsequently recovers it from the contributing Member States as the ultimate subjects of the wrongful action. This model of responsibility reflects the idea of the EU titular responsibility model, which, however, would be of general application to all CFSP measures.

The legal character of the EU titular responsibility model is also defined by its relation to the other existing remedial regimes. Establishment of this proposed responsibility model would not affect neither the availability of those to the individual, nor require any considerable alterations in their substantive or procedural framework. By reason of the individuals' interests that the EU titular responsibility model is intended to protect in the human rights context, and also of the normative character of the CFSP under the auspices of which such a model would be established, it can not imperatively impose itself to other responsibility mechanisms. First, the establishment of such a model, even though and because it is intended to protect the individual, cannot limit the individual's right to choose the most appropriate venue for remedying his/ her human rights violation. Moreover, the establishment of this model would be an arrangement between the EU and its Member States initially, and an arrangement between the EU and the relevant international jurisdictions subsequently – all such international arrangements by the *pacta tertiis* rule cannot deprive the individual of his/ her anterior privileges. The individual may still resort to, for instance national court with a claim against a separate EU Member State that has participated in the wrongful CFSP act; yet, then this choice deprives him/ her of the privilege embodied in the EU titular responsibility model to be discharged from the *onus probandi* regarding the factual attribution of conduct (instead formal attribution of responsibility). Secondly, this innovation

[338] Council Decision 2004/197/CFSP of 23 February 2004 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications, *OJ L 63, 28.2.2004.*

cannot affect the availability of national remedial regimes, as a CFSP act that would establish the EU titular responsibility model cannot by its nature alter national procedural laws[339]. Thirdly, even though such a liberty of choice would not prevent the possibility of "forum shopping" and thus do not conform to the interests of legal coherence and predictability of the international legal order, this would be the lesser harm significantly outweighed by the advance in the effectiveness of human rights protection that such a model would bring in fact, not just in the pro-active slogans of human rights promotion characterising the CFSP.

[339] Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and after Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", Vol. 23, 2004, p. 111.

B. PRACTICAL MODALITIES OF THE EU TITULAR RESPONSIBILITY MODEL

To render the theoretical scheme of the EU titular responsibility model functional, the due practical arrangements for its normativisation and implementation in the international and European legal order must be taken in accordance with the material and procedural framework of the latter. These practical arrangements would have to concern two aspects of the EU titular responsibility model – first, the attribution of responsibility ("the acknowledgement and adoption") and, second, its enforcement before international courts, both in terms of substance and procedure. Despite the most pragmatic approach to all suggestions made thereto, it becomes clear that the credibility of their practical implementation, at least in the near future, is quite variable, ranging from almost immediate probability of realisation to almost utopian visions. Thus, the attribution of titular responsibility for human rights violations committed in the conduct of the CFSP would be the more easily envisageable advance as a politico-legal commitment of the EU, the justiciability of this commitment before the ECJ and the ECtHR following with much more fluid contours, probably in a very limited manner in terms of the justiciable matter and cumbersome conditions of admissibility, and a general justiciability of the CFSP before international courts (the International Court of Human Rights being the "droits de l'hommiste" panacea). Nevertheless, such an étalage of the propositions serves a double purpose: not only it statically defines the practical grounds for the establishment of the EU titular responsibility, but also sketches the dynamics of its potential further development.

B.1. Practical modalities of "acknowledgement and adoption"

According to Article 7 of the ILC Draft Articles on Responsibility of international organisations, the responsibility can be attributed to the relevant international organisation by derogation from the general principle of attribution as laid down in Article 3 of these Draft Articles only "if and to the extent that the organisation acknowledges and adopts the conduct in question as its own." This concise condition implies a set of elements which the expression of international organisation's will has to fulfil in order to constitute legally valid and sound grounds for attribution of responsibility. Moreover, these elements and the lack of international practice in their judicial or doctrinal interpretation provide sufficient room for their functional clarification so as to accommodate the specificity of the EU titular responsibility model "in the light of its object and purpose" (Article 31 of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations[340]).

[340] Even though the analysed legal relation is not internationally contractual within the scope of

1.1. Material modalities

In terms of contents, it must be assured that the expression of the EU's will to assume responsibility for human rights violations as flow from the conduct of the CFSP would precisely reflect the character of the EU titular responsibility model and would effectively realise its goals. Therefore, the statement of "acknowledgement and adoption" must be express, genuine, prior, comprehensive, and titular.

a) express

According to the general rules on the expression of will in international law, the "acts of formal confirmation" or "acceptance" (Article 2(1) (b bis) and 2(1)(b ter) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations) can be either explicit or tacit. As correspondingly stated in the ILC commentary to the Draft Articles on Responsibility of States for internationally wrongful acts, acknowledgement and adoption of conduct by a State may "take the form of words or conduct"[341] – "be express (as for example in the *Diplomatic and Consular Staff* case), or it might be inferred from the conduct of the State in question"[342].

However, the formula "if and to the extent that" in Article 7 of the ILC Draft Articles on Responsibility of international organisations implies that the act of acknowledgment and adoption must be "clear and unequivocal"[343]; when the clarity might be negatively affected by that, "the attribution of conduct need not be implied"[344]. A tacit expression of will by the EU in regard to adoption of titular responsibility would not provide the due legal clarity and certainty to the third parties, would encumber their facility to rely upon the EU commitment thereby undertaken in judicial process, as well as fail to convey the specific characteristics of the EU titular responsibility model in a sufficient detail so as to effectively functionalise it. Thus, taking into account the specific "object and purpose" of the EU act of "acknowledgement and adoption", it should be express. In terms of the decision-making practice of the CFSP, that implies adoption of an according written act.

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application of the Vienna Convention, the application of its rules to interpretation of this relation is permissible, as previewed by Article 3 of the Vienna Convention.

341 *Draft Articles on Responsibility of States for internationally wrongful acts*, UN International Law Commission, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV, UNGAOR 56th Session, Supplement No. 10, UN doc. A/56/10, p. 121.

342 *Ibid*, p. 122.

343 *Ibid*, p. 122.

344 *Second Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur*, International Law Commission, 55th Session (3 May – 4 June and 5 July – 6 August 2004), UNGAOR, UN doc. A/CN4/541, p. 6.

b) genuine

The objective of the act of acknowledgement and adoption is accepting the responsibility for an internationally wrongful act, that is, undertaking the commitment to duly remedy the negative consequences of such act. To constitute valid grounds for such a substantial commitment, the relevant act of will must genuinely reflect the according determination of the international organisation. Hence, the act of will must be unequivocal[345] in conveying both acknowledgement and adoption. These two conditions are cumulative, as indicated by the word "and" linking them (following the grammatical method of interpretation – "the ordinary meaning" of words), and emphasizes that both are indispensable for a valid attribution of responsibility. The phrase "acknowledges and adopts the conduct in question as its own" is intended to "distinguish cases of acknowledgement and adoption from cases of mere support or endorsement" [346]. The ICJ in the *Diplomatic and Consular Staff* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]"[347]. These were sufficient in the context of that case, but as a general matter, conduct would not be attributable to the international organisation under Article 7 where it "merely acknowledges the factual existence of conduct or expresses its verbal approval of it" [348]. It is argued as a matter of practice that "in international controversies [subjects of international law] often take positions which amount to 'approval' or 'endorsement' of conduct in some general sense but do not involve any assumption of responsibility"[349]. Therefore, the act of will of the EU should clearly convey a genuine undertaking of responsibility rather than make a general acknowledgement of the potentiality of human rights violations ensuing from the conduct of the CFSP.

c) prior

The wording of Article 7 of the ILC Draft Articles on Responsibility of international organisations is silent as to the element of time in the act of will for assuming responsibility. Even though it has been considered that "the relevance of acknowledgement and adoption of

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[345] *Draft Articles on Responsibility of States for internationally wrongful acts*, UN International Law Commission, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV, UNGAOR 56th Session, Supplement No. 10, UN doc. A/56/10, p. 120.

[346] *ibid*, p. 121.

[347] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* p. 3, at p. 29, para. 56.

[348] *Draft Articles on Responsibility of States for internationally wrongful acts*, UN International Law Commission, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV, UNGAOR 56th Session, Supplement No. 10, UN doc. A/56/10, p. 121.

[349] *ibid*, p. 121.

conduct may be viewed as reflecting a 'principle [...] of ratification'"[350] which thus infers its *post hoc* character, there are no other proofs in legal norms or practice that would confirm such limitation of the *ratione temporae* scope of the act of will. Besides, a subsequent acknowledgement and adoption of responsibility would to a considerably lesser degree assure achievement of the optimum protection of individual's interests and of legal certainty inherent in the teleology of the EU titular responsibility model.

The essential element of acknowledgement and adoption is the hierarchical priority of the *de iure* act of will over the rules of *de facto* attribution of conduct, and not the element of time - "the unattributability of conduct [to the international organisation] at the time of its commission"[351] and the subsequent alteration by the act of will. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations provides in Articles 2(1)(b bis) and 2(1)(b ter) that the act of consent to a certain obligation can be both in the form of an "act of formal confirmation" – meaning "an international act corresponding to that of ratification" – and of an "'acceptance', 'approval' and 'accession'" - meaning in each case any international act so named – and by the means of both aforementioned an international organization establishes on the international plane its consent to be bound. The juxtaposition of the two forms, where the first is referred to as a subsequent one, but the second is unqualified in terms of the timing of its expression, infers that the element of time is irrelevant for the act of will. The ICJ has explicitly referred to the same in the *Diplomatic and Consular Staff* case, stating that "it made no difference whether the effect of the .approval. of the conduct of the militants was merely *prospective*, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*"[352].

Taking into account the general nature and purpose of the act of will, it must be prior. Only by a statement that precedes the human rights violations that would have to be treated according to the thereby established EU titular responsibility model, the attribution of responsibility that this model is based upon can be rendered general (as not an *ad hoc* one, selectively referring only to cases of specific human rights violations) and ensure due legal certainty. Because "the protective function of any remedial action is partly based on a sufficient degree of predictability, irrespective of the chances of a successful outcome,"[353] the

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[350] Ian Brownlie, *System of the Law of Nations. State Responsibility. Part I,* Oxford, Clarendon Press, 1984, p. 158.

