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**THE EUROPEAN UNION AND THE UN SECURITY COUNCIL:  
A CONFLICT OF ATTRIBUTION**

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## INTRODUCTION

The law of the European Union consists of an elaborate set of rules which resulted from the progressive sedimentation of state-like prerogatives among the competences of EU organs via several amendments of the original constitutive treaties. As a result, the EU is arguably the most developed and complex organisation of states on the international scene, and rightfully took its place as a subject of studies among scholars and professionals. The complexity of the European integration, as well as the numerous transformations of its structure that occurred over the years, led to a growing specialisation of those scholars and professionals, with the consequence that the EU is no longer studied within the general domain of international organisations but in the specific and exclusive context of EU law. The specialisation of EU law experts is particularly linked to the continuous development and enlargement of the original mandate of the organisation. Indeed, the Union evolved from an original economic institution for the suppression of trade barriers, the trade of coal and steel and the co-operation in developing nuclear power to a legal international entity, after the establishment of the Union in 1992, with exclusive competences, military capacity, uniform judicial review and legislative organs whose regulations enjoy primacy over domestic legislations of Member States. The uniqueness of the dynamic European integration, compared to the “static” nature of most international organisations, had the effect of distancing the study of EU law from general international law, of which the EU is nonetheless part since founded by an international agreement by its Member States.

The EU is, as argued further, an international organisation, and as such it is bound by international law and subject to the rules of the Charter of the United Nations, yet not being a member, and customary law, as a consequence of the original commitment of all its Member States duly replicated in the constitutive instruments of the Union. The relation with the UN acquired a major importance recently as the enlargement of EU mandate has taken up objectives traditionally reserved to UN organs, such as peace and security and the use of sanctions, which are now expressly provided for by EU treaties. Nevertheless, the above relation is seldom examined in depth. Indeed, EU experts are normally absorbed by the study of EU law, its recent modifications and future perspectives, while international law experts have lesser knowledge of EU law, in all its instances, to draw accurate conclusions that take into account the peculiarities of the EU compared to other international organisations. Moreover, those who studied the relationship between the EU and the UN – or more specifically, the Security Council<sup>1</sup> – are, obviously, either European or non-European, with the

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<sup>1</sup>Research on the EU at the UN Security Council is especially thin, compared to studies on other topics dealing with the EU and the UN. In this view JORGENSEN K. E., LAATIKAINEN K. V., *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power*, Routledge Handbooks, 2013, 120-121.

consequence that in the former case they are more prone to support European integration even at the cost of the original consistency of the UN Charter scheme, where for instance all competences in the matter of military sanctions are strictly retained by the Security Council outside of self-defence, while in the latter case they would normally confine the EU to the study of international organisations in general, possibly neglecting a thorough examination of its peculiar traits such as the acquired autonomy in emanating sanctions and deploying military operations.

conclude that the EU oversteps the powers that international law grants to international organisations, without too much attention to the needs of the European process.

The friction between the point of views of European and non-European scholars is further accentuated with regards to specific topics. As an example, with reference to the long-standing debate around the reform of the UN Security Council composition and the proposals for an European seat in particular, non-EU literature stresses the fact that the EU itself could never obtain a seat because seats are reserved exclusively to States according to the UN Charter. On the other hand, typical EU literature focuses instead on the benefits that an European seat would have on the process of European integration, as well as on the feeble representativeness of the Security Council now that several decades have passed since the immediate aftermath of World War II. Likewise, EU and non-EU literature take opposite position on the justification of the European jurisprudence concerning targeted sanctions or the legitimacy of EU peacekeeping operations outside its borders.

The separate study of EU law, on the one hand, and international law, on the other, not only has rendered uncertain the judgement on the legitimacy of certain EU advancements and specific EU-related events according to international law, but also obscured the need of a better exegesis and the critical interpretation of current European *ordre juridique* in light of international law in order to prevent further and future conflicts of competences between the two systems. The European Union has progressively acquired a number of competences and objectives, especially in the context of the Common Foreign and Security Policy, that strikingly resemble or even mirror those of the UN Charter with respect to promotion and safeguard of international peace and security, and it is thus theoretically possible that the EU compels its Member States to act *ultra vires*, out of specific directives from the *ad hoc* UN bodies, on delicate international matters. Although this circumstance may be reduced, at first glance, to a merely apparent conflict, as the UN Charter and related obligations prevail on any other international obligation, it hides an utterly different significance because of the ways the EU and the UN, especially the Security Council, are actually intertwined. Besides the political and economic influence that any major global player may exercise on UN organs, the EU as an organisation has a certain legally binding power over two of the permanent members of the UN Security Council, namely France and until very recently the UK, which are conversely meant to act

as sovereign states within the latter organ to promote and restore international peace. Considering that international law, which binds the EU, is also made by UN Security Council resolutions, the above observation depicts a “vicious circle” difficult to escape without a careful analysis of international law and EU law altogether, in lieu of the rigid division between the two fields of study.

The peculiar traits of the European Union raise many questions of compatibility with international law, which are often left unanswered by the specialised doctrine, because of the special place that the EU acquired in the scenario of international organisations. Furthermore, the continuous integration within the EU, as well as the assumption of new competences and responsibilities, complicates all the efforts to ensure a consistent relationship between EU law and international law. Such efforts are nevertheless necessary, and demanded, with the awareness that “*étudier la place des Communautés dans l'ordre international consiste [...] à soulever une série de problèmes et à faire état de situations que l'on n'a pas coutume d'évoquer à propos d'une organisation internationale*”<sup>2</sup>, still actual with regards to the European Union.

This paper will address some of the peculiarities of the two organizations, with a particular focus on the potential influence of EU rules and common positions on the activity of the UN Security Council and vice versa, with the aim of a comprehensive approach with specific regards to the domain of international peace and security.

The first chapter will set out a general introduction on the respective roles and current cooperation between the EU and the UN Security Council on matters of global relevance, while also highlighting how different structures – one based on original, state sovereignty and the other on pooled, devolved sovereignty - reflect on the specific roles of those states which are, at one time, Member States of the Union and holders of a permanent seat in the Security Council. Such circumstance, is argued, generates a theoretical conflicts in the attributions of those States when called to act for matters regulated differently by the two institutions. This potential conflict is presented *in abstracto*, together with a review of current forms of cooperation, between the EU and the UN for the specific purpose of ensuring an harmonized conduct of peace-keeping operations and preventing the conflict from occurring.

The second chapter will address and develop a number of instances where, in spite of the legal and political efforts of both institutions, the conflict introduced above has actually manifested and resulted in delayed action, reduced effectiveness of international response, or issues of legal analysis and interpretation of the prerogatives of EU bodies in the application of the UN Charter. First, it will be argued how the implementation of UN Security Council sanctions through common decisions

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<sup>2</sup> GROUX J., MANIN P., *Les Communautés Européennes dans l'ordre international*, OPOCE, coll. Perspectives Européennes, 1984, 14.

under the framework of the Common Foreign and Security Policy, albeit in line with the UN Charter and the recommended implementation through regional organisations of which states are members, has led to a certain level of engagement of other EU bodies – namely, the European Court of Justice – and presented a whole new challenge to the effectiveness of UNSC sanctions in terms of additional scrutiny under *jus cogens*. Secondly, the positive obligation to represent and advocate for EU common interests in international *fora*, to which all Member States are bound, may result in delays, or even impediments, to the very emanation of a UNSC resolution. If, on the one hand, the ensuing influence on the decision-making process at the UNSC level may be seen as endemic and welcomed as a stimulus to more accurate discussions around themes of European relevance, on the other hand the binding commitment of EU Member States when acting as permanent members of the Security Council carries the risk of EU-oriented exercise, or threat of exercise, of veto power. Finally, this paper will give an overview of EU military and peace-keeping operations, where the cooperation with the UN has been especially productive, focusing on those – very few – cases where, by means of deployment ahead of a prior UNSC mandate, a conflict could have occurred were those operations to deviate from international law and to be subject to the remedial action of the UN Security Council and the EU Member States represented therein.

The third chapter will further delve into the legal and political foundations of the two institutions and their rules, for the purpose of correctly frame the origins of the conflict in their attributions, as well as the perspective reforms or other means of enhanced cooperation that could reduce, or eliminate, the theoretical or practical risks of friction described in the previous chapters. Final considerations and conclusive remarks will stress the opportunities for both the UN and the EU to profit from the current situation, capitalising on the expanded influence and representation of the EU in the Security Council as a powerful asset in the pursuit of interests of international relevance.

## CHAPTER I

### THE CONFLICT OF ATTRIBUTION BETWEEN EU AND UNSC

#### I.1 THE DUAL ROLE OF FRANCE AND UK

The United Nations, which is the main intergovernmental organisation to promote international peace and cooperation, is variously influenced by a number of international actors, either states or international organisations. The UN is made up of states, and likewise states regroup in other international organisations to achieve different objectives. Since most states are members of the UN, many diverse views and interests are represented within the UN organs and influence their decisions. Such an influence is endemic in each and every organisation, and symptomatic of the necessary pluralism that the latter ought to represent and give voice to<sup>3</sup>. The European Union, in this sense, funnels the positions of its 27 members, with reference to all domains of EU competences and responsibilities, and as such it is subject to an enhanced observer status compared to that of other international organisations at the UN<sup>4</sup>, which includes the right to speak, to reply, and to circulate documents in order to ensure the due coordination of Member States<sup>5</sup>.

At the same time, the European Union is a legal entity with a set of competences whose exercise can bind its Member States and variously orient their behaviour in the UN organs. Consequently, the behaviour of the UN organs themselves is indirectly affected by EU policies and decisions. This indirect influence is opposed to direct, or normative<sup>6</sup>, influence, which is normally exercised via agreements or other conventional paradigms with other international organisations, and which is also particularly diffused<sup>7</sup> due to the legal personality<sup>8</sup> of the EU and its large set of exclusive competences and related capacity to establish contractual links with third countries and organisations. On the contrary, what is here called “indirect influence” stems from the capacity of the EU to bind its Member States to uphold EU law and positions in other international organisations of which they are members,

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<sup>3</sup>The UN can be seen as the “universal form of multilateralism”: HILL C., *The European Powers in the Security Council: Differing Interests, Differing Arenas*, in *The European Union at the United Nations : Intersecting Multilateralisms*, LAATIKAINEN K.V. and SMITH K. (Eds.), 2006, 49.