[351] *Draft Articles on Responsibility of States for internationally wrongful acts*, UN International Law Commission, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV, UNGAOR 56th Session, Supplement No. 10, UN doc. A/56/10, p. 119.

[352] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* p. 3.

[353] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 45

act of will must preliminarily establish the framework which the affected third parties could rely upon.

d) comprehensive

The principle of legal security would comprise also the requirement of comprehensiveness. In order to prevent interpretative speculations upon each and every specific case of human rights violation as to the applicability of the EU titular responsibility model, the acknowledgement and adoption needs to be "unqualified"[354] – in horizontal terms it must comprise the whole domain of the CFSP, and in vertical terms – all the spectrum of the EU human rights obligations. The opposite approach and specific selective references to certain categories or even only to certain individual cases would too heavily depend on the general EU good-will and on the Member States' individual political preferences in the specific situation, would reinforce neither the legal security of third parties, nor the clarity in the international remedial system.

The acknowledgement and adoption of responsibility by the EU can be *a contrario* compared to the "holding harmless" clauses included in the SOFAs of specific CFSP missions; this act of will, to the quite opposite, infers a "holding harmful" presumption of the EU as the titular subject of responsibility. Unlike the "holding harmless" clauses, it has to comprise in a general manner all CFSP action regardless of the formal grounds for its implementation. Any formal portioning of the CFSP subject-matter for the purposes of justiciability would be doomed to fail: first, the classification of conduct as justiciable or not by the title of the CFSP act that serves as the basis for the wrongful act cannot be performed due to the "flexibility and lack of strict structure"[355] in the typology of the EU acts; second, any speculations as to the "political question doctrine"[356], whereby a distinction would be drawn between "political questions" and "legal questions" ("Political questions are those which concern the end of the CFSP and the means for attaining this end. Legal questions are those which concern the procedure by which the end is defined and the means are adopted."[357]), would be unworkable, since as if for the sake of simplification, they would rather introduce a new formal criterion that would require much more complex argumentation and more intricate understanding of

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[354] *Draft Articles on Responsibility of States for internationally wrongful acts*, UN International Law Commission, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV, UNGAOR 56th Session, Supplement No. 10, UN doc. A/56/10, p. 120.

[355] Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", Vol. 23, 2004, p. 128.

[356] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 864.

[357] *The Future Role of the European Court of Justice*, House of Lords, European Union Committee, 6th Report of Session 2003-2004, 15 March 2004, p. 32.

the CFSP decision-making than it is claiming to attempt to avoid. Moreover, in the context of international affairs, it is never possible to clearly distinguish the political aspects from the legal ones[358], and the ICJ has refused to apply the criterion of "political question" to define a dispute's justiciability[359].

Instead of attempts of formal limitations, the functional methodology of the ECtHR to limit the justiciability by the conditions determining the existence of a human rights violation should be followed. Article 34 of the ECHR "requires that an individual applicant should claim to have been actually affected by the violation he alleges"; in principle, it does not suffice for an individual applicant to claim that the mere existence of an act [a law] violates his rights under the ECHR; it is necessary that it should have been applied to his detriment"[360]. It is worth noting also that, in the context of human rights, the ECJ has developed a special "user friendly" approach to access and has always permitted individual challenges to the legality of measures on the grounds of an alleged violation of human rights, even though these, by definition, could not always be considered "clear and precise"[361]. Such approach synchronises with the general tradition of European human rights law: "[it] consists in a complex universalism with a sufficient degree of sensitivity to negative experiences of human beings – puts an emphasis on negative experiences, the loss and regaining of the victim's voice, and the memory of injustice and fear as the most salient features of the political culture of human rights. Human rights are considered by this approach from *the victim's point of view*. From the victim's perspective, it makes no difference if he or she is tortured or raped by the agents of the State, by an ordinary citizen committing a crime, or by armed forces under the command of a war lord."[362] Thus, by analogy to the objective liability in international and civil law[363], it is the fact of violation *ipso facto* that defines the need for a judicial review. The formal character of the act causing the wrongful conduct is here irrelevant, the wrongful effect of the act's implementation subjects it to adjudication, regardless the modalities of the acts' adoption and its legal status. Moreover, taking into account the scheme of the EU titular responsibility model, the *onus probandi* incumbent upon

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[358] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 865

[359] *Personnel Diplomatique et consulaire de Etats-Unis a Teheran*, ICJ Reports, 1980, p. 19; *Acitivites militaires au Nicaragua*, ICJ Reports, 1984, p. 439; *Actions armees frontalieres et transfrontalieres*, ICJ Reports, 1993, p. 325.

[360] *Klass and Others v. Germany*, ECHR judgment, 6 September 1978, [1978] ECR 28, p. 17.

[361] P. Alston and J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 52.

[362] Klaus Günther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 141

[363] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 764.

the claimant should be alleviated, and limited only to the *prima facie* establishment of the link of causality between the EU conduct and the violation, as argued in more detail *supra* in this work.

To come back to the other aspect of "comprehensiveness", "whereas human rights are universal, indivisible, interdependent and intrinsically linked"[364], the catalogue of human rights that the EU acknowledgement and adoption of responsibility refers to shall not be circumscribed. It should neither be limited to specific category of human rights (civil, political, economic, social, cultural), nor *a fortiori* to concrete rights only or to specific level of gravity of their violation ("a sufficiently serious breach of a superior rule of law"[365], "right to life, food and medicine of the individual or guarantees for due process of law"[366]). The extent of *ad hoc* discretionary power of the EU in estimations of specific situations would in the opposite case threaten the object and purpose of the EU titular responsibility model. The act of acknowledgement and adoption thus needs to be comprehensive - unqualified in terms of scope apart from the sectoral limitation to the CFSP field and the substantive limitation to human rights violations as a special category of internationally wrongful acts.

e) titular

The wording of Article 7 of the ILC Draft Articles on Responsibility of international organisations permits certain flexibility as to the degree of the "acknowledgement and adoption". Even though it seems evident that "the reference to the 'extent' reflects the possibility that the acknowledgement and adoption relate only to part of the *conduct* in question"[367], the general scheme of the provision which distinguishes attribution of conduct from attribution of responsibility permits to refer the limitation of extent also to the "*responsibility* in question". Unlike Article 3 of the ILC Draft Articles on Responsibility of international organisations, the Article regulates primarily the attribution of responsibility. Also, the responsibility regime of States (p. ex., Article 47 of the ILC Draft Articles on Responsibility of States for internationally wrongful acts) which is by analogy applicable to that of international organisations, permits a multitude of subjects of responsibility for the

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[364] Common Position (98/350/CFSP) of 25 May 1998 defined by the Council on the basis of Article J.2 of the Treaty on European Union, concerning human rights, democratic principles, the rule of law and good governance in Africa, OJ L 153, 11.6.1997, p.1, preamble.

[365] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 28, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

[366] *ibid*

[367] *Draft Articles on Responsibility of States for internationally wrongful acts*, UN International Law Commission, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV, UNGAOR 56th Session, Supplement No. 10, UN doc. A/56/10, p. 120.

same internationally wrongful act[368]. Explicitly in regard to responsibility of international organisations, "joint, or joint and several, responsibility does not necessarily depend on dual attribution of conduct."[369]

Thus, it is clear that international responsibility is not a monolith legal instrument, that it is subject to apportionment. If the apportionment can be horizontal like in the aforementioned case, then it may as well be vertical and refer only to a certain level of responsibility. Consequently, in order to precisely convey the specifics of the EU titular responsibility model, the act of acknowledgement and adoption needs to clearly identify that the EU assumes only the titular responsibility for human rights violations ensuing from the conduct of the CFSP, in the case that this responsibility model is chosen to be resorted to by the affected third party; the titular responsibility is not exclusive of the substantive responsibility of the CFSP actors to whom the conduct in question can be attributed subsequently according to the general principles of attribution of responsibility and the EU's "internal rules of organisation".

I.2. Procedural modalities

The material substance of the acknowledgement and adoption requires formalisation in an act that would both correspond to the procedural rules of the EU decision-making and attribute the acknowledgement and adoption the necessary legal meaning in the international legal system. Here, the question arises of the form of the act of will – the type of the EU act that could best assure that these imperatives are best met, and related to that also the competence of the institution, organ or agent which would adopt it. The lack of any specific rule determining these considerations in international law, innovatively, leads to the "the unusual (but legally sound) solution in international law that the internal law [of a partner] may determine who is responsible for a breach"[370]. The ILC, in a commentary to Article 7 of the Draft Articles on Responsibility of international organisations, explicitly states that "the rules of the organisation govern this issue"[371]. Thus, the choice of the relevant act for expressing

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[368] *Draft Articles on Responsibility of States for internationally wrongful acts*, UN International Law Commission, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV, UNGAOR 56th Session, Supplement No. 10, UN doc. A/56/10, p. 290.

[369] *Third Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur*, International Law Commission, 57th Session (2 May – 3 June and 4 July – 5 August 2005), UNGAOR, UN doc. A/CN4/553, p. 4.

[370] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 120.

[371] *Draft Articles on Responsibility of States for internationally wrongful acts*, UN International Law Commission, Report on the work of its 53rd Session (23 April to 1 June and 2 July to 10 august 2004), Chapter IV, UNGAOR 56th Session, Supplement No. 10, UN doc. A/56/10, p. 122.

the acknowledgement and adoption and the competences of the relevant decision-maker are to be judged by reference to the EU internal rules of decision-making in regard to the CFSP.

According to Article 2(i)(j) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and Article 4(4) of the ILC Draft Articles on Responsibility of international organisations, the notion "rules of the organisation" is to be broadly construed as for its contents[372] and entails, "in particular: the constituent instruments, decisions, resolutions and other acts taken by the organisation in accordance with those instruments, and established practice of the organisation". Hence, in regard to the EU the relevant provisions are to be found in the TEU, notably Title V "Provisions on common Foreign and Security Policy", as interpreted in the context of the decision-making practice in regard to the CFSP matters. These sources provide some options in the form of the act of acknowledgement and adoption, to be employed according to the will to thereby establish a unilateral or a multilateral commitment.

a) unilateral (intra-EU)

The first step to formalising the EU titular responsibility model, according to the largely political nature of co-operation in the CFSP, would be an according statement in the European Council conclusions. If defined as a genuine adoption of responsibility, not only acknowledgement[373] of the state of affairs, the act could fall within the definition of a "principle of the CFSP" in the meaning of Article 12 and Article 13(1) TEU. While the potentiality of such form of statement is in the current state of EU affairs the highest, and would constitute political grounds for subsequent legal approach to the issue, nevertheless, such an act would indeterminately remain without direct legal implications as regards the practical aspects of undertaking international responsibility.