<sup>4</sup> UN General Assembly, A 64/L. 67, Aug 31, 2010, available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N10/500/71/PDF/N1050071.pdf?OpenElement> (last accessed Nov 16, 2015).

<sup>5</sup>See also “The European Union and the United Nations: The choice of multilateralism”, Communication from the Commission to the Council and the European Parliament. COM (2003) 526 final, 10 September 2003, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:r00009&from=EN> (last accessed Nov 16, 2015).

<sup>6</sup>BENLOLO-CARABOT M., CANDAS U., CUJO E., *Union Européenne et Droit International*, CEDIN, Editions Pedone, 2012, 91.

<sup>7</sup>“L'influence normative qu'exerce l'UE sur les organisations internationales est a priori plus diffuse [ ... ] du fait d'une relative rareté des liens conventionnels noués entre l'UE et des organisations internationales”, *Ibidem*.

<sup>8</sup>Consolidated Version of the Treaty on European Union, 2012, OJ C 326/41, Art. 47 (hereinafter “TEU”).



with particular attention to the role of France and UK as permanent members of the UN Security Council and to their duties and responsibilities in such context.

France, and UK until very recently<sup>9</sup>, are at the same time permanent Members of the UN Security Council and Member States of the EU, with the consequence that they are subject to the rules provided for both institutions. As permanent Members of the Security Council, France and UK are in charge of all measures for the maintenance of international peace and security, for which the Council has primary responsibility<sup>10</sup>, that all Members of the United Nations agree to accept and implement in accordance with the UN Charter<sup>11</sup>. The maintenance of international peace and security is the overarching purpose of the United Nations<sup>12</sup>, and the latter pursues such major objective based on the principle of state sovereignty and equality of its Members<sup>13</sup>. In other words, the teleological foundation of the UN provide for an international organisation that relates the guarantee of international peace to the safeguard and promotion of state sovereignty, if need be through the coercive measures of the organ primarily responsible for such task, organ composed of states that act as sovereign states. Although such assessment is challenged, on a regular basis, by the many features of modern society<sup>14</sup> and by many commentators<sup>15</sup>, this is the traditional approach, and the actual approach at least *à la carte*, of the United Nations for its primary mission of maintenance of international peace and security<sup>16</sup>.

The European Union, in its contemporary physiognomy, pursues objectives very similar to those of the United Nations, adopting nevertheless an utterly different approach. After the acquisition of an external dimension via the creation of the late second pillar Common Foreign and Security Policy (CFSP) and the entry into force of the Treaty of Lisbon, the EU has codified its objectives in

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<sup>9</sup> The so-called *Brexit* process has formally concluded in January 31<sup>st</sup> 2020, with the withdrawal of the UK from the Union after invocation of Article 50 TEU in 2017.

<sup>10</sup> UNITED NATIONS, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Art. 24 (hereinafter “UN Charter”).

<sup>11</sup> Art. 25 UN Charter.

<sup>12</sup> Art. 1 (1), UN Charter.

<sup>13</sup> Art. 2 (1), UN Charter.

<sup>14</sup> In this regard, the concept of “responsibility to protect”, or *R2P*, deserves a mention, representing one of the major breakthrough in international law by affirming the responsibility of the international community for gross human rights violations in case the state – primarily responsible – has failed to perform its functions. UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available at: <http://www.refworld.org/docid/44168a910.html> ( last accessed 19 November 2015); INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *The responsibility to protect*, December 2001, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last accessed Nov 17, 2015). Another example of limitation of state sovereignty in order to maintain international peace may be found in Art. III (1) of the Non-Proliferation Treaty, 729 UNTS 161; 7 ILM 8809 (1968); 21 UST 483.

<sup>15</sup> Especially with regards to human rights obligations and *erga omnes* obligations in general, see for instance PETERS A., *The Security Council's Responsibility to Protect*, International Organisations Law Review 8, 2011, 25.

<sup>16</sup> The pivotal role of state sovereignty in the maintenance of peace and security has been recently reaffirmed at the 7389<sup>th</sup> meeting before the Security Council by diplomats and representatives of over 80 UN Members, see UNITED NATIONS, Meetings Coverage and Press Release, “Prospects for Protecting People Improve When Sovereignty Not Viewed as ‘Wall or Shield’”, Secretary-General Tells Security Council in Ministerial Debate”, SC/11793, 2015, Feb 23, available at <http://www.un.org/press/en/2015/sc11793.doc.htm> (last accessed Dec 15, 2015).

Article 21 TEU<sup>17</sup>, and extended them by means of textual reference to the CFSP<sup>18</sup> and to specific external policies regulated in the fifth part of the TFEU<sup>19</sup>. As a result, the EU enlarged mandate now includes the objective to “ ... *preserve peace, prevent conflicts and strengthen international security* ... ”<sup>20</sup>, which clearly projects outside EU borders and pertains to the international society as a whole. Therefore, peace represents a common value and objective of both the EU<sup>21</sup> and the UN<sup>22</sup>. Whilst the latter, as mentioned above, has pursued international peace through a collective security system based on the central role of sovereign states, the EU approach has been, since its very beginning, that of progressive integration with federal objectives at the cost of state sovereignty<sup>23</sup> or, at any rate, by means of delegation of decision-making power to shared institutions according to the principle of “pooling sovereignty<sup>24</sup>”. Even though the supranational decision-making process may not be referred *tout court* to the CFSP, which is of intergovernmental nature<sup>25</sup>, EU foreign policy is even so subject to specific rules and procedures<sup>26</sup> and its decisions, common positions and joint actions are nonetheless binding upon Member States<sup>27</sup>, among which France and, for all matters covered herein, UK.

France is, thus, at the same time permanent Member of the Security Council, tasked with the adoption of measures to maintain international peace and security and acting as a sovereign state for what concerns, for instance, its power of veto<sup>28</sup>, and a EU Member State, abiding by CFSP decisions and common positions adopted to fulfil the objectives of Article 21 TEU, among which the preservation of international peace. The United Kingdom has been in the same situation until January

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<sup>17</sup>Art. 21(2) TEU.

<sup>18</sup>Art. 23 TEU.

<sup>19</sup>Consolidated Version of the Treaty on the Functioning of the European Union, 2012, OJ 326/47, Art. 207 (1) for the Common Commercial Policy; Art. 208 (1) for Cooperation and Development; Art. 212 (1) for Financial and Technical Economic Cooperation with Third Countries; Art. 214 (1) for Humanitarian Aid.

<sup>20</sup>Art. 21 (2)(c) TEU.

<sup>21</sup>Global peace has been a purpose of the European Communities since their foundation: see Shuman Declaration, 9 May 1950, “*World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations*”; available at [http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index\\_en.htm](http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm) (last accessed Nov 19 2015).

<sup>22</sup>See also the Preamble of the UN Charter: “*We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war ...*”

<sup>23</sup>The European integration was labelled as the first real attempt to overcome the Westphalian world order of nation-states by means of a new form of governance that could effectively sustain peace, especially in the globalised society: FALK R. A., *Predatory Globalization: A Critique.*, Cambridge, UK: Polity Press, 1999.

<sup>24</sup>“*Pooling sovereignty means, in practice, that the member states delegate some of their decision-making powers to shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level*”, EU Delegation to Israel, [http://eeas.europa.eu/delegations/israel/what\\_eu/eu\\_institutions/index\\_en.htm](http://eeas.europa.eu/delegations/israel/what_eu/eu_institutions/index_en.htm) (last accessed Nov 16, 2015).

<sup>25</sup>NEUHOLD H., *European Common Foreign and Security Policy*, in Max Planck Encyclopedia of Public International Law (MPEPIL), 2013.

<sup>26</sup>Art. 24 (2) TEU.

<sup>27</sup>Art. 24 (3) TEU; Art. 26 (3) TEU; Art. 28 (2) TEU; Art. 34 (1) TEU.

<sup>28</sup>Art. 27 (3) UN Charter.

2020, when its withdrawal from the Union has been formalized after the troublesome six-year long negotiations occurred following the unexpected vote in the British referendum of 2016, and ensuing invocation of Article 50 of the TEU in 2017. This circumstance determines, from the perspective of France and UK, a “conflict of attribution<sup>29</sup>”, *id est* a situation for which two different sets of rules apply to the subjects involved on a given matter. Indeed, the two sets of rules stem from different organisations and assign a different role to France and UK: within the UNSC, states assume a role of authority, or supremacy, whereas as EU Member States they have to uphold and endorse EU law, in a relation of subservience, or subordination, to the organisation. Therefore, when France and UK are convened to act in both capacities, which is the case of matters dealing with international peace and security like sanctions, a conflict of attribution arises between UNSC rules, that place states at the top, and EU law, whose top is the organisation. While the formal withdrawal of the UK from the European Union does certainly complicate further the matters discussed herein, especially for what concerns discussions and perspective of reforms for the purpose of adequately reflect the European common stance in the work of the United Nations, the primacy enjoyed by EU law and its organs over British national institutions and rules led the European Union Withdrawal Act of 2018 to retain most of EU law as domestic legislation, for which the issues hereby discussed may still be considered actual until a next level of detachment of the UK from the common European views and policies.