The due effectiveness of the acknowledgement and adoption can only be achieved by its formulation in a binding act. The choice of form in the CFSP range of instruments must be made between a joint action and a common position. According to Article 14(1) TEU, a joint action "shall address specific situations where operational action by the Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation." In the EU practice, joint actions have referred rather to operational necessities (establishment of the EU

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[372] *Second Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur*, International Law Commission, 55th Session (3 May – 4 June and 5 July – 6 August 2004), UNGAOR, UN doc. A/CN4/541, p. 13.

[373] See *infra*, in the previous section, on "genuine" criterion.

Police Mission in Bosnia and Herzegovina[374], on anti-personal landmines[375], establishing a forensic experts' mission in the Federal Republic of Yugoslavia[376], to support anti-terrorist activities in the Palestinian territories[377], establishing the EU Institute for Security Studies[378], contributing to the conflict settlement process in South-Ossetia[379]) than to mere diplomatic commitments. The common positions which, according to Article 15 TEU "shall define the approach of the Union to a particular matter of a geographical or thematic nature", form the second – and "softer" – form of commitment in the intra-CFSP relations. It does not design a particular operational undertaking by the Member States under the auspices of the CFSP, but rather requires that the Member States ensure conformity of their national policies with the common positions[380]. Taking into account that the establishment of the EU titular responsibility model does not directly require any pro-active operational measures from the Member States supplementary to their existing international obligations, the formula of the commitment inherent in the common positions is adequate; it falls also within the scope of the notion "a particular matter of a thematic nature" as provided for by Article 15 TEU. The passive acceptance of the EU titular responsibility externally and acknowledgement of the EU's right to recovery from the ultimate subject of responsibility internally form the Member States' direct obligations under the EU titular responsibility model, and can be duly achieved by the undertaking to "ensure conformity of national policies with that common position". Moreover, if this general commitment is accompanied with explicit behavioural guidelines and recommended measures, like it has been demonstrated in the CFSP practice[381], then the

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[374] Council Joint Action of 11 March 2002 on the European Union Police Mission, *OJ L 070 13.03.2002 p. 1.*

[375] 96/588/CFSP: Joint Action of 1 October 1996 adopted by the Council on the basis of Article J.3 of the Treaty on European Union on anti-personnel landmines *(OJ L 260 12.10.1996 p. 1)*

[376] 98/736/CFSP: Joint Action of 22 December 1998 adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning a forensic experts mission in the Federal Republic of Yugoslavia *(OJ L 354 30.12.1998 p. 3)*

[377] 2000/298/CSFP: Council Joint Action of 13 April 2000 on a European Union assistance programme to support the Palestinian Authority in its efforts to counter terrorist activities emanating from the territories under its control *(OJ L 097 19.04.2000 p. 4)*

[378] Council Joint Action of 20 July 2001 on the establishment of a European Union Institute for Security Studies *(OJ L 200 25.07.2001 p. 1)*

[379] 2001/759/CFSP: Council Joint Action of 29 October 2001 regarding a contribution from the European Union to the conflict settlement process in South Ossetia

[380] This distinction between common positions and joint actions, while quite clear in the TEU, has nevertheless not been reflected in the CFSP practice, and therefore attracted well-founded critique. For that, see, for example, Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, pp. 31-39. Nevertheless, immersion in scrupulous analysis of this critique would not advance the purpose of this work, therefore remains outside its scope.

[381] 95/150/CFSP: Common Position of 28 April 1995 defined by the Council on the basis of Article J.2 of the Treaty on European Union with regard to the extension of the suspension of certain restrictions on trade with the Federal Republic of Yugoslavia (Serbia and Montenegro) *(OJ L 099 29.04.1995 p. 2)*; 95/379/CFSP: Common Position of 18 September 1995 defined by the Council on the basis of Article J.2 of the Treaty on European Union, concerning blinding lasers *(OJ L 227 22.09.1995 p. 3)*; 96/184/CFSP: Common Position of 26 February 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union concerning arms exports to the former Yugoslavia *(OJ L 058*

vague "famous 'obligation of loyalty', under which [the Member States] are called upon to support the Union's policy actively and universally in a spirit of mutual solidarity" [382] acquires sufficiently precise contours for the implementation of the EU titular responsibility model.

Among other CFSP instruments, the common position establishing the EU titular responsibility model would acquire a particular status. Even though there is no kelsenian hierarchy established among the CFSP instruments[383], it would regulate the model of treatment of the other CFSP instruments in the cases that their implementation had violated human rights of third parties, therefore it could be considered as at least in this functional aspect superior to the other instruments. Yet, this relation can be better described as one of speciality vs. generality than hierarchy, as the common position would regulate the Member States' behaviour upon certain factual conditions occurring horizontally throughout the CFSP realm. The common position on EU's cooperation with the ICC[384] is another example of such transversally applicable CFSP measure.

Finally, it can be noted also that, ultimately, if/ when established as a well-recognized rule of the EU order, the provisions on such distribution of responsibility may be constitutionalised by inclusion in the TEU, by analogy to Article 288(2) TEC which sets out the point of reference on this issue in the EC legal framework: "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused its institutions or by its servants in the performance of their duties."

b) multilateral (extra-EU)

One of the core elements of the object and purpose of the EU titular responsibility model is the functionality of the established scheme for effective human rights protection of the third parties negatively affected by the conduct of the CFSP. The affected third parties need to be enabled to rely upon the relevant provision establishing the model and to refer to it in the procedural course of the settlement of the ensuing legal disputes. In considering the capacity

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07.03.1996 p. 1)

[382] Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, p. 35.

[383] Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", Vol. 23, 2004, p. 101.

[384] Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court *(OJ L 150 18.06.2003 p. 67)*

of the common position establishing the EU titular responsibility model to provide such legal grounds for third parties, the interesting and yet unsettled question of the international legal effect of the CFSP measures needs to be touched. However, no matter which side of the debate is taken in regard to the status of the common position, an unambiguous multilaterally legal effect of this EU commitment would be achieved by externalizing it through according international agreements with the relevant international jurisdictions as discussed in the final section of this work, or eventually by special provisions on the EU accession to the rules laid down in the ILC Draft Articles on the Responsibility of international organisations, if/ when those would be conventionalised.

The *pacta tertiis* rule and the doctrine of good faith and estoppel collide in the determination of the international legal effect of an EU common position in the meaning of Article 15 TEU. Internally, the common position despite the lack of an explicit attribution of normativity seem endowed with a legally binding force, by interpretation of both the wording of Article 15 TEU and the procedure of their adoption. Namely, the mandatory language ("shall ensure") and the fact that the adopted common positions are normally – though, must admit, not mandatorily – published in the legislative series of the Official Journal of the EU[385] seem to leave little doubt about the intent to endow them with a legally binding character. Externally, however, formally a common position for a third party is a *res inter alios acta*, constituting an internal EU arrangement, which cannot be invoked under international law[386]. On the other hand, it can be argued that in reality the provisions of the common position provide an additional assurance to third parties that the internal obligation would be honoured also in regard to them.[387] Doctrine of international law seems to affirm that "even common positions *lato sensu*, declarations and joint communiqués of all kinds under the CFSP may create legal obligations"[388]. If the instrument contains a clear commitment to future action, it may become

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[385] See provisions of Article 17 of the Rules of Procedure of the Council of the European Union. Council Decision (2004/338/EC, Euratom) of 22 March 2004 adopting the Council's Rules of Procedure *(OJ L 106 15.4.2004 p. 22)*

[386] The ECJ has developed a well-established jurisprudence on the *res inter alios acta* doctrine in the context of the EC legal system; the arguments contained therein can be in substance, *mutatis mutandis* due to the specifics of the CFSP instruments, applied also to the EU. See the reasoning in:
Hauptzollamt Mainz v. *Kupferberg & Cie. KG a.A,* Case 104/81, ECJ preliminary ruling, 26 October 1982, [1982] ECR 3641, para. 13;
Meryem Demirel v. *Stadt Schwäbisch Gmünd,* Case 12/86, ECJ preliminary ruling, 30 September 1987, [1987] ECR 3719, para. 9-11;
Hermès International v. *FHT Marketing Choice BV,* Case C-53/96, Opinion of Advocate General of the European Court of Justice Tesauro, ECJ preliminary ruling, [1998] ECR 3603, para. 18-20;
Commission of the European Communities v. *Ireland,* Case C-13/00, ECJ judgment, 19 March 2002, [2000] ECR I-2943, para. 15.

[387] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, p. 134.

[388] Jan Klabbers, *The Concept of Treaty in International Law*, The Hague, Kluwer Law International, 1996, pp. 15-25, and for a review of the ICJ practice in this respect p. 165 *et seq.*

binding under international law either under the doctrine of good faith and estoppel as laid down in the *Nuclear Tests Cases*[389] or as an agreement in simplified from as suggested in the *Qatar-Bahrain Maritime Delimitation Case*[390]. The legal effect of informal acts of the EC institutions has also been recognized within the EC law[391]. To sum up, "any type of consensus reached within the Council may, if the requirements *Vertrauenschutz* so require, and intent can plausibly be inferred from the context, be cited [against the EU] as a legally binding commitment"[392]. Thus, the common position on acknowledgement and adoption of the EU titular responsibility for human rights violations ensuing from the conduct of the CFSP, if duly worded, could be interpreted both as an internal commitment of the EU and as an internationally binding act entitling the relevant third parties to rely upon it.