## **I.2 THE EU AND THE UN: THE CONFLICT *IN ABSTRACTO***

The conflict of attribution between the EU and the UNSC exists *in abstracto* with regards not only to France and previously UK, but to other EU Member States that temporarily compose the Security Council according to Art. 23 of the UN Charter<sup>30</sup>. All EU Member States are also members of the UN, and as such they are bound by the obligations contained in the UN Charter. Article 103 of the UN Charter decrees that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail<sup>31</sup>”. The provision indicates the effort of the international community to place the Charter at the vertex of the international order, preventing successive treaties from depriving the provisions of the Charter of effect. Indeed, the

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<sup>29</sup>The concept is borrowed from the Constitution of the Republic of Italy to identify the conflict between two sets of norms emanated by two different legal powers, as opposed to the “conflict of competence” which relates to the conflict between two authorities within the same legal power.

<sup>30</sup>During the two-year term 2007-2008, five EU Member States were represented in the Security Council (France, UK, Italy, Belgium, Slovakia). The five states also instituted mechanisms of enhanced cooperation, in line with the “European use” of the UNSC seat promoted by Italy: see *infra*, chapter IV.

<sup>31</sup>Art. 103 UN Charter.

derogation to the general principle *lex posterior derogat priori* with regards to the UN Charter was reaffirmed by the Vienna Convention on the Law of Treaties<sup>32</sup>, permanently ratifying the higher rank of the Charter in the international legal order<sup>33</sup>. As a consequence, UN Members may not take on obligations conflicting with those contained in the UN Charter by means of successive international agreements, among which the constitutive treaties of the European Union.

EU treaties are not contrary to the obligations of the UN Charter, as they pursue similar objectives and commit Member States to respect the latter<sup>34</sup>. Nevertheless, EU secondary law provide obligations on Member States that may conflict with superior obligations of the UN Charter. In the context of the CFSP, the EU adopts decisions defining the actions and the positions of the Union<sup>35</sup>, based on the strategic interests, objectives and general guidelines set by the European Council<sup>36</sup>. The decisions are taken by the Council<sup>37</sup>, acting unanimously<sup>38</sup>, like the European Council<sup>39</sup>, and implemented by the High Representative for Foreign Affairs and Security Policy and the Member States<sup>40</sup>. The common positions of the EU, as defined through the CFSP mechanisms, are then binding and must be upheld by Member States in their external relations, in international organisations and conferences<sup>41</sup>, as a general rule. Article 34 (former Article 19) of the Treaty on the European Union further states that “[i]n international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the Union's positions<sup>42</sup>” and that “Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter<sup>43</sup>”. The Article seems to limit the prescriptive power of CFSP decisions in international *fora* with regards to the position of EU Member States in the UN Security Council. However, those States maintain a duty to keep other EU Member States and the High Representative fully informed, to defend the positions of the EU and to concert<sup>44</sup>, as well as to

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<sup>32</sup>Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), Art. 30 (1).

<sup>33</sup>Art. 103 UN Charter is therefore an expression of “international constitutionalism”: see ORAKELASHVILI A., *Research Handbook on the Theory and History of International Law*, Research Handbook in International Law, Edward Elgar Publishing, 2011, 304.

<sup>34</sup>Although the reference is limited to the *principles* of the UN Charter: see Art. 3(5) TEU, Art. 21 (1) TEU, Art. 42 (1) TEU; see also Protocol (No. 10) on Permanent Structured Cooperation Established by Article 42 of the Treaty on European Union. See *infra*.

<sup>35</sup>Art. 25 (b) TEU.

<sup>36</sup>Art. 26 (1) TEU.

<sup>37</sup>Art. 26 (1), 28 (1), 29 (1) TEU.

<sup>38</sup>Art. 31 TEU.

<sup>39</sup>The decision-making process in the context of the CFSP is rather complex and involves several actors. See Chapter 2, Section 1 of the TEU.

<sup>40</sup>Art. 26 (3) TEU.

<sup>41</sup>Art. 34 (1) TEU.

<sup>42</sup>*Ibidem*.

<sup>43</sup>*Ibidem*, (2).

<sup>44</sup>*Ibidem*.

invite the High Representative at the UNSC to illustrate EU positions<sup>45</sup>. Moreover, the reference to the responsibilities of UNSC members under the UN Charter is unclear, since Chapter V of the latter refers only to the responsibilities of the Security Council as a whole<sup>46</sup>. Although many commentators share the view that the new Article 34 does not impose any restraint to the prerogatives of UNSC members as sovereign states<sup>47</sup>, particularly for what concerns the veto power of France and UK, it is here argued, conversely, that Article 34 provides precise positive obligations on Member States regarding their power of initiative within the UN organ. Indeed, EU Member States are obligated only to defend the positions of the Union and not to uphold them in the Security Council, which means that they are not bound to veto a Resolution contrary to a certain EU position once the latter has been discarded by the Council. Nevertheless, they are bound to take initiatives compliant with EU common positions and interests, otherwise the obligation “to defend” would be logically frustrated by the proposition of positive actions divergent from those positions and interests all along<sup>48</sup>. The assertion is consistent with the general loyalty obligation contained in Article 24, which states that “[t]he Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area<sup>49</sup>”, which is seen as setting out a twofold duty: a positive duty to take action in accordance with the Union's policy, and a negative duty not to engage in behaviour which would run counter to the Union's action<sup>50</sup> - especially considering that deviations from the Treaties, while allowed in several instances<sup>51</sup> for matters of national security and/or for the purpose of complying with their responsibilities under the UN Charter are to be interpreted restrictively<sup>52</sup>, and are still subject to the scrutiny of the European Court of Justice for what concerns the existence of a real and serious threat to Member States' fundamental national interests, not providing for an inherent general exception<sup>53</sup> unlike the Security Exemptions under WTO Law.

CFSP decisions ought to be defended by EU Member States in the UN Security Council, which translates, at least, in joint propositions representing EU positions on each particular topic in question, provided it has been the subject of a CFSP decision. Since those decisions develop following interests

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<sup>45</sup>If a decision under the CFSP is on a subject which is on the UNSC agenda, *ibidem*.

<sup>46</sup>RASCH M. B., *The European Union at the United Nations: The Functioning and Coherence of EU External Representation in a State-Centric Environment*, BRILL, 2008, 174.

<sup>47</sup>*Ibidem*, 169-189; KRAUSE J., RONZITTI N., *The EU, the UN, and Collective Security: Making Multilateralism Effective*, Routledge, 2012, 94-99; JORGENSEN, LAATIKAINEN, *supra* note 1, 120-123.

<sup>48</sup>The conclusion can also be referred to the so-called “pocket veto”, namely the threat to make use of the veto so that a draft resolution is discarded before the vote. See *infra*, para II.3.

<sup>49</sup>Art. 24(3) TEU.

<sup>50</sup>KOUTRAKOS P., *The EU Common Security and Defence Policy*, Oxford University Press, 2013, 62.

<sup>51</sup>Art. 4(2) TEU; art. 36, 45, 52, 65, 346, 347 TFEU; Declaration 13 concerning the Common Foreign and Security Policy

<sup>52</sup>Recently, Case C-615/10 *Insinööritoimisto InsTiimi*, ECLI:EU:C:2012:324, 2012, para 35; see

<sup>53</sup>Recently, Case C-337/05 *Commission v. Italy* [2008] ECR I-2173, para 43

and objectives defined by EU organs under EU law, it may not be excluded *a priori* that those decisions may conflict with the obligations of the UN Charter. Indeed, chapter 2 of the TEU bases the CFSP on the general objectives of EU external actions, while it contains only sporadic references to the UN Charter limited to its principles<sup>54</sup>. Since the principles of Article 21 TEU and those of the UN Charter share a substantial identity, it would appear that the foreign policy of the EU is established and coordinated between the Member States quite self-referentially, notwithstanding the obligation to uphold CFSP outcomes in international organisations and conferences and to defend them in the UN Security Council. The consideration is of utmost importance when confronted with the fact that the European Union, being an international organisation<sup>55</sup>, is not in principle bound by the UN Charter, whose membership is solely open to States<sup>56</sup>. In this guise, the statement entails a certain liberty of EU organs to emanate binding decisions unrelated with the UN Charter, that EU Member States have at any rate to defend even within the Security Council. However, the above statement needs to be further expanded on.

First, CFSP decisions do not enjoy supranational status like EU legislation in other domains<sup>57</sup>. Such decisions are taken unanimously and are not subject in principle to the jurisdiction of the European Court of Justice - except for what concerns restrictive measures against natural or legal persons and the pertinence of a subject-matter to the CFS<sup>58</sup> - due to their intergovernmental nature and therefore they may be said to constitute a shared fulfilment of UN Charter's obligations by EU Member States<sup>59</sup>. However, such conclusion, that entails the full responsibility of Member States for possible breaches of the UN Charter, would assume a plainly discretionary power of determination of their foreign political conduct. On the contrary, not only Member States' foreign policy has to be concerted and defined according to CFSP procedural norms<sup>60</sup>, but CFSP decisions on joint actions and positions are binding on Member States, restraining their further external competences<sup>61</sup>. Indeed, the TEU sets out general obligations to conform to CFSP positions and decisions in Articles 28 and 29<sup>62</sup>. Therefore, determinations made by the Council, even if by qualified majority<sup>63</sup>, bind EU

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<sup>54</sup>See *supra* note 32.

<sup>55</sup>“*Il faut d'abord réaffirmer, quitte à choquer, que les Communautés sont, du point de vue juridique, des organisations internationales comme les autres*”, LEBEN C., *A propos de la Nature des Communautés Européennes*, 14 Droits, 1991, 64. See also *infra*.

<sup>56</sup>Art. 4 (1) UN Charter.

<sup>57</sup>*Supra* note 23.

<sup>58</sup>Art. 275 TFEU, Art. 40 TEU.

<sup>59</sup>See *infra*, II.1.

<sup>60</sup>Art. 215 TFEU, see *infra*, II.1.

<sup>61</sup>HILLION C., WESSEL R., *Restraining External Competences of EU Member States under CFSP*, in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, 2008, 79-121.

<sup>62</sup>Art. 28(2) TEU: “Decisions referred to in paragraph 1 shall commit the Member States in the positions they adopt and in the conduct of their activity”; Art. 29 TEU: “Member States shall ensure that their national policies conform to the Union positions”.

<sup>63</sup>Art. 31 (2)(3) TEU.

Member States whether or not they insist on matters also regulated by provisions of the UN Charter<sup>64</sup>. Secondly, the EU is not a member of the United Nations, being an international organisation, and thus it is not bound by the UN Charter *ex se*. Therefore, the validity of a EU measure, including a common position under the CFSP, could not be affected, in principle, by the incompatibility of the measure with the UN Charter<sup>65</sup>, save the responsibility of Member States for breaches of their international obligations. The fact that all EU Member States are bound to the UN Charter has nonetheless offered arguments in order to assess that the EU is itself bound by the Charter. European States could not, indeed, withdraw from their international obligations by concluding a treaty between them<sup>66</sup>, such as the EU constitutive treaty. Following this line of reasoning, the European Court of Justice of First Instance has, in various instances, concluded that the organisation, assuming the powers and the functions previously exercised by its Member States, has likewise assumed their prior obligations to third countries<sup>67</sup>, including those contained in the UN Charter, inherent to those powers and functions. As a consequence, the EU assumed an obligation not to impede the fulfilment of its Member States' obligations deriving from the UN Charter, and it has also been argued that the higher rank of the UN Charter was codified in EU law through the combination of Article 103 of the Charter and Article 351 TFEU<sup>68</sup> (*ex* 307 TEC)<sup>69</sup>. Also, the EU committed itself to the respect of the provisions of the UN Charter through the Declaration number 13 on the CFSP<sup>70</sup> - rather, the Declaration saves the primary responsibility of the Security Council and its Members, and stresses that the CFSP and the European External Action “*do not affect the responsibilities of the Member States [...] nor [...] their representation [...] in international organisations*”, thus clearly acknowledging the hierarchy to which Member States are subject in the domain of international peace and security and related

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<sup>64</sup>Significantly, some CFSP instruments, such as the legally binding joint actions and the possibility to adopt a decision by qualified majority have been labelled as “rudiments pointing at a supranational direction”: HAFNER G., in *Europarecht. Ein systematischer Überblick mit den Auswirkungen der EU-Erweiterung* 33 (2005), cited by ISAK H., *The 'Second Pillar' in a Union without Pillars – A New Quality of the Common Foreign and Security Policy with the Treaty of Lisbon?*, in *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Martinus Nijhoff Publishers, 2008, 1006.

<sup>65</sup>This was also stated, with regards to the GATT Agreement, by the Court of Justice of the European Communities in 1972, see Joined Cases 21-24/72, *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit*, 1972 ECR 1219, para 7: “before the incompatibility of a community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision.”

<sup>66</sup>*Ibidem*, para 11.

<sup>67</sup>*Ibidem*, paras 14-18; Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 2001, ECR II-3533, para 243 (hereinafter “Yusuf case”)

<sup>68</sup>As long as Art. 351 TFEU states that agreements concluded before the 1<sup>st</sup> of January 1958 by Member States shall not be affected by the provisions of EU Treaties.

<sup>69</sup>In this view, ORAKELASHVILI, *supra* note 31, 304; EECKHOUT P., *External Relations of the European Union*, Oxford University Press, 2004, 436; HILPOLD P., *EU Law and UN Law in Conflict: the Kadi Case*, 13 Max Planck Yearbook of United Nations Law, 2009, 161.

<sup>70</sup>Declaration concerning the Common Foreign and Security Policy, no. 13, annexed to the Treaty of the 13 December 2007, see Appendix.

obligations<sup>71</sup> -, although an argument may be made on the prescriptive force of such unilateral act against the reference to the sole principles of the Charter contained in the treaties<sup>72</sup> . At any rate, the EU would not be bound by the UN Charter as a matter of international law, but only as a matter of EU law<sup>73</sup>. In addition, the conclusions of the Court in *Kadi*, *Yusuf*, and *International Fruit* cases were developed by further judgements in order to precise that the EU would succeed on the obligations of its Member States only if the Union assumed all the powers previously exercised by the Member States that fall within the particular international treaty in question<sup>74</sup>. In the above-mentioned *Kadi* and *Yusuf* cases, the Court of First Instance attempted to construe the primacy of the UN Charter, in spite of the general rank of international treaties of Member States in EU law between EU treaty law (or primary law) and secondary legislation<sup>75</sup>, to such an extent that Member States ought to “*leave unapplied any provision of the Community, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations*”<sup>76</sup>. Nevertheless, the ECJ, when called upon deciding jointly on the *Kadi* and *Yusuf* case, rejected the above arguments, stating that “[t]hat primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part”<sup>77</sup>. Therefore, the rulings<sup>78</sup> purport the conclusion that the EU would be bound by the UN only as a matter of EU law, as a constitutional self-limitation set by EU primary law, with the consequence that the UN Charter could never enjoy primacy over that EU primary law from which it gathers its effectiveness and validity within the EU system. Hence, considering that EU primary law sets out those principles and objectives highlighted above and applicable to the CFSP as well, the resulting scenario envisages the possibility of a binding CFSP determination concerning international peace and security based exclusively on EU law, notwithstanding the prospect of conflict with the UN Charter.

In conclusion, in light of what discussed above, the EU is not bound to respect the UN Charter nor the Resolutions of the Security Council, although all its Member States are, if not by means of

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<sup>71</sup> HAFNER G., BUFFARD I., *International Law between Universalism and Fragmentation: Festschrift in honor of Gerard Hafner*, BRILL, 2008, 1023.

<sup>72</sup> See *infra*.

<sup>73</sup> Yusuf case, *ibidem*; Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, 2005, ECR II-3649, para 193 (hereinafter “Kadi case”).

<sup>74</sup> Case C-366/10, *Air Transport Association of America and others (ATAA) v Secretary of State for Energy and Climate Change*, 2011, ECLI:EU:C:2011:864, para 63.

<sup>75</sup> Based on the wording of Art. 216 TFEU, see EUROPEAN COURT OF JUSTICE, Case C-61/94, *Commission of the European Communities v Federal Republic of Germany*, 1996, Sep 10, ECLI:EU:C:1996:313; VON BOGDANDY A., SMRKOLJ M., *European Community and Union Law and International Law*, Max Planck Encyclopedia of Public International Law, 2011.

<sup>76</sup> Kadi case, para 190.

<sup>77</sup> Joined Cases C-405/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation*, 2008, ECR I-6351, para 308.

<sup>78</sup> See also *infra*.



EU law itself. Accordingly, any act emanated by the Union is based upon EU law only, entailing the possibility of a conflict between the obligations of Member States under EU law and under the UN Charter. In the context of international peace and security, the conflict of attribution gives rise to particular issues with regards to the role of France and UK, since they could prevent a UNSC Resolution from entering into force due to compliance with a CFSP common position or joint action. Likewise, in case a UNSC Resolution has already been adopted, EU law, and the CFSP decision-making procedure in particular, could deprive such Resolution of effect with respect of its national implementation, via the imposition of conflicting obligations on Member States.

### **I.3 CURRENT COOPERATION BETWEEN UN AND EU: PREVENTING THE CONFLICT**

The above overview, of the respective legal frameworks under which the CFSP and the UN Security Council work within their organisations, aims to highlight the chance of a conflict of attribution in the precise domain of international peace and security. Before analysing the instances in which, indeed, such conflict has had the potential to manifest and hinder the Charter scheme for addressing threats to peace, it is necessary to review the many steps undertaken by both the UN and the EU for the purpose of forging a better cooperation, enforcing a partnership in the conduct of peace-keeping operations, and ultimately prevent the above theoretical conflict.

The starting point to analyse the current framework of cooperation between the United Nations and the European Union, especially for what concerns the maintenance of international peace and security (a fundamental goal of both organisations), is the clear hierarchy established by Chapter VII of the UN Charter. Decisions of, and sanctions imposed by, the United Nations are mandatory and have to be carried out by all UN Member States as specified by Article 25 of the Charter as a particular application of the general obligation under Article 2(2) to fulfil the general obligation to comply with the Charter. It is the Charter itself to open to the possibility, for the purpose of maximising the efficacy and efficiency of its action through the Member States, of carrying out decisions through “their action in the appropriate international agencies of which they are members<sup>79</sup>”. Such hierarchy is implemented in the EU treaties, both in their articles laying out the fundamental rules of the Union where Member States commit to “respect for the principles of the UN Charter<sup>80</sup>” and in those pertaining to peace and international security in more specific terms<sup>81</sup>. The European Union has

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<sup>79</sup> Art. 48(2) UN Charter.

<sup>80</sup> See Articles 3(5), 21(1) and 21(2)(c) TEU.

<sup>81</sup> Art. 347 TFEU.

further reaffirmed this hierarchy in several instances<sup>82</sup>, all related to the general commitment to international peace which is part of the core values of the Union to be attained through integration, pluralism, and democracy<sup>83</sup>. A proper recognition of the paramount role of the United Nations, and the UNSC for matters related to international peace and security, may well be seen as a necessary condition for enhanced coordination and representation within the Security Council itself in the vein of the main objectives of EU external action through its Common Foreign and Security Policy and for better unity of intents between the various actors internal to the EU<sup>84</sup>.

Notwithstanding the above, the European Union clearly presents some practical challenges to the legal construction of an international community governed by the principles of the UN Charter and comprising sovereign states acting within their regional organisations. The European Union, in addition to its two Member States occupying a permanent seat in the Security Council, may see other members sitting in the Council and thus in a position of great representation, in spite of not being a member of the United Nations. Such factual situation constituted a lever for increased representation rights to the Union, advocated by both the EU (for the purpose of better credibility and better functioning of its CFSP system) and the UN (in order to leverage on the internal European mechanisms for coordination to be translated into more expedite and efficient action inside the UNSC). For the reasons above, steps in the direction of an enhanced, and structural, representation and coordination have been taken by both organisations.