Nevertheless, in order to avoid the need for such burdensome legal argumentation in each case that a third party would need to rely upon the common position's provisions, a clear international engagement would be preferable thereto. The obligation to ensure the effectiveness of the CFSP as laid down in Article 13(3) indent 3 TEU, and accompanied with the prerogative of conclusion of international agreements "envisaged in order to implement a joint action or a common position" (Article 24(3) TEU), lays ground for the "externalisation" of the EU internal commitment regarding titular responsibility *vis-à-vis,* first, the third parties – victims of the human rights violations, second, - the international legal order both in terms of procedure (by relevant procedural arrangements with the competent international jurisdictions) and substance (in regard to the general rules of attribution of conduct and responsibility as laid down in the ILC Draft Articles on the Responsibility of international organisations). The procedural specifics of international adjudication as required by the EU titular responsibility model could be regulated either by means of according international agreements or by special declarations (as in the case of the EC declarations of competence in mixed agreements[393]), protocols (as envisaged for the potential accession of the EU to the ECHR) or annexes (as in the case of the UN Convention on the Law of the Sea[394]) attached to the primary acts of procedure. It is suggested that in the hypothetical case of the ILC Draft Articles on the Responsibility of international organisations being conventionalised, "[t]he

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[389] *Nuclear Tests Case*, ICJ Reports, 1974, p. 268, para. 46.

[390] *Qatar-Bahrain Maritime Delimitation*, ICJ Reports, 1994, pp. 126-127.

[391] Joël Rideau, *Droit institutionnel de l'union et des communautés européennes,* Paris, L.G.D.J., 1994, pp. 114-116.

[392] Martti Koskenniemi, *International Law Aspects of the Common Foreign and Security Policy*, in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague/ London/ Boston, 1998, pp. 31-32.

[393] P.J. Kuijper and E. Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organisations*, in "International Organisations Law Review", vol. 1, 2004, pp. 7-9.

[394] *Second Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur*, International Law Commission, 55th Session (3 May – 4 June and 5 July – 6 August 2004), UNGAOR, UN doc. A/CN4/541, p. 6.

special situation of the European Community and other potentially similar organizations[395] could be accommodated in the draft articles by special rules of attribution of conduct" [396] – which could be contained therein or attached to the general provisions in one of the aforementioned forms.

[395] The "other similar organizations" here being a reference to the EU, most notably if not exclusively.

[396] *Third Report on Responsibility of International Organisations by Mr. Giorgio Gaja, Special Rapporteur*, International Law Commission, 57th Session (2 May – 3 June and 4 July – 5 August 2005), UNGAOR, UN doc. A/CN4/553, p. 4.

B.2. Practical modalities of justiciability

The lack of appropriate procedural arrangements for claiming the EU responsibility before international courts significantly diminishes the role of any substantive, no matter how elaborate, rules laid down thereto. Access to justice as a human right in itself and its accessory, yet key role, in assuring the enforcement of other human rights brings into focus the procedural modalities required for the practical application of the EU titular responsibility model. These modalities attempt to maintain the delicate balance between preserving the necessary autonomy of the international organisation and responding to the need to have it held responsible for human rights violations[397]. Unfortunately, so far Dinah Shelton's assessment of the development of legal remedies – that it "should be governed by the desire for consistent redress, but more often is determined by administrative feasibility, institutional functions and relationships, and too often, by government's desire not to be held accountable"[398] – equally applies to international organisations which, at present, are, if at all, only reluctantly and *in abstracto* in favour of the legal responsibility regime. The international courts themselves have neither been particularly eager to extend their jurisdiction over international organisations. Therefore, and taking into account the imperatives of human rights protection, the establishment and refinement of a responsibility mechanism for international organisations and for the EU as a particular one of them may require development of innovative procedures to allow individual third parties to bring complaints directly against the international organisation concerned. Nevertheless, "[t]rue judicial protection can only result from a direct appeal against an act."[399]

The procedural proposals in this Chapter are made on two levels – first, in terms of the required adjustments of or innovations in the procedures themselves, and then, if so necessitated, the implied institutional changes of the judicial architecture. The assessment of the international organisations' powers and the rules of organisation as to the course of implementation of these adjustments or innovations remains outside the scope of this work; the latter are secondary matters that would require separate in-depth research of the internal institutional rules of each relevant international organisation, the goal of this work is to identify the primary rules – the venues for further development.

[397] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 34, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

[398] Dinah Shelton, *Remedies in International Human Rights Law*, Oxfors, Oxford University Press, 1999, p. 90.

[399] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 259.

2.1. Internal: accessibility of the ECJ

The internal quasi-constitutional system of the EU provides the first and the foremost locale for credible advances in human rights protection against the wrongful consequences of the CFSP conduct. Art. 6(2) TEU, matched by Art. 6(4) TEU: "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies", reflects the general principle that "international organisations do have the inherent power to confer jurisdiction upon their internal courts in order to deal with such cases"[400]. According to this principle, the so-called "extended jurisdiction" of international organisations on the personal basis constituted by the human rights violation, entitles the international organisation even "to establish courts for the adjudication of such disputes between itself and physical or legal persons other than officials" [401]. To take into account that there is a general interpretative principle of "wide jurisdiction" for the ECJ, with the effect that the ECJ's jurisdiction can only be restricted or ousted by express, unambiguous wording[402], the EU must be recognized in full powers to adjust its judicial architecture so as to encompass the human rights disputes with third parties regardless the cause of the violations lying in the CFSP domain.

a) procedure

In terms of procedure, two tactics can be followed – either adjustment of the existing, general procedure for non-contractual liability/illegality of acts under the TEC, or establishment of a new, special procedure for human rights violations. Both of these options would dictate the extenstion of the ECJ's jurisdiction over Title V TEU, and the former – also careful reconsideration of the individual's *locus standi* rule as laid down in Article 230(4) TEC and consolidated by the restrictive ECJ case-law.

- general

The benefit of this approach is the possibility to build up on an already well-established system of judicial remedy, by just carrying out the necessary adjustments so as to render it functional in the specific category of human rights violations. The EC internal mechanism for non-contractual liability would provide a sound basis for these adjustments "because of the similarity [to the human rights disputes] and importance of questions of principle and general

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[400] Finn Seyersted, *Settlement of Internal Disputes of Intergovernmental Organisations by Internal and External Courts*, in "Zeitschrift fur Auslandisches offentliches Recht und Volkerrecht", vol. 24, 1964, p. 28.

[401] *ibid*, pp. 40-41.

[402] Steve Peers, *Human Rights and the Third Pillar*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 172.

policy that frequently arise in this category of claims". [403] The adjustment should be general[404] and cover two problematic issues: the individual right of standing and the confinement of the Article 230(4) TEC procedure to the CFSP.

i) standing to sue – amendment of Article 230(4)TEC

The condition of "direct and individual concern" is interpreted rather strictly by the ECJ[405], so that standing to sue under Art. 230 TEC is in fact considerably narrower that standing to sue in the Member States' systems of administrative justice and narrower also than before the ECHR. [406] The former set as the basic test of standing "whether the applicant has been *adversely affected* by the contested act", a term which is inspired by the liberal standing rules in the US and UK administrative law, or the *intérèt à agir* criterion of French administrative law. The latter has been flexible in defining the standing to sue – individual petition is confined to the "*victim* of the violation", a broadly interpretable[407] term construed to mean someone "directly affected".

As to the form of adjustments, it has been considered if the necessary alterations in the contents of the notion of "individual and direct concern" could be achieved by means of mere judicial interpretation only, without the need to alter Treaty provisions. However, the inflexibility of the ECJ in interpretation of this clause, even with the CFI having ruled in favour of an extensive interpretation in favour of the individual claimant[408], deems such an approach improbable. Only a revision of Article 230(4) TEC according to the aforementioned national and ECHR models[409] would definitively, clearly and reliably alleviate the rigidity

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[403] Pierre Klein, *La Responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Bruxelles, Editions Bruylant et Editions de l'Université Libre de Bruxelles, 1998, p. 147.

[404] This amendment should not take the form of an opt-in provision to the jurisdiction of the ECJ by each Member State (procedure adopted in the Europol Convention)

[405] L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities*, London, Sweet & Maxwell, 2000, p. 149.

[406] Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 877

[407] Carol Harlow, *Access to Justice as a Human Righ: The European Convention and the European Union*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, pp. 191-193.

[408] L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities*, London, Sweet & Maxwell, 2000, p. 146.

[409] proposed by: A. Arnull, *Private Applicants and the Action for Annullment under Art. 173 of the EC Treaty*, in „Common Market Law Review", vol. 32, 1995, p. 7, and G. Vandersanden, *Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont addressées*, dans « CDE » 535, 1995, p. 551, who proposed the following text of a new para. in Art. 230: "[t]oute personne physique ou morale peut former, dans les mèmes conditions, un recours contre les actes autres que ceux dont elle est destinataire, dans la mesure où elle est suffisamment affectée par de tels actes".

currently resulting from the condition of "individual and direct concern" in Article 230(4) TEC.

Several possibilities of wording have been proposed or could be conceived to that effect. A suggestion has been made to convert the conditions of "direct" and "individual" concern in Article 230(4) TEC into alternative criteria (i.e., "direct or individual concern). A very similar result would be achieved by simple deletion of the words "...and individual...". It appears that this solution could lead to a rather significant opening-up of direct access of individuals to the ECJ[410].

It is considered that it would not be practical to reserve such a broader right of access just to cases of human rights violations. While "the issue of Article 230(4) TEC certainly has a nexus with human rights"[411], it transcends the protection of those rights - as judicial protection must exist for all subjective rights. Therefore, a general extension of the right of action under Art. 230 would be preferable, although one could imagine that victims of human rights violations would more easily be able to show that they were "adversely affected" or "directly affected" by a given measure.[412]

ii) extension of jurisdiction to the CFSP – amendment of Article 46 TEU

The statement that "the implementation of the rule of law requires judicial control. Hence the jurisdiction of the ECJ should be extended to the CFSP at least in principle,"[413] marks the general spirit of the debate currently. It has been recognised that the CFSP cannot be *ipso facto* excluded from the scope of the ECJ review; collisions appear, however, in regard to the practical nuances and implications of the extension of the ECJ's powers.

The first quasi-normative[414] corroboration of the idea is found in Article 47(1) of the EU Charter of Fundamental Rights. Given that it applies when Member States are implementing

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[410] Paper by Mr António Vitorino "The question of effective judicial remedies and access of individuals to the European Court of Justice", Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, WD 21, WG II, 1 Octobre 2002.
See also in regard to more detailed assessment of these modifications as regards their influence of the division of tasks of the national courts and the ECJ, the standing to sue in the case of general acts of the EC law, and other considerations.

[411] Final Report of Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, CONV 354/02, WG II 16, 22 October 2002.

[412] Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 893.

[413] Final Report of Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, CONV 354/02, WG II 16, 22 October 2002.