In 2011, the UN General Assembly has formally acknowledged the prominent and peculiar results of European integration by granting, in addition to the status of permanent observer already enjoyed by the European Community since 1974<sup>85</sup>, enhanced participation rights to the European Union in 2011<sup>86</sup>. In turn, the EU has created several working groups inside the Council for the purpose of periodical consultations on matters to be brought to the attention of the United Nations. This enhanced status differentiates the EU from other international organisations even within the UN framework, adding important prerogatives such as the right to speak and advancing proposals at the General Assembly which may not be available to other observers to the same extent. Thus, the UN has, to a certain extent, followed in the footsteps of other international organisations, such as the World Trade Organisation or the Food and Agriculture Organisation which allowed full membership to the Union respectively in 1994 and 1991. The enhanced status at the UNGA also works as a formal

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<sup>82</sup> See for instance Council Common Position on the international response to terrorism, OJ L 344/93, 2001, December 27<sup>th</sup>.

<sup>83</sup> ANASTASIOU H., *The EU as a Peace Building System: Deconstructing Nationalism in an Era of Globalization*, International Journal of Peace Studies, Volume 12, Number 2, 2007.

<sup>84</sup> In this view, KEUKELEIRE S., MACNAUGHTAN J., *The Foreign Policy of the European Union*, Basingstoke, Palgrave Macmillan, 2008.

<sup>85</sup> UN General Assembly, A/L. 734, Oct 11, 1974.

<sup>86</sup> UN General Assembly, A 64/L. 67, Aug 31, 2010.

recognition of the active role of the EU in terms of contribution to the UN general budget and the funding of peace-keeping missions, the largest of all members, and resulted in a formal pathway to speak EU common position in the UN assembly. Following the 2011 recognition, the EU has the right to intervene in all matters discussed in the General Assembly, and to do so via its own external representatives (the President of the European Council, of the European Commission, and the High Representative for Foreign Affairs and Security Policy, therefore the same representatives tasked with the European definitions within the context of the CFSP<sup>87</sup>), thus speaking with one voice, and to further introduce proposals and amendments to the UNGA agenda, being the sole organisation with observer status allowed to do so.

The steps made by the UN towards strengthening EU presence in the General Assembly reflect the many tools that the Union has unilaterally developed for the purpose of speaking with one voice at the international level. The Union can indeed leverage not only on its twenty-seven votes in the UNGA, but also on its own representatives who are ensured a seating<sup>88</sup>, thus capitalising on internal synergies while engaged in the work of the international community.

The area of major interest for what concerns cooperation between EU and UN is, however, peacekeeping and conflict management, a fundamental goal shared by both organisations and a sector where the international community and the United Nations have often stressed the opportunity of “moving towards partnership peacekeeping<sup>89</sup>”. The efficiency of joint action vis-à-vis threats to peace is crystalised in the UN Charter, Chapter VII on Regional Arrangements, and progressively adopted since the end of the Cold War and especially in the African Region<sup>90</sup>, alongside an evolution in the institutionalisation of partnerships between the UN and other international organisations where to aim is to keep the UNSC fully informed on all peace-related activities carried out in the area relevant to a certain international organisation. Cooperation in this sector is particularly harmonious with EU core values and its strive for multilateralism in its external action, and reflected in the working groups, panels, and internal offices that the Union has established for the purpose of refined coordination with UNSC and the United Nations in general since the assumption of competences in security and defence with the Treaty of Amsterdam in 1999. Recently, the EU and the UN signed yet another agreement on cooperation in collective responses during international crisis, on September 29<sup>th</sup>, 2020<sup>91</sup>.

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<sup>87</sup> See *supra* note 37 and 40.

<sup>88</sup> *Ibidem*, Annex (2)

<sup>89</sup> BAN KI-MOON, *Report of the Secretary-General Partnering for Peace: Moving Towards Partnership Peacekeeping*, 2015, April 1<sup>st</sup>.

<sup>90</sup> BELLAMY J., WILLIAMS P., *Thinking Anew about Peace Operations*, in *International Peacekeeping*, Volume 11, No. 1, SPRING 2004.

<sup>91</sup> Framework Agreement between the European Union and the United Nations for the Provision of Mutual Support in the context of their respective missions and operations in the field (OJ L 389 19.11.2020, p. 2, CELEX, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A1119\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A1119(01))) (last accessed July 30<sup>th</sup>, 2022).

Although covering mostly practical and organisational matters on field logistic and supervision of peace-keeping troops, the agreement at one time highlights the primary importance assigned to partnerships with regards to collective defence, and the ever important role of the EU in the eyes of the international community. At the same time, the Council of the European Union has likewise reaffirmed the need, and the opportunity, of the EU to commit to the global order which sees the United Nations at its core, and the mutually beneficial advantages of a strategic partnership in the domain of peacekeeping and crisis management<sup>92</sup>. In short, the European Union has been recognised as a regional organisation for the purposes of Article 53 of the UN Charter and deployed, after jointly planning and strategizing with the UN Security Council, more than forty peace-keeping operations both inside and outside of its territory, particularly in the African region, and is the main financial contributor to both general UN budget and peace-keeping operations' funding.

At present, the cooperation between the EU and the UN is therefore institutional, where the EU is fully recognised as a regional arrangement for the purposes of Article 53 of the UN Charter and so addressed in a number of Resolutions of the UN Security Council. At any rate, the present analysis focuses on the two legal systems, under a theoretical point of view, as well as on those practical instances, in terms of upholding common positions within the UNSC, exercising veto, implementing UNSC sanctions or deploying autonomous military operations, where the EU has walked an autonomous path different than what is typically in the power of regional organisations, such as the NATO or the African Union.

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<sup>92</sup> See lastly UN-EU Strategic Partnership on Peace Operations and Crisis Management: Council Conclusions on priorities for 2022-2024, Council of the EU, Press Release January 24<sup>th</sup>, 2022, available at [https://www.consilium.europa.eu/en/press/press-releases/2022/01/24/un-eu-strategic-partnership-on-peace-operations-and-crisis-management-council-conclusions-on-priorities-for-2022-2024/?utm\\_source=dsms-auto&utm\\_medium=email&utm\\_campaign=UN-EU%20strategic%20partnership%20on%20peace%20operations%20and%20crisis%20management%3A%20Council%20conclusions%20on%20priorities%20for%202022-2024](https://www.consilium.europa.eu/en/press/press-releases/2022/01/24/un-eu-strategic-partnership-on-peace-operations-and-crisis-management-council-conclusions-on-priorities-for-2022-2024/?utm_source=dsms-auto&utm_medium=email&utm_campaign=UN-EU%20strategic%20partnership%20on%20peace%20operations%20and%20crisis%20management%3A%20Council%20conclusions%20on%20priorities%20for%202022-2024) (lastly accessed July 30<sup>th</sup>, 2022).

## CHAPTER II

### THE CONFLICT IN PRACTICE

#### II.1 IMPLEMENTATION OF UNSC SANCTIONS THROUGH CFSP DECISIONS

EU Member States have agreed to comply with the obligations of the UN Charter, particularly with reference to the domain of international peace and security, via a common conduct of their foreign policies through the CFSP, and adopting common positions and decisions accordingly. The obligations above include, according to Article 25 of the UN Charter, that to accept and carry out the decisions of the UN Security Council, emanated under Chapter VII of the Charter following a determination on a threat or breach of the peace *ex* Article 39. The decisions of the UN Security Council, and, for the purposes of this paper, those imposing sanctions as per Article 41 of the Charter, are compulsory for all members to the point that the existence of regional agreements between states – such as the European Union, which, in spite of certain criticism focusing on a narrow interpretation of the term “regional” in the Charter which would exclude the EU<sup>93</sup>, has been recognised as such by the United Nations as argued further– are taken into account as a tool to boost the efficiency of such sanctions, which can indeed be carried out by states through “*their action in the appropriate international agencies of which they are members*” in accordance with Article 48(2) of the UN Charter. In addition, a potential conflict of attribution is, in principle, resolved in favor of the obligations under the Charter by Article 103, which prevail over obligations “*under any other international agreement*” in the event of a conflict. The Charter, therefore, clearly outlines the hierarchy with respect to any other international agreement and its obligations with regards to the implementation of UNSC sanctions. The decisions of the UNSC, normally emanated through Resolutions, are assimilated to the obligations of the Charter<sup>94</sup>, given the content of Article 25, weighting on all its members, whereas there is no conventional obligation on the EU itself to carry out those decisions<sup>95</sup>, if not as a matter of EU law. As a theoretical consequence, the conflict of attribution previously illustrated may exist, in practice, with regards to the implementation of a UNSC Resolution imposing sanctions, should the European Union make determinations contrary to the content of those Resolutions.

EU Member States have agreed, through the Treaties of the Union, to jointly implement sanctions via CFSP decisions. The new Article 215 TFEU<sup>96</sup> establishes that the Council, acting by qualified majority, shall adopt all necessary measures to give effect to a CFSP decision imposing

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<sup>93</sup> See for instance SCHMIDT L., *The European Union and the Use of Force*, BRILL, Volume 17, 2020, 150.

<sup>94</sup> ECKHOUT P., *supra* note 66, 436.

<sup>95</sup> See *supra*.

<sup>96</sup> Ex Article 301 TEC.

economic or financial sanctions against third States or against natural or legal persons. Whilst the absence of a prior CFSP decision would not of course affect the responsibility of Member States to apply a UNSC Resolution, the fact that UNSC economic sanctions concern a domain of exclusive EU external competence (*id est*, the Union's Common Commercial Policy<sup>97</sup>) implies the necessity of a prior EU determination<sup>98</sup>, to be made through CFSP decision-making procedures<sup>99</sup>, resulting in a binding CFSP decision for the implementation of economic sanctions mandated by the UN Security Council<sup>100</sup>. Indeed, the ECJ stated that in case a measure affects an exclusive competence of the Union, Member States are precluded from individual actions notwithstanding any possible foreign policy reasons underlying such measure<sup>101</sup>. Therefore, Member States committed themselves to implement UNSC economic sanctions through the CFSP, save their exclusive responsibility in case of non-fulfilment, entailing the possibility of a stricter or looser EU sanction compared to the UNSC one<sup>102</sup>. Even though Article 215 TFEU, and Article 75 TFEU<sup>103</sup> for what concerns the so-called “targeted” or “smart” sanctions, clearly imply and mandate a CFSP decision in order to implement UNSC sanctions, European literature attempted to stress the fact that the implementation of UNSC sanctions is not exclusively a EU fact, but simply a means that Member States agreed to resort to for the fulfilment of their obligations under Article 25 and 48(2) of the UN Charter<sup>104</sup>. Such interpretation follows the general commitment of the EU itself to “*respect for the principles of the United Nations Charter*”<sup>105</sup> and further substantiate the obligation of each Member State to “*consult each other with a view to taking together the steps needed [...] in order to carry out the obligations it has accepted for the purpose of maintaining peace and international security*”<sup>106</sup>. The implementation via the CFSP mechanism would not, hence, stem from a legal obligation, but from mere “reasons of opportunity<sup>107</sup>”. Nevertheless, the assertion seems to disregard, on the one hand, the fact that CFSP decisions bind EU

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<sup>97</sup>Art. 3(1)(e) and 207 TFEU.

<sup>98</sup>It has been argued that Member States have a duty, when their obligations under a UNSC Resolution affect a matter of exclusive competence of the EU, to take all necessary measures in order for the EU to implement such Resolution. See BENLOLO-CARABOT, *supra* note 6, 435; see also KUIJPER P. J., *Les mesures commerciales à l'encontre d'Etats tiers. Tendances de la pratique*, in PINGEL I., *Les Sanctions contre les Etats en Droit Communautaire*, Editions Pedone, 2006, 85.

<sup>99</sup>Art. 215 TFEU.

<sup>100</sup>CURTIN D. M., WESSEL R. A., *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Intersentia, 2005, 245. This has also been the practice insofar, given also the strong resemblance of Art. 215 TFEU with Art. 41 UN Charter: CANNIZZARO E., *The European Union as an Actor in International Relations*, Kluwer Law International, 2002, 217.

<sup>101</sup>Case C-124/95, *Centro-Com s.r.l. Royaume-Unis (The Queen) v Royaume-Unis (HM Treasury) – Bank of England*, 1997, ECR I-81, paras 26, 41.

<sup>102</sup>KUIJPER P. J. et al., *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford University Press, 2013, 286.

<sup>103</sup>Art. 75 TFEU, second period.

<sup>104</sup>ASCENSIO H., *Les fins de la sanction externe*, in PINGEL I., *supra* note 98, 72.

<sup>105</sup>Art. 3(5), 21(1), 21(2)(c) TEU.

<sup>106</sup>Art. 347 TFEU.

<sup>107</sup>BENLOLO-CARABOT, *supra* note 6, 436.

Member States to pursue the common objectives and to take the joint actions thereby defined and, on the other hand, that each EU Member State maintains the power to prevent a decision to implement a UNSC sanction from being adopted, due to the unanimity<sup>108</sup> required in the context of the CFSP. Therefore, the intergovernmental nature of the CFSP does not exclude the decisive role of EU organs, in particular the Council and the European Council, in the implementation of UNSC sanctions, notwithstanding the individual responsibility of each Member States in case a sanction is not, or not adequately, implemented. Accordingly, the extent of the implementation of a UNSC sanctions will depend on the determination, by means of a CFSP decision, of the EU.

EU law, and in particular EU primary law and the general, or constitutional, principles, would then represent the guiding principles that EU organs involved in the CFSP decision-making process have to comply with when tasked, under the mechanism described above, with the implementation of a UNSC sanction. Such consideration is especially significant when targeted sanctions are at stake, since they could affect one of the general objectives of the European Union, namely the protection and promotion of human rights of the individuals. Specific indications around the general approach of the EU to the matter are to be found in the notorious *Kadi* case, where the ECJ<sup>109</sup> had defined, or attempted to define, the content of the EU obligation to implement UNSC targeted sanctions in light of EU law and international law altogether. The Court of First Instance (CFI) had ascertained the obligation of the EU to implement UNSC sanctions, following the assumption that the Union had succeeded in the obligations of its Member States vis-à-vis the UN Charter and international law<sup>110</sup>. In light of the above, the CFI concluded that EU Courts had no jurisdiction to review the legality of EU measures<sup>111</sup> implementing UNSC Resolutions, as that would imply that the same Courts had jurisdiction to review, although indirectly, the legality of the Resolutions themselves<sup>112</sup>. Such position is also consistent with the general rule for which the ECJ should have no role in the context of the CFSP, being it of intergovernmental nature – and indeed it has been argued that the initial intent of the CFSP itself was to adopt decisions, and ratify common positions, which would escape a judicial review of the Court<sup>113</sup>. Nonetheless, the CFI affirmed the competence of EU Courts to review the compatibility of UNSC Resolutions with *jus cogens*<sup>114</sup>, subsequently upheld by the ECJ in the joint

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<sup>108</sup>Art. 31 TEU.

<sup>109</sup>Whereas the ECJ has no role, as a general rule, in the context of the CFSP, being the latter of intergovernmental nature, it does with regards to targeted sanctions, according to Art. 263(4) TFEU.

<sup>110</sup>See *supra*, para I.2.

<sup>111</sup>The claimants *Kadi* and *Yusuf* had indeed impugned the Council Regulation implementing UNSC sanctions and imposing, *inter alia*, the freeze and seizure of the economic assets of the two individuals.

<sup>112</sup>KOUTRAKOS P., *EU International Relations Law*, Bloomsbury Publishing, 2015, 220.

<sup>113</sup>WESSEL R. A., LARIK J., *EU External Affairs Law, Text, Cases, and Materials*, Oxford: Hart Publishing, 2<sup>nd</sup> edition, 2020, chapter 9.

<sup>114</sup>*Ibidem*; *Yusuf* case, *supra* note 64, para 281.

decision on *Kadi* and *Yusuf*<sup>115</sup>, notwithstanding the care in excluding that such judicial review in light of *jus cogens* would undermine the recognised primacy of the UN Charter and UNSC Resolutions in the international legal order<sup>116</sup>. The decision attracted much criticism: not only the European Courts omitted to duly explain on which bases they would be in charge of enforcing *jus cogens* even against UNSC Resolutions<sup>117</sup>, but also they eventually did review those Resolutions on which they had previously excluded any judicial competence<sup>118</sup>. For this reason, the approach of the ECJ was labelled either paradoxical<sup>119</sup> or fictional<sup>120</sup>, since it ultimately allowed for a judicial review of UNSC targeted sanctions – the sole on which the ECJ may have jurisdiction according to Article 263 TFEU – in light of the constitutional principles of human rights laid down in the EU treaties. Nevertheless, the ECJ has recently reaffirmed its competence in rendering preliminary rulings on CFSP decisions, along the vein expressed in the *Kadi* case, since the statutory limitation on the jurisdiction of the Court and scrutiny of CFSP determinations should be given a “narrow interpretation<sup>121</sup>”.

In conclusion, EU law depicts a quite different scenario than the alleged joint exercise of national obligations to implement UNSC sanctions for reasons of opportunity. On the contrary, while UNSC targeted sanctions can be reviewed by the ECJ in order to assess their compliance with an instance of *jus cogens* to be found primarily in the set of EU constitutional principles, UNSC economic sanctions have to be implemented at the Union's level via a common determination under the CFSP. Since the latter develops pursuant to EU general objectives, and features unanimity, the ultimate content of EU sanctions will be highly dependant on the determination of EU organs involved in the CFSP decision-making procedures, and each EU Member States will have the power to block any decision by means of a negative vote. From the perspective of France and UK, the conflict of attribution between UN law and EU law is solved, in this instance, in favour of the latter, since the two States would have, paradoxically, less power of determination around the content of a sanction within the EU organs than in the UNSC, which features more liberty in such determination and a veto power limited to its Permanent Members.

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<sup>115</sup>Kadi case, *supra* note 73, paras 286-287.

<sup>116</sup>*Ibidem*, para 288.

<sup>117</sup>KOUTRAKOS P., *supra* note 107, 221.

<sup>118</sup>Kadi case, *supra* note 73, paras 304 and 326.

<sup>119</sup>KOUTRAKOS P., *supra* note 107, 221.

<sup>120</sup>BENLOLO-CARABOT, *supra* note 6, 705.

<sup>121</sup>Case C-455/14 P, *H v Council and Others*, EU:C:2016:569, para 40; Case C-134/19 P *Bank Refah Kargaran v Council*, 2020.



## II.2 UPHOLDING EU COMMON POSITIONS WITHIN THE UNSC

The conflict of attribution illustrated above may imply that EU Member States represented in the UN Security Council act not as sovereign States, according to the scheme of the UN Charter, but as advocates of EU common positions following binding CFSP decisions. As argued, Article 34 TEU translates into initiatives of France and UK, within the UN organ, compliant with EU law and CSFP determinations in particular. A clear example can be found in the struggle of EU Member States in order to support the International Criminal Court, since its constitution in 2002, at the UN level via a strong opposition to the various US proposals to exempt peacekeeping troops from the jurisdiction of the international tribunal.