[414] To take into account the specificity of the Charter's current legal status:
It was drawn up during 2000 by the Convention and then approved by the Biarritz European Council. Explanations regarding the text of the Charter were drawn up by the Praesidium of that Convention; it

the *EU law*, as opposed to the *EC law*, jurisdiction will be satisfied if it can be shown that the Member State concerned is implementing rules passed *via* Title V TEU or Title VI TEU. This may mark an important first step in overcoming the "anomalies that can result from obliging litigants to prove that their claim falls within the 'scope of application' of the EC law before attracting the protection of the ECJ case law on human rights"[415].

In order to grant the ECJ jurisdiction over CFSP matters in the current Treaty system, Article 46 TEU would need to be amended and supplemented with a provision explicitly including Title V TEU in the scope of the ECJ's powers. There should be no *de iure* limitations of the ECJ's jurisdiction over the CFSP, as it would be the *de facto* considerations of the justiciability of each specific case coming before the ECJ that would limit the practical scope of review.

- special (European *amparo*)

It is relevant to ask if instead of artificially stretching the margins of the procedure for non-contractual liability it would be much more appropriate and effective for human rights protection to establish a new direct form of legal action to protect the human rights of individuals, "along the lines of certain national constitutional procedures"[416]. This option, which has been proposed for quite some time and was mentioned in the report of the ECJ of May 1995 (prior to the Intergovernmental Conference leading to the Treaty of Amsterdam), would consist of the introduction of a new special action enabling individuals to challenge acts, including those of general application (i.e. of legislative or "regulatory" character), directly in the ECJ; the causes of action would be limited to alleged violations of the

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was specified that these explanations had no legal value but were intended to clarify the provisions of the Charter. The Charter was signed and solemnly proclaimed by the Council, the European Parliament and the Commission on 7 December 2000 and published in the Official Journal.
Since the solemn declaration, a series of Advocates-General at the ECJ have referred to the Charter, using it – despite its lack of any formally binding force, which they take care to note – as a source for identifying EC fundamental rights. More recently, the CFI invoked on two occasions articles of the Charter as "confirmation" of the constitutional traditions common to the Member States. On the other hand, the ECJ has refrained to date from mentioning the Charter.
Furthermore, the Commission decided in March 2001 that any proposal for a legislative act and any regulatory act that it was preparing to adopt would be the subject, at the time of its drafting according to the usual procedures, of a prior compatibility check with the Charter; in addition, a new "model recital", testifying to this compatibility check, is now inserted into its legislative proposals or regulatory acts which have a specific connection with fundamental rights. Such recitals referring to the Charter have in the meantime been included in certain acts adopted by the legislator.
The Charter is now incorporated in the EU Constitutional Treaty, and is bound to thus acquire legally binding and constitutional status upon the entry into force of the Constitution.

[415] Angela Ward, *Access to Justice*, in Steve Peers and Angela Ward (eds.), *The European Union Charter of Fundamental Rights. Politics, Law and Policy – Essays in European Law*, Oxford and Portland Oregon, Hart Publishing, 2004, pp. 123-140, at p. 140.

[416] Discussion paper on the Charter/ECHR, Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, CONV 116/02, WG II 1, 18 June 2002.

applicants' human rights. The proposition was upheld by the Italian presidency which suggested to "extend the scope for bringing actions before the ECJ by enabling individuals to bring actions directly for violation of a fundamental right'[417]. The idea of "the European *amparo*" – even though never materialised – is worthy in the sense that it lays down the main elements of the hypothetical *special* procedure for the protection of *human rights* which would go beyond what is offered by Art. 230 TEC for the protection of private interests *in general*.

The model for this suggestion is formed, undoubtedly, by the constitutional complaint procedure (*Verfassungsbeschwerde*) in German law and by the slightly different *recurso de amparo* procedure in Spanish law. In this procedure, the applicant must show that he is directly concerned by the measure (in one of its first judgments, the German Constitutional Court used the formula that the applicant must be affected personally, directly, and presently (*selbst, unmittelbar, und gegenwärtig*) concerned by the measure; this formula has been used eversince.[418]

Advocates of "the European *amparo*" argue that it would allow to leave intact the "normal" system of direct actions as established by Article 230(4) TEC and Article 288(2) TEC focusing on individual acts of administrative character, and to add a special remedy of truly constitutional character. Critics however doubt notably whether it would be possible or convincing to distinguish alleged violations of fundamental rights from other violations of law serving as causes of action under Article 230 TEC. They point to experience in Germany suggesting that it is possible in almost all cases to express an alleged illegality also in terms of a fundamental rights violation, given the large scope of a number of human rights in modern constitutional and international law. According to these critics, the relationship between such a special "constitutional" action and the ordinary system of remedies in Article 230(4) TEC could be difficult to establish.[419] Nevertheless, the great benefit which such action would bring to "the coherence of the rule of law in the EU and the enforceability of the EU human rights commitments"[420] remains fully acknowledged.

b) structure

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[417] Conference of the Representatives of the Governments of the Member States, Conf. 3860/1/96, 17 June 1996.

[418] Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights*, Oxford University Press, 1999, p. 894.

[419] Paper by Mr António Vitorino "The question of effective judicial remedies and access of individuals to the European Court of Justice", Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, WD 21, WG II, 1 Octobre 2002.

[420] Final Report of Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, CONV 354/02, WG II 16, 22 October 2002, p. 15.

Institutionally, the described procedural adjustments could be either accommodated in the existing structural framework of the ECJ (including the CFI) or in a specialised judicial structure that would be charged solely with the settlement of human rights disputes. While the latent ideology of the ECJ as the ultimate judicial guardian of European legal order[421] would imply that its unity should be preserved, the practical difficulties of the consequently increased case-load of the ECJ and of the specifics of human rights disputes in regard to the anterior market-oriented ECJ jurisprudence would rather advocate for creation of a new structure.

The ECJ in the EU/EC institutional architecture retains a significant role, one beyond the traditional notion of a "court", rather a meta-court with several layers of capacities, as it may act:

- as a civil court (hearing disputes over contracts concluded by the EC, usually on appeal from the CFI);
- as an appeal court (from the CFI in direct actions brought against the EU institutions and other bodies).

  Formerly the ECJ also acted as an employment tribunal (appeals by the EU civil servants). Staff cases are now dealt with by the CFI, the ECJ retaining an appellate jurisdiction;
- as a constitutional or administrative court (determining whether the EC institutions are acting within the scope of their powers, reviewing the legality of the EC measures);
- as an international court (dealing with conflicts between Member States or between the Commission and Member States and with conformity of international agreements with the Treaties, and interpreting conventions such as the Europol Convention and other Conventions made under or in the light of the Treaties)[422].

To the last two roles, the jurisdiction over human rights matters could and should be added homogeneously. The capacity to rule over human rights issues would reaffirm the ECJ's prominent standing and enhance the credibility of the developing EU legal order.

Nevertheless, there are both objective and subjective considerations which advocate for the creation of a specialized structure for human rights disputes. The concerns of thereby significantly increased case-load and the potentially high share of human rights cases therein

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[421] Armin von Bogdandy, Felix Arndt, and Jürgen Bast, *Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis*, in "Yearbook of European Law", Vol. 23, 2004, p. 109.

[422] *The Future Role of the European Court of Justice,* House of Lords, European Union Committee, 6th Report of Session 2003-2004, 15 March 2004, p. 10.

are the objective factors. Subjectively, there are curious conjectures about the possible subjection of human rights to the common market imperatives of the EC if the ECJ would be left to adjudicate human rights disputes in a general procedure and general institutional framework with other disputes originating in the EC law and practice. A major debate has taken place over this issue, *a propos* a provocative study by Jason Coppel and Aidan O'Neill, who argued that the ECJ "subordinates human rights to the end of closer economic integration in the Community" by treating "human rights, and in particular their place in any normative hierarchy, in a confused and ambiguous way."[423] Such an approach would seem to justify the current reluctance to set sufficiently liberal conditions of *locus standi* for individuals so to assure the protection of their rights that extend beyond damage which is calculable, as "access to justice is, in general, sufficiently ensured, if economic interests are at stake,"[424] and "corporate and commercial litigation is likely to remain the pattern for the foreseeable future."[425]

The most recently elaborated institutional provisions on the EC/ EU judicial structure indicate the venues for circumventing these obstacles. First, the Treaty of Nice provides for the creation of "judicial panels"[426] below the CFI to deal with such matters as intellectual property[427] and staff cases[428]. Second, the EU Constitutional Treaty provides for the creation

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[423] Pavlos Z. Eleftheriadis, *The Future of Environmental Rights,* in Philip Alston, Mara Bustelo and James Heenan (eds.), *The European Union and Human Rights,* Oxford University Press, 1999, p. 547.

[424] Communication from the Commission, Implementing Community Environmental Law (1996), COM (96) 500, at para. 36.

[425] Carol Harlow, *Access to Justice as a Human Right: The European Convention and the European Union,* in Philip Alston, Mara Bustelo and James Heenan (Eds.), *The EU and Human Rights,* Oxford University Press, 1999, p. 195.

[426] Article 220

"The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

In addition, judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty."

Article 225a

"The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission, may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas.

The decision establishing a judicial panel shall lay down the rules on the organisation of the panel and the extent of the jurisdiction conferred upon it.

Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance."

[427] With regard to extending the powers of the Court of Justice, the new Article 229A of TEC created a legal basis to allow the Council, acting unanimously, to adopt provisions to confer jurisdiction on the ECJ in disputes relating to industrial property rights. This provision applies essentially to disputes between private individuals concerning the future Community patent.

[428] Declaration No 16, annexed to the Treaty, calls on the ECJ and the Commission to prepare a draft decision to create a judicial chamber of this kind to rule on disputes between the Community and its servants (Article 236 EC).

of "specialized courts"[429], which would be "attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas" (Article III-359(1)). Such judicial structures would provide the necessary institutional framework for dealing specifically with the category of human rights cases in due time, without endangering the coherence and specificity of the European legal order, as the rulings of the specialized panels would be subject to re-examination by the ECJ/ General Court "on points of law only or, when so provided for [in the European law establishing the specialized court], also on matters of fact" (Article III-359(3)) "if there is a serious risk to the unity or consistency of EU law"[430].

c) relation to external mechanisms

With the setup of an internal EU procedural mechanism for the adjudication of human rights violations, an inevitable question surges as to its relation to the comparable external systems, as discussed below. Partly the result of most international organisations lacking any kind of (personal) jurisdiction over non-state entities without the context of a contractual relationship and the ensuing lack of parallelism between states and international organisations as to the existence of internal remedies, this question has not been well established in international law[431].

In brief anticipation of future problematics, it is relevant here merely to assess the possible applicability of the exhaustion of local remedies rule to claims against international organisations. In regard to the applicability of this rule to the EU in the hypothetical case that the human rights procedure extending over the CFSP would be established, one would have to assess the "equal protection" doctrine implying the need for an equivalent or higher standard of protection of human rights so as to exclude its scrutiny by external courts (notably the ECHR), the doctrine of acts "subject to the ECJ control"[432], and, finally, the ruling of the ECHR in the *Akdivar* case, which defined that "[t]his generally recognised rule of international law on the exhaustion of local remedies should be applied with some degree of flexibility and without excessive formalism and with a realistic assessment of the general and

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[429] Article I-29 The Court of Justice of the European Union
"1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Constitution the law is observed."

[430] *The Future Role of the European Court of Justice,* House of Lords, European Union Committee, 6th Report of Session 2003-2004, 15 March 2004, p. 9.

[431] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 43.

[432] *Segi and Gestoras Pro Amnistia v. Germany and Others,* applications 6422/02 and 9916/02, European Court of Human Rights, admissibility, 16 May 2002; *Jégo-Quéré et Cie S.A. v. Commission of the European Communities,* Case T-177/01, CFI order, [2002] ECR II-2365.

political context in which the remedies operate and the personal circumstances of the applicant."[433].

2.2. External: accessibility of international courts

Traditionally, international organisations have remained reluctant towards any form of external judicial or quasi-judicial control, such as human rights bodies. These bodies, in turn, have not hastened to extend their scrutiny over international organisations. It is at the same time logical and illogical attitude depending on which aspect – political or legal - of the international organisations' phenomenon is taken as the point of reference; if, from the political aspect submission to external scrutiny implies recognition of the other subjects' supremacy and express constraint of own public prerogatives, then, on the other hand, from the legal aspect it would mean simple recognition of the principle of rule of law in its totality. After all, one of the principle's manifestations is the rule of *nemo judex in causa sua;* restraint to internal judicial review solely would imply that the defendant would in all cases be *judex in re sua.* This principle lays express limits upon the international organisations' powers to qualify its activities unilaterally – these powers are not boundless and, from the responsibility point of view, "have to be subject to external review." [434] The principle is also a yardstick for assessing the effectiveness of a remedy, as the effectiveness depends on two cumulative criteria: institutional effectiveness or the independence of the decision-maker from the respondent authority and remedial effectiveness or the element of enforceability"[435]. Thereby, the independence of the judicial body which can be fully ensured in case of an external jurisdiction has direct repercussions on the adequacy of the responsibility mechanism.

The jurisdiction of external judicial mechanisms can be extended over the EU CFSP activity through bi-fold procedural arrangements – the *ratione personae* and *ratione materiae* openness of the internal rules of the forum (the international jurisdiction) to the human rights disputes between the EU and the alleged victims of human rights violations necessitates, according to the principle of consensual jurisdiction[436], a corresponding international act of "acknowledgement and adoption" of the jurisdiction, as the dynamic counterpart of the static "acknowledgement and adoption" of responsibility.

a) the UN system

[433] *Akdivar v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions,* vol. 4, 1996, 1210
[434] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 173.
[435] *Ibid*, p. 28.
[436] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 864

The ICJ, the only universal judicial institution to deliver a legally binding judgment on "any question of international law" (Article 36(2)b of the ICJ Statute) would have the highest authority to adjudicate cases of human rights violations allegedly perpetrated by international organisations. It would be in the best position in terms of legitimacy and capacity to assure the compatibility between "on the one hand, the autonomy which international organisations require in their decision-making and operational processes and, on the other hand, the requirements of a solid responsibility regime"[437], the compatibility of international public interests with the imperatives of human rights protection. From the perspective of the EU, its adherence to the rule of law and functioning in and by the rules of international law requires conceptualizing the UN Charter as the primary element of secondary constitutional law of the EU and thus binding CFSP to the general principles of the UN Charter. Consequently, in the light of the constitutional character of the UN Charter, "it would also be worthwhile to contemplate an adherence of the EU to the Statute of the ICJ as the main judicial body of the United Nations constitution"[438]. To enable the ICJ to judge on human rights violations committed in the course of the CFSP, the EU should accept the compulsory jurisdiction of the ICJ according to the Article 36(2) of the ICJ Statute like the EU Members.

Taking into account the universal character of the ICJ and that the case of the EU responsibility is merely the first swallow to make the "spring" of such a new typology of responsibility issues, the procedural adjustments for coping with the current EU problematics should not be exclusively directed at the EU, but at the category of international legal disputes that it represents. The limitations that the international responsibility mechanism of the ICJ would have to overcome in order to assure that the EU could be held responsible for human rights violations in its CFSP conduct are the rules on procedural standing – both of international organisations and of individuals. Article 34(1) of the ICJ Statute currently is laconic: "Only states may be parties in cases before the Court."

- *locus standi* of international organisations

The need for change – for amending Art. 34 of the ICJ Statute – has been long-how recognized (the idea circulated already at the UN Conference on international organisation at SanFranciso, at the 47th Conference of the International Law Association in 1956, at the ILC discussion of Art. 66 of what became the 1986 Vienna Convention on the Law of Treaties

[437] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 50, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

[438] Markus Krajewski, *Foreign Policy and the European Constitution*, in "Yearbook of European Law", vol. 22, 2003, p. 454.

between States and International organisations or between International organisations[439]). The first detailed proposals on amending Article 34 and originating from states were tabled before the Special Committee on the Charter of the United Nations and on Strengthening the Role of the Organisation in January 1997, but they were withdrawn in April 1999, as their adoption in the foreseeable future appeared "most unlikely".[440]

If the reasons as to why international organisations do not have *locus standi* before the ICJ are "more political than juridical"[441], as stated by Philip Jessup in 1948, then policy reasons could convincingly be put forward in favour of this long-overdue wider access to the ICJ by amending Art. 34(1) and Article 36 of the ICJ Statute. These policy reasons flow directly from the need for a comprehensive responsibility regime for international organisations, "not only containing primary rules governing the conduct of these actors, but also providing for secondary rules as to the implementation of that responsibility"[442]. Politico-legal reasons in favour of giving international organisations *locus standi* can also be found in the fact that they are ultimately creatures of states, that they do share with states the same systemic interests in abiding by obligations of the international legal system and, finally, that the ICJ would otherwise be unable to play a leading role in this area.[443]

The proposed wording of Article 34(1) of the ICJ Statute stands such: "States and International Organisations, duly authorised by their constituent instrument, may be Parties in the cases before the Court."[444] With the formulation of "States and International Organisations" as the "Parties", Article 36 of the ICJ Statute would remain without significant changes in wording, except for replacement of the references to "states" or "states parties" to the cumulative term "Parties". Another proposition to the sought-after formulation of Article 36 of the ICJ Statute contains explicit references to international organisations:

1. The jurisdiction of the Court comprises all cases which the parties or which *public international organisations, so authorised by their constituent instrument,* refer to it and all matters specially provided for in the Charter of the UN or in treaties and conventions in force.
2. The States parties to the present Statute and *public international organisations, so authorised by their constituent instrument,* may at any time declare that they recognise

[439] P. Couvreur, *Développements récents concernant l'accès des organisations intergouvernementales à la procédure contentieuse devant la CIJ*, dans E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Mohammed Bedjaoui,* The Hague, Boston and London, Kluwer Law International, 1999, p. 293.

[440] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 53, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

[441] P. Szasz, *Granting International Organisations Jus Standi in the ICJ*, in A. Muller, D. Raic and J. M. Thuransky (eds.), *The International Court of Justice: Its Future Role After Fifty Years,* The Hague, Boston and London, Kluwer Law International, 1997, p. 172.

[442] *ibid*, p. 172.

[443] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 238-239.

[444] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 52, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a) the interpretation of a treaty;
b) any question of international law;
c) the existence of any fact which, if established, would constitute a breach of an international obligation;
d) the nature or extent of the reparation to be made unconditionally or on condition of reciprocity on the part of several or certain States or *public international organisations*, or for a certain time." [445]

The question of whether the capacity to appear before the ICJ should be granted to all international organisations or only to some was included in the draft questionnaire to be circulated to states and submitted by Guatemala in January 1998 during the session of the Working Group of the Special Committee[446]. The question was left to be decided by the internal rules of the relevant international organisations, as their capacity of standing would be subject to a formal declaration thereto[447]. The principle of equality between the parties before the Court would be best achieved by the potential respondent international organisations becoming parties to the ICJ Statute, thereby depositing with the UN Secretary-General on the occasion of that accession a formal declaration that they will comply with the decisions of the ICJ in any case to which they are a party.[448] Also the consensual basis of the ICJ jurisdiction would remain fully intact, even "in the light of the remedial imperatives of the accountability regime for international organisations" [449]. There is no reason why international organisations should not enjoy the same freedom as states of limiting their acceptance of the ICJ's jurisdiction, provided, of course, that "the object and purpose [of the responsibility regime] are not being eroded or nullified"[450]. The remedial advantage for applicant states attached to the reciprocity aspect of the methods of acceptance of the Court's jurisdiction should be preserved. [451]

- *locus standi* of individuals

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[445] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 248.
[446] A/AC/182/L.101 of 3 February 1998. The proposal was finally withdrawn by Guatemala.
[447] P. Szasz, *Granting International Organisations Jus Standi in the ICJ*, in A. Muller, D. Raic and J. M. Thuransky (eds.), *The International Court of Justice: Its Future Role After Fifty Years,* The Hague, Boston and London, Kluwer Law International, 1997, p. 173.
[448] P. Couvreur, *Développements récents concernant l'accès des organisations intergouvernementales à la procédure contentieuse devant la CIJ*, dans E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Mohammed Bedjaoui,* The Hague, Boston and London, Kluwer Law International, 1999, p. 297.
[449] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 53, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf
[450] Patrick Daillier et Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 806.
[451] International Law Association, *Accountability of International Organisations*, Final Report, Berlin Conference, 2004, p. 53, at: http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf

Possible access for individuals was already voiced as a question in regard to the jurisdiction of the Permanent Court of International Justice. The Advisory Committee of Jurists entrusted with the task of drafting a Statute for the Permanent Court of International Justice based itself on the qualification "international" in order to reject any such possibility.[452] The same stance was retained in regard to the individual *locus standi* before the ICJ.