Bush administration launched a campaign against the ICC since the immediate aftermath of its establishment in 2002<sup>122</sup>, following the decision to withdraw the US from signature of the ICC treaty<sup>123</sup>. The reason was reportedly to exempt US military personnel employed in UN peacekeeping mission from the risk of politically-motivated and unwarranted trials<sup>124</sup>, against the possibility of Contracting Parties to defer judgements to the international Court<sup>125</sup> regardless of the nationality of the accused. Bush's campaign was intended to conclude international agreements with ICC Contracting Parties in order to deprive of effect the content of the obligation *aut dedere aut judicare* that many States had incorporated in their domestic legislations to implement the ICC treaty<sup>126</sup>. Such agreements would have been concluded pursuant to Article 98(2) of the Statute of Rome, which provides that the ICC may not request a State to surrender an individual in case an agreement requires the consent of the requested State<sup>127</sup>. At the UNSC level, the US campaign against the ICC resulted in two draft resolutions intended to exempt peacekeeping personnel employed in East Timor (May 2002) and in Bosnia – Herzegovina (June 2002)<sup>128</sup> from the jurisdiction of the Court. A successful attempt in this sense would have likewise substantially deprived of effect Article 27 of the ICC treaty,

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<sup>122</sup>The Statute of Rome entered into force on the 1<sup>st</sup> of July 2002.

<sup>123</sup>Rendered on the 6<sup>th</sup> of May 2002. President Clinton had signed the treaty on the 31<sup>st</sup> of December 2000.

<sup>124</sup>According to the words of US representative at the UN Security Council, John Negroponte, cited in CAMPBELL D., *A Bird in the Bush: Failed Policies of the George W. Bush Administration*, Algora Publishing, 2005, 145. See also *Security Council Rejects Draft Proposing Extension of United Nations Mission in Bosnia and Herzegovina*, UN Press Release, 2002, June 30, accessible at <http://www.un.org/press/en/2002/SC7437.doc.htm> (last accessed Dec 1, 2015).

<sup>125</sup>Art. 12(2)(a) of the Rome Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9.

<sup>126</sup>France, for instance, enacted two Laws to allow full implementation of the provisions of the Statute: Law No. 2002-268 of 26 February 2002 on cooperation with the International Criminal Court, and Law No. 2010-930 of 9 August 2010 amending the criminal law to accord with the requirements of the International Criminal Court

<sup>127</sup>*Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> (last accessed December 1, 2015), art. 98 (b) (hereinafter “Rome Statute”).

<sup>128</sup>MACPHERSON B., *Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings*, American Society of International Law, 7 Insights, 9, 2002.

which established the “irrelevance of official capacity<sup>129</sup>”, so to impede that functional immunities under international law worked as a bar to the jurisdiction of the Court<sup>130</sup>.

The US tried to put their idea into effect by amending the Security Council Resolution to create a new peacekeeping operation in East Timor – not yet a party to the ICC but the government had already expressed its intention to ratify the Statute of Rome – so to exempt all UN personnel and troops from prosecutions carried out by international tribunals<sup>131</sup>. The attempt failed due to the stiff opposition of other UNSC members, among which France and UK<sup>132</sup>. The US raised the same issue shortly after upon the proposed renewal of the peacekeeping mission in Bosnia, the UNMIBH. The resolution was vetoed by the US, presumably as a form of reprisal for the rejection of the exemption from ICC prosecutions for UN troops deployed in East Timor, notwithstanding the proposition of France to withdraw US personnel from the mission so to avoid the risks exposed by US representatives at the UNSC<sup>133</sup>. The mission was eventually renewed by Resolution 1422<sup>134</sup>, which granted a one-year exemption from the ICC to UN troops as a compromise between the “blanket” exemption proposed by the US and the operations of the ICC as supported by European representatives at the UNSC<sup>135</sup>. This was seen as the first time that US was in open dispute with its long-time allies in the Security Council, France and UK<sup>136</sup>.

The European Union has always been one of the major supporter, and monetary contributor, of the International Criminal Court since its establishment in 1998. The commitment to support the development and the efficiency of the Court is well manifested at the institutional level, where the EU adopted and updated a CFSP Common Position<sup>137</sup> with the objective to strengthen the functioning of the Court and to promote the widest possible participation to the Statute<sup>138</sup> and an Action Plan to follow-up on the Common Position on the ICC<sup>139</sup>. The EU is also morally committed to the co-operation among Member States in order to bring perpetrators of gross human rights violations to

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<sup>129</sup> Art. 27 Rome Statute.

<sup>130</sup> Art. 27 represents the ratification in an international treaty of the position of a strong movement among international law professionals and human rights advocates against immunities for those who commit serious human rights violations., see HUMAN RIGHTS WATCH, *US Proposals to Undermine the International Criminal Court through a UN Security Council Resolution*, Global Policy Forum, 2002, June 25.

<sup>131</sup> BONE J., *American Threat to Quit East Timor over Treaty Clash*, New York Times, 2002, May 21.

<sup>132</sup> LOBE J., *Bush Threatens the Future of Peacekeeping*, Foreign Policy, 2002, Jun 8.

<sup>133</sup> CAMPBELL D., *supra* note 119, *ibidem*.

<sup>134</sup> UN SECURITY COUNCIL, S/Res/1422 (2002), July 12, 2002.

<sup>135</sup> MACPHERSON B., *supra* note 123

<sup>136</sup> MCGOLDRICK D., *The Permanent International Criminal Court: Legal and Policy Issues*, Bloomsbury Publishing, 2004, 421.

<sup>137</sup> COUNCIL COMMON POSITION 2003/444/CFSP, OJ L 150/67, 2003, June 16.

<sup>138</sup> For detailed information about the EU support to the ICC, see General Secretariat of the Council, *The European Union and the International Criminal Court*, November 2007, accessible at [http://www.consilium.europa.eu/uedocs/cmsUpload/ICC\\_en\\_intenet.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_en_intenet.pdf) (last accessed Dec 12, 2015).

<sup>139</sup> Council of the European Union, *Action Plan to follow-up on the Common Position on the International Criminal Court*, Doc. n. 5742/04, 2004, January 28, accessible at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205742%202004%20INIT> (last accessed Dec 12, 2015).

justice, as shown by the many Decisions<sup>140</sup> adopted in this regard. For these reasons, France and UK, as well as Bulgaria and Ireland temporarily represented at the UN Security Council, reportedly strongly opposed US proposals not to undermine the ICC and the political struggle of the EU to promote the universal participation to the Court. In particular, the representative of France Jean-David Levitte stated, in his explanation of France's vote, that his state was upholding the clear position of the EU of full support of the Court and promotion of its universality<sup>141</sup>. The statement is notably significant, since it purports that France, as well as the other EU states in the Security Council, rejected the US proposals based on the EU engagement in favour of the ICC, rather than adducing the possible illegality of those proposals under international law<sup>142</sup>.

In conclusion, the establishment within the EU of a fully supportive policy of the International Criminal Court reflected into an open opposition of EU Member States against the US positions, notwithstanding the long-standing political alliance that normally connotes the relations between those states. Therefore, the events that led to the adoption of Resolution 1422 delineate a strong commitment of EU Member States to EU common positions and interests, due to both legal and moral reasons, that could cause further disagreements within the UN Security Council in the future, should the EU take a position on a matter on the UN organ's agenda. Those events also purport what has been here argued about the content of Article 34 TEU with respect to the obligation to defend EU common positions in the UN Security Council, namely that the provision imposes the use of the power of initiative of Member States in the UNSC in a manner compliant with EU law and CFSP determinations in particular. Indeed, the efforts of France and UK translated into the adoption of Resolution 1422, in lieu of the acceptance of US pretensions, which is symptomatic of the achievement of a diplomatic compromise. Moreover, EU commitment is not due to any conventional obligation of co-operation with the ICC, not being the Union a party to the Rome Statute<sup>143</sup>, but only as a matter of EU secondary legislation, defined through CFSP common positions and decisions. In

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<sup>140</sup> Decision 2002/494/JHA, of 13 June 2002 (OJ L 167, p. 1), setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes; Framework Decision 2002/584/JHA, of 13 June 2002 (OJ L 190, p. 1), on the European arrest warrant and the surrender procedures between Member States; and Decision 2003/335/JHA, of 8 May 2003 (OJ L 118, p. 12), concerning the investigation and prosecution of genocide, crimes against humanity and war crimes. See *supra* note 113.

<sup>141</sup> *Security Council Rejects Draft Proposing Extension of United Nations Mission in Bosnia and Herzegovina*, UN Press Release, 2002, June 30, *supra* note 96. Although the official sources are scarce, the opposition of France and UK to US proposals has been reported to be severe: see CAMPBELL D., *supra* note 119, 140-145.

<sup>142</sup> For a review of arguments *pro* and *contra* the legality of US proposals and of Resolution 1422, see MACPHERSON B., *supra* note 123. See also AMNESTY INTERNATIONAL, *International Criminal Court: The Unlawful Attempt of Security Council to Give US Citizens Permanent Impunity from International Justice*, May 2003, accessible at <https://www.iccnw.org/documents/Amnesty1422May2003.pdf> (last accessed Dec 1, 2015).

<sup>143</sup> Thus, in absence of any “transitivity of obligations”, the obligations of the EU towards the ICC do not descend from the individual obligations of its Member States, but solely from its own legislation and constitutional rules: LAGRANGE E., *La Représentation Institutionnelle dans l'Ordre International: Une Contribution à la Théorie de la Personnalité Morale des Organisations Internationales*, Kluwer Law International, 2002, 427.

this light, Member States' obligations in the context of the CFSP have proved to bind foreign policies of Member States notwithstanding the lack of involvement of central institutions.

### II.3 VETO IN COMPLIANCE WITH EU LAW

The role of France and UK in the UN Security Council can be pivotal for what concerns a possible clash between EU law, or at any rate a common view shared by EU institutions and Member States, and international law as interpreted by other states represented at the Security Council. Whilst EU Member States temporarily represented in the UNSC abide by the general obligation to uphold (in the specific case, to defend) EU common positions in international organisations<sup>144</sup>, France and UK enjoy a greater power to influence the determinations of the Security Council due to the provision of Article 27 of the UN Charter which substantially assigns to each permanent member the authority to cast a veto and thus block any proposed Resolution. Therefore, certain EU obligations, or even a mere affinity of values between the EU and the two European permanent members at the UNSC, may translate into a veto to a UNSC Resolution, or into a “threat” of veto orienting further discussions within the Council. As a result, the traditional solution to the conflict of attribution between EU law and the UN Charter (to which UNSC Resolutions are assimilated<sup>145</sup>), namely the consideration that UN Charter obligations prevail according to Article 103, would not be logically applicable in such a case, since the prevailing obligation would be vetoed and thus non-existing.

France and UK are, traditionally, not very prone to veto UNSC Resolutions, compared to other permanent members such as the US<sup>146</sup>. The last time France and UK made use of their veto prerogative was in 1989, with regard to the situation in Panama, for that matter exercised jointly with the US<sup>147</sup>. The probability that France and UK cast a veto in compliance with EU law seems therefore remote, also considering that the provision of Article 34 TEU does not seem to purport such a legally binding “European” use of their veto; and considering as well the public position of President Macron first expressed on the occasion of the 70<sup>th</sup> General Assembly about unilaterally renouncing to cast a veto to any draft resolution credibly addressing mass atrocities<sup>148</sup> and currently jointly proposed by France and Mexico and supported by 106 countries<sup>149</sup>. The initiative, promoted indeed by France, resulted very recently in a Resolution of the UN General Assembly aimed at holding the five permanent

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<sup>144</sup> See Art. 34 TEU.

<sup>145</sup> See *supra*, para II.1; see EECKHOUT P., *supra* note 66, 436.

<sup>146</sup> See *Subjects of UN Security Council Vetos*, Global Policy Forum Website, accessible at [http://www.globalpolicy.org/images/pdfs/Z/Tables\\_and\\_Charts/vetosubj.pdf](http://www.globalpolicy.org/images/pdfs/Z/Tables_and_Charts/vetosubj.pdf) (last accessed Dec 4, 2015).

<sup>147</sup> *Ibidem*.

<sup>148</sup> See *Why France Wishes to Regulate Use of Veto in the United Nations Security Council*, Ministère de L'Europe et des Affaires Étrangères, France Diplomacy, Press Release, 2022, June 9<sup>th</sup>.

<sup>149</sup> *Ibidem*.

Council members accountable for their use of veto<sup>150</sup>. Nevertheless, it remains possible that a draft Resolution is not even proposed at the UNSC, because of the threat of veto by one of the permanent members. The threat of a veto is known, in the practice, as the so-called “pocket veto”, which cannot result from the official statistics<sup>151</sup> but that reportedly played a major role in several instances. France especially made often use of the “pocket veto<sup>152</sup>”: in 2003, for instance, France managed to prevent a UNSC Resolution authorising right away the attack on Iraq by the US, the UK, and Spain<sup>153</sup>; likewise, France prevented the UNSC to adopt a Resolution authorising UN inspectors to investigate into the violent repression of demonstrations in West Sahara by Moroccan forces in November 2010<sup>154</sup>. Pocket veto may play an important role with regards to the obligation “to defend” EU common positions in the UN Security Council<sup>155</sup>. Indeed, whilst the softened obligation for EU Member States which are at the same time UNSC permanent members is generally viewed as non-imposing any restraint nor indication for what concerns the use of veto<sup>156</sup>, the positive content of the provision, namely to “... *defend the positions and the interests of the Union* ...<sup>157</sup>”, may well be intended as comprising a pocket veto consistent with EU law or EU positions on common foreign policy.

Article 34 TEU maintains the primacy of the responsibilities under the provisions of the Charter of those Member States which are also members of the UN Security Council. Prior Article 19 had to be replaced by the Treaty of Lisbon in order to regulate, in particular, the role of the High Representative<sup>158</sup>. In addition, the new Article expunged the reference to the “permanent” members at the UN Security Council, so aligning the obligations of all EU Member States represented at the UNSC, temporarily or permanently. The common view holds that amendment brought by Article 34 to former Article 19, in this regard, does not add to the substance of the provision, particularly concerning the prerogatives of France and UK as veto holders at the UNSC, since it left untouched the last sentence on the responsibilities under the UN Charter<sup>159</sup>. The amendment does, nonetheless,

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<sup>150</sup> UN GENERAL ASSEMBLY, A 77/L. 52, 2022, April 26<sup>th</sup>.

<sup>151</sup> HATUEL-RADOSHITZKY M., *Criticism of the UN Security Council Veto Mechanism: Ramifications for Israel*, 765 INSS Insight, 2015, Nov 10.

<sup>152</sup> OKHOVAT S., *The United Nations Security Council: Its Veto Power and its Reform*, CPACS Working Paper 15/1, 2011, 16.

<sup>153</sup> KAFALA T., *The Veto and How to Use it*, BBC News Website, 2003, Sept 17, accessible at [http://news.bbc.co.uk/2/hi/middle\\_east/2828985.stm](http://news.bbc.co.uk/2/hi/middle_east/2828985.stm) (last accessed Dec 4, 2015).

<sup>154</sup> CHOMSKY N., *Libya and the World of Oil*, New York Times Syndicate, 2011, April 5, accessible at [http://inthesetimes.com/article/7146/libya\\_and\\_the\\_world\\_of\\_oil](http://inthesetimes.com/article/7146/libya_and_the_world_of_oil) (last accessed Dec 4, 2015).

<sup>155</sup> Art. 34(2) TEU.

<sup>156</sup> See *supra* note 45.

<sup>157</sup> *Ibidem*.

<sup>158</sup> See Foreign and Commonwealth Office (London), “A Comparative Table of the Current EC and EU Treaties as Amended by the Treaty of Lisbon”, January 2008.

<sup>159</sup> FASSBENDER B., *The Better Peoples of the United Nations? Europe’s Practice and the United Nations*, 15 The European Journal of International Law, 5, 2004, 881.

highlight the trend towards enhanced integration also for what concerns the faculties of UNSC permanent members, to be used in a spirit of co-operation and in concert with other Member States and EU institutions<sup>160</sup>. New Article 34 thus represent another step forward in the process of progressive integration, with federative purposes<sup>161</sup>, with reference to EU and Member States' action in other international organisations. Indeed, general principles of interpretation would require an amendment to be interpreted in order to give it a certain significance, rather than none<sup>162</sup>. In this view, it has been criticised, instead, the little effectiveness of new Article 34 in building a stronger CFSP to be upheld within other international organisations and the UN Security Council<sup>163</sup>.

Article 34 maintains nonetheless the priority of the responsibilities under the UN Charter with regards to states composing the UN Security Council. The consideration that France and UK may veto a UNSC draft Resolution in compliance with EU common positions and interests out of an objective obligation in this sense in EU law does not, *ipso facto*, hamper the original UN Charter scheme for which veto and other prerogatives at the UNSC must be exercised by states acting as sovereign states. Indeed, state sovereignty may well entail that states act according to their national policies and interests<sup>164</sup>, even though members of the Security Council are primarily charged with the task to preserve or restore international peace and security of the international community. In the case of France and UK, acting as sovereign states may thus imply the endorsement of EU positions and interests, as defined by means of CFSP decisions on specific matters, especially considering the benefits that compliance with EU law would bring within the EU area. From a different perspective, non-compliance with EU law and positions at the UNSC may culminate in a breach of EU law itself, be it secondary legislation, such as a EU directive or a CFSP decision on foreign policy, or primary legislation, should a certain UNSC Resolution be inconsistent with EU treaties. Furthermore, non-compliance with EU law may indicate a breach of a state's domestic legislation, following the implementation of the former as it often happened<sup>165</sup>. In this regard, notwithstanding the absence of a precise obligation concerning the veto (until very recently<sup>166</sup>), the ramification of EU law within Member States' domestic legislations represents a substantial incentive to uphold EU law in the UN

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<sup>160</sup> See *supra*, para 1.3.

<sup>161</sup> BENLOLO-CARABOT, *supra* note 6, 475.

<sup>162</sup> See for instance BOUVIER J., *A Law Dictionary: Adapted to the Constitution and the Laws of the United States of America*, T. and J. W. Johnson (eds.), Vol. 1, 1843, 709: "When a clause is capable of two significations, it should be understood in that which will have some operation rather than, that in which it will have none". *A fortiori* a change in the legislation should hence be interpreted as to actually amend the previous provision.

<sup>163</sup> EECKHOUT P., *EU External Relations Law*, Oxford University Press, 2011, 172.

<sup>164</sup> Indeed, this is one of the harshest critics to the current UNSC system, since in practice the permanent members have often used their veto power to pursue national interests or to protect their allies. See for instance OKHOVAT S., *supra* note 125.

<sup>165</sup> See, for instance, *supra*, para II.2: EU Member States had modified their national legislation in order to give full support to the recently established International Criminal Court.

<sup>166</sup> See *supra* note 145.

Security Council, so to not incur in violations of EU law or national law, in case the former has brought to amend the latter. Whereas many international organisations, such as the World Trade Organisation, have specific provisions in order to lift states' responsibilities under their treaties for security matters<sup>167</sup>, that may well include actions undertaken with the object to preserve or restore international peace and security within the UN Security Council, the TEU only mentions the priority of responsibilities under the UN Charter, without expressly exempting its Member States from the fulfilment of any specific provision of its Treaties – with the exception of so called National Security Clause *ex. Article 346(1)(b) TFEU*. Consequently, it is not clear to what extent France and UK act as sovereign states while sitting at the UN Security Council, given the influence of EU law and, above all, EU determinations on its common foreign policy, both direct and indirect.

Progressive integration in the EU, with a view to a federative allocation of competences between the central institutions and the Member States, has led to a profound influence of EU law on Member States' policies also with regard to their external relations, since the construction and the development of the CFSP. EU law and national legislations of members are so intertwined that it appears arduous to affirm that France still acts as a sovereign state at the UN Security Council. If it is true that the European Union does not intend to regulate the use of veto at the Security Council, it must be ascertained that EU law permeated the judicial systems of the Member States to such an extent that the “European use” of the veto can be said to represent