With the field of human rights acquiring an ever-increasingly significant role in the general body of international public law, the needs of good administration of international justice render this practice questionable. It has been proposed to grant direct access to individuals to the ICJ along the lines of Protocol 11 to the ECHR. Following and enhancing the ECHR model, *locus standi* for individuals would make it possible for them to bring suits for both states and international organisations[453]. A new paragraph would be added to Article 35 of the ICJ Statute – namely paragraph 4, pursuant to which the ICJ would be empowered to receive petitions "from any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation of international law by one of the States parties to the Court or by an international organisation"[454] – provided that the respondent state or international organisation has by declaration, along the lines of the optional clause system under the ECHR, accepted the Court's jurisdiction to that end.

The proposal is wide-ranging both *ratione personae* and *ratione materiae*. First, it would not only provide access to a single individual, but also to a group of individuals (echoing the eligibility conditions for requests of the World Bank Inspection Panel) and to non-governmental organisations without specifying even whether those should be nationally or internationally based. From a remedial perspective, the ECJ's jurisdiction *ratione materiae* would comprise alleged violations of international law, thus excluding claims that are merely non-contractual claims, [455] but not being explicitly limited to human rights violations. The aperture of "any question of international law" (Article 36(2)b of the ICJ Statute) to claims by individuals seems utopian – admirable in theory, but impracticable in the current, even though decreasingly, yet still principally state-oriented system of international law and relations - "[b]ringing about the innovative *locus standi* before the ICJ [..] will, of course, depend on the political willingness of the main actors on the international scene" [456]. Surely, the access to

[452] M. Janis, *Individuals and the International Court of Justice*, in A. Muller, D. Raic and J. Thuransky (Eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague, Boston and London, Martinus Nijhoff Publishers, 1997, p. 206-207.
[453] *ibid*, p. 209-214.
[454] *ibid*, p. 209-214.
[455] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 256.
[456] Karel Wellens, *Remedies against International Organisations*, Cambridge University Press, 2002, p. 256.

individuals to adjudication of other questions of general international law could be as well limited by the notion of "victimhood" implicitly containing the condition of "direct adverse effect upon the claimant's rights" or by formulating this condition as an explicit criterion of admissibility; nevertheless, even if having an identical practical value, a protocol on the admissibility of individual claims to the ICJ in the category of human rights violations merely (not extendable to other cases of a general international law character) would be a more feasible form of the adjustments of the ICJ Statute. With all the consideration for the idealism behind the proposal aiming at the maximum permissible subject-matter for individual access to the ICJ, in practice it would necessarily bring about the situation when "it would take several, indeed many, lean years while we wait for states and the UN to accept the option of individual applications to the International Court of Justice." [457]

b) the ECHR

Amidst all the hypothetical constructions on the EU responsibility for human rights violations, this is the least hypothetical. The ever-icreasing awareness that "[t]he EC and the EU evolve into structures which are increasingly comparable to those of a federal State" [458] and that if "[a]ll acts imputable to the EU member states are subject to the external supervision of the ECtHR after local remedies have been exhausted: similarly, acts imputable to the EU should ultimately be subject to the same external control,"[459] has led to a situation when the issue of synchronisation of the two European systems primarily or incidentally assuring human rights protection has usurped the European human rights talk and produced countless pieces of doctrinal, normative and political reasoning[460]. The almost magic-stick solution is generally considered to be the EU's accession to the ECHR, conditional upon the entry into force of the EU Constitutional Treaty with its provision in Article I-9:

> "1. The [European] Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.
> 2. The [European] Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the [European] Union's law."

On the part of the ECHR, apposite procedural and institutional amendments would then be

[457] *ibid*, p. 256.
[458] European Commission for Democracy through Law (Venice Commission), Opinion no. 256/2003 on the implications of a legally binding EU Charter of Fundamental Rights on Human Rights Protection in Europe, 18 December 2003, CDL-AD (2003) 92, para. 58, p. 13.
[459] *ibid.*
[460] See *supra* notes 260 and 419

carried out, so as duly accommodate the changes by simultaneously not diluting the special character of the ECHR system.

On the level of general assessment of these provisions, it has been ascertained that the EU's accession to the ECHR would provide an optimal and autonomous system of control over the protection of human rights in Europe and from the abuse by European actors on the international legal and political scene. The anticipated incorporation of the EU Charter of Fudamental Rights into the EU Constitutional Treaty and the EU's accession to the ECHR have been eloquently described as an important bulwark against any abuse of the EU's enhanced powers,[461] particularly in the area of the CFSP, praised as "an important contribution to the protection of fundamental rights in the EU on a transparent, principled, and securely entrenched constitutional basis,"[462] and even deemed "the only possible démarche"[463] to avoid all risk of conflict between the two systems. It has been settled that, after accession, "the ECJ would remain the sole supreme arbiter of questions of the EU law and of the validity of the EU acts; the ECtHR could not be regarded as a superior court but rather as a specialised court exercising external control over the international law obligations of the EU resulting from accession to the ECHR. The position of the ECJ would be analogous to that of national constitutional or supreme courts in relation to the ECHR at present." [464] Provisions as to the required procedural adjustments and the setup of the ECtHR are meticulously elaborate, thus divesting all scientific value from any attempts to merely reflect them herein.

A more curious point for fresh analysis has been recently raised by the Council of Europe Venice Commission. In their Opinion on Human Rights in Kosovo, the Commission has assessed the possibility "to conclude some form of agreement between the Council of Europe and the international authorities in Kosovo placing them, along with the Provisional Institutions of Self-Government which are subsidiary to the international authorities, within the jurisdiction of the ECtHR"[465]. The ECHR is applicable in Kosovo by means of the UN

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[461] Allan Rosas, *The European Union and International Human Rights Instruments*, in Vincent Kronenberger, *The European Union and the International Legal Order: Discord or Harmony?*, T.M.C. Asser Press, The Hague, 2001, p. 65.

[462] Stephen Carruthers, *Beware of Lawyers Bearing Gifts: A Critical Evaluation of the Proposals on Fundamental Rights in the EU Constitutional Treaty*, in "European Human Rights Law Review", issue 4, 2004, pp. 424-435, p. 435.

[463] Florence Benoît-Rohmer, *La Charte des droits fondamentaux de l'Union européenne, in « Le Dalloz »*, no. 19, 2001, p. 1491.

[464] Final Report of Working Group II "Incorporation of the Charter accession to the ECHR", the European Convention, CONV 354/02, WG II 16, 22 October 2002, p. 12.

[465] *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, European Commission for Democracy Through Law (Venice Commission), Opinion No. 280/2004, CLD-AD(2004)033, 11 October 2004, p. 3.

Security Council Resolution 1244[466] which lays down the principle of protection and promotion of human rights and by the first UNMIK Regulation "On the Authority of the Interim Administration in Kosovo"[467] which provides expressly that "in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards, as reflected in particular in [..] the European Convention for the protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto". The legal status of the ECHR in Kosovo is thus interesting, yet in the context of responsibility of international organisations it is the fact that to subject UNMIK and KFOR to the jurisdiction of the ECtHR[468] would imply that the UN, a universal international organisation, and NATO, an international military alliance, would have to agree becoming subject to scrutiny by the ECtHR, a regional body. Seems a paradox, yet clearly illustrates the increasing credibility that the ECtHR is gaining as the standard for human rights protection on the international scene and the surfacing readiness of international organisations to accept external judicial review of the compliance of their action worldwide with human rights.

c) Visionary: International Human Rights Court?

It is often said that "it is all just about comparisons". To avoid reproaches of utopianism in regard to the afore-decribed responsibility mechanisms, an even more utopian responsibility system helps. The idea of an International Court of Human Rights is overarching both in terms of scope – *ratione teritoriae* and *ratione materiae* reach, but also in time – by sketching

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[466] UN Security Council Resolution 1244(1999), adopted at the 4011th meeting of the UN Security Council, on 10 June 1999.

[467] UNMIK/REG/1999/1 (*On the Authority of the Interim Administration in Kosovo*), 25 July 1999, amended by UNMIK/REG/2000/54, 27 September 2000.

[468] In concise, in order to avoid the complications of a (temporary) adaptation of the ECHR by an amending protocol, it was considered to establish a system for the ECtHR's jurisdiction *in parallel to* the actual ECHR system. This would involve that the Council of Europe, with the consent of all member States (including Serbia and Montenegro), conclude an agreement with the UN and possibly also with NATO and those NATO States which are not Council of Europe members. Such an agreement could then lay down the obligation for UNMIK and the interim administration, and possibly also KFOR, to comply with the substantive provisions of the ECHR and its Protocols, and could also stipulate that jurisdiction be assigned to the ECtHR concerning any complaint against UNMIK and the interim Administration, and possibly also KFOR for not complying with these provisions. If KFOR were to be included, those countries participating in the operation which are not members of the Council of Europe would need to consent to the Court's jurisdiction. Such an agreement might also regulate such matters as the composition of the ECtHR when acting under the agreement – or even the setting up of a special section of the ECtHR for this purpose -, the way the rule on prior exhaustion of domestic remedies should be applied, waivers of the immunity with respect to UNMIK and KFOR staff, etc. The ECtHR would also have to give its explicit consent to such an extension of the jurisdiction of the ECtHR.
Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, European Commission for Democracy Through Law (Venice Commission), Opinion No. 280/2004, CLD-AD(2004)033, 11 October 2004.

a human-rightist perspective that the current dynamics of international law of responsibility should approach.

The human rights' expert Mr. Manfred Nowak reveals his visionary faculty by suggesting that "since human rights courts have been established in Europe, the Americas and Africa, there is no more reason why the UN should not establish an International Human Rights Court" [469]. The current lack of an international court of human rights may, at first glance, seem truly surprising as human rights are an international affair *par excellence.* The gigantesque undertaking that the establishment of the International Court of Human Rights might provide a chance for the ultimate optimisation and consolidation of the human rights protection standards and procedures that have been dispersedly elaborated by now. Thus, such a permanent court could be created "on the basis of a new international treaty" [470] which would "need to combine the complaints mechanisms of the ECHR with the prosecutory possibilities of the ICC"[471]. In terms of *ratione personae*, it should have jurisdiction to decide on "individual and collective complaints"[472] relating to all human rights treaties: "in addition to the two UN Covenants and the other four core treaties (the CERD, the CEDAW, the CAT, the CRC) one might also think of other, such as the Genocide Convention or the Migrant Workers Convention."[473] As to the respondents, not only "the respective State Party who has ratified [the treaty in question]"[474] should be subject to determination of international responsibility, but also, as proven to be crucial by this work, international organisations need to be included among the Contracting Parties of such a comprehensive regime of human rights protection.

It has to be said with the President of the ICJ Mr. Mohammed Bedjaoui: "There is no compelling reason why, "in the same way as international human rights law has been creative, the establishment and refinement of an responsibility regime for international organisations would not develop innovative procedures to allow individuals affected in their interests or rights by acts, actions or omissions of an international organisation to bring complaints directly against the organisation concerned."[475] Even though not in the nearest future, there is

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[469] Manfred Nowak, *New challenges to the International Law of Human Rights,* in www.rwi.lu.se/pdf/seminar/nowak.pdf; see also Manfred Nowak, *Introduction to the International Human Rights Regime,* Martinus Nijhoff Publishers, Leiden/ Boston, 2003, p. 79 and 275.

[470] *ibid*

[471] Istvan Kantsin, *No Rights without a Remedy: in Search of an ICHR,* in "Eumap.org – Monitoring human rights and the rule of law in Europe", vol. 2, January 2002, www.eumap.org/journal/features/2002/jan02/remedy/

[472] Manfred Nowak, *New challenges to the International Law of Human Rights,* in www.rwi.lu.se/pdf/seminar/nowak.pdf; see also Manfred Nowak, *Introduction to the International Human Rights Regime,* Martinus Nijhoff Publishers, Leiden/ Boston, 2003, p. 79 and 275.

[473] *ibid*

[474] *ibid*

[475] President Bedjaoui's address, *Yearbook ICJ,* vol. 49, 1994-5, p. 212

grounds for belief that international justiciability of human rights may not be the daydream that it appears today, and that the Nietzschean "extraordinary privilege of responsibility"[476] becomes the Levinasean "obligation of responsibility"[477].

[476] Friedrich Nietzsche, *La Généalogie de la Morale,* dans Philippe Raynaud, Stéphane Rials (eds.), *Dictionnaire de philosophie politique,* Quadrige, PUF, 2003, p. 502.
[477] Emmanuel Levinas, *Humanisme de l'Autre Homme,* dans Philippe Raynaud, Stéphane Rials (eds.), *Dictionnaire de philosophie politique,* Quadrige, PUF, 2003, p. 409.

IV. Conclusions

A. Grounds

1. There is a considerable gap in international legal regulation left by the acknowledgement of the potentiality of human rights violations by international organisations and the need to grant redress for those, yet failing to elaborate adequate legal provisions.

2. The EU's human rights policy in the CFSP is solely pro-active and excludes the passive/ reactive aspect of legal responsibility. The sporadic efforts of addressing this problem have remained on the level of internal accountability rules.

3. The need for holding the EU responsible for the human rights violations that may occur in the conduct of the CFSP has factual, functional, legal and ideological justification.

4. The implied powers of an international organisation "which are essential to the performance of its duties" include not only the power but also the duty to establish appropriate remedial mechanisms for third parties.

B. The EU titular responsibility model

B.I. Scheme

1. The proposed model of the EU responsibility can be described as "titular" – having a particular formulation as such, but not possessing the contents usually associated with this formulation. It combines two models of international responsibility: on the formal level (externally) - the EU assuming international responsibility for human rights violations and standing as the defendant in the relevant legal disputes; on the substantive level (internally), - the EU being entitled to a right of recovery from the CFSP actor to whom the wrongful conduct can be attributed according to the general principle of attribution.

2. Normatively, the EU titular responsibility model is based on Article 7 of the ILC Draft Articles on Responsibility of international organisations on "Conduct acknowledged and adopted by an international organization as its own" and on the developing international practice on assumption of responsibility irrespective of the attribution of conduct. The model is based on a conceptual distinction between the attribution of conduct (*de facto* criterion) and attribution of responsibility (*de iure* criterion), delinking the two as cumulative in establishing an international organisation's responsibility for an internationally wrongful act.

3. The idea of the EU titular responsibility model reflects some parallel advances in other fields of law that regulate relations between subjects of unequal distribution of power. There are parallels by the subject of responsibility and by the sector: environment protection and consumer protection.

4. Drawing upon the principles like legal security, equality of arms and *pacta tertiis* rule, on the one hand, and upon the notions of subsidiarity, political economy and *effet utile* in international integration, on the other hand, this model reflects the specifics of the asymmetrical power relation of individuals and international organisations and fits in the teleology of human rights.

5. The EU titular responsibility model is a tailor-made arrangement for the EU to effectively deal with the external and internal dimensions of responsibility, rather than a model to extract a comprehensive fit-all regime of responsibility of international organisations therefrom. The specificity of the EU allows a search for comparable *sui generis* solutions.

B.2. Content

1. The formal categorisation of conduct as pertaining to "the CFSP" does not legalise limitation of the human right of access to justice. Such absence of a mechanism of responsibility could in substance constitute a "fraudulent denial of justice".

2. Kelsenian relativisation of the concept of international legal personality simplifies the density of the doctrinal debate on the distribution of powers within the EU. Recognition of a nominal, presumptive EU legal personality for procedural standing in suits for human rights violations discharges the individual third party from any negative consequences of this inclarity on his/ her status. The EU is acknowledged to have a sufficiently separate personality to stand formally as the subject of titular responsibility, but simultaneously not claimed to have an undisputable supra-national substantive international legal personality analogous to that of the EC.

3. The EU titular responsibility model does not necessitate definition of precise authorship of the human rights violation, only a sufficiently clear distinction between the CFSP actors and the external subjects. The identification of authorship is carried out *a posteriori* within "the EU" circumscription, without direct concern to the victim remedied.

4. To establish the EU titular responsibility, the claimant must have reasonable grounds to *bona fide* – objectively and subjectively – establish that the relevant act *prima facie* belongs to the CFSP.

5. The *pacta sunt servanda* principle – by the means of *pacta tertiis* rule and the inadmissibility of the claim of internal legal order – dually protects the individual victim from procedural and material obstacles to claiming the EU responsibility.

6. The EU titular responsibility model epitomizes the dynamic aspect of the principle of subsidiarity: on the centrifugal aspect, it allows for the subsequent internal inter-state and inter-institutional dynamics and the attribution of the ultimate conduct-based responsibility; on the centripetal aspect, the EU is recognized as a standalone, even though just formally and primarily (titular), subject of responsibility.

7. The EU titular responsibility model does not affect the availability of national remedial regimes to individuals:
- cannot limit the individual's freedom of choice of the most appropriate remedial venue;
- as an arrangement between the EU, its Member States and international jurisdictions, by *pacta tertiis* rule it cannot deprive the individual of his/ her anterior privileges;
- a CFSP act that would establish the model cannot alter national procedural laws.

B.3. Implementation

3.1. "Acknowledgement and adoption"

1. The EU act of "acknowledgement and adoption" must provide the due legal clarity and certainty to the third parties and therefore be:
- express: not implied or tacit;
- genuine: clearly and unambiguous undertaking of responsibility, not a mere general acknowledgement of the potentiality of human rights violations by the conduct of the CFSP;
- prior: preceding human rights violations that would have to be treated according to the thereby established EU titular responsibility model, not *ad hoc;*

- comprehensive: unqualified – in horizontal terms comprising the whole CFSP, and in vertical terms – all the spectrum of the EU human rights obligations. Instead of formal limitations by the typology of the CFSP acts or by doctrine of "political question", the functional methodology of limiting justiciability by the conditions determining the existence of a human rights violation should be followed. By analogy to the objective liability, the fact of violation defines the need for a judicial review. The *onus probandi* on the claimant must be alleviated, and limited only to the *prima facie* establishment of the link of causality between the EU conduct and the violation.
- titular: vertically apportioned, referring only to titular responsibility.

2. The EU act of "acknowledgement and adoption" should take the form of a thematic common position, applicable to other CFSP acts transversally as *lex specialis*. Its internationally binding effect could be achieved either by due wording or, best, by an apposite international engagement: international agreements with the relevant international jurisdictions or eventually by special provisions on the EU accession to the rules laid down in the ILC Draft Articles on the Responsibility of international organisations, if/ when those would be conventionalised.

3.2. The role of courts

1. Despite the allegation that the aptitude of the ECJ scrutiny over the CFSP matters is limited due to the specific character of its acts and the lack of due legal standards for the appreciation of those, the ECJ has in practice duly carried out analysis of analogous matters.

2. In terms of procedure, human rights disputes between the EU and individual third parties can be accommodated by adjustment of the existing TEC procedures or by establishment of a new direct form of legal action - "the European *amparo*". Both options would require extension of the ECJ's jurisdiction over Title V TEU and careful reconsideration of the individual's *locus standi* rule.

3. Institutionally, the EU titular responsibility model may be accommodated either in the general framework of the ECJ or in a specialised judicial structure charged solely with the settlement of human rights disputes. Practical considerations advocate for the latter option, nevertheless preserving the ECJ's supervisory authority.

4. According to the principle *nemo judex in causa sua*, EU's compliance with human rights norms must be subject to external review.

5. The jurisdiction of external judicial mechanisms can be extended over the EU CFSP activity through bi-fold procedural arrangements – the *ratione personae* and *ratione materiae* openness of the internal rules of the subject of international jurisdiction and a corresponding international act of "acknowledgement and adoption" of the jurisdiction by the EU.

6. The EU's accession to the ECHR would provide an optimal and autonomous system of control over the protection of human rights in the conduct of the CFSP.

7. The ICJ would provide the ultimate forum for the typology of disputes that the human rights violations by the EU represents. To grant the ICJ jurisdiction over such disputes, the general rules on procedural standing – both of international organisations and of individuals – need to be amended.

8. The establishment of an International Court of Human Rights would provide a chance for the ultimate optimisation and consolidation of the human rights protection standards and procedures.

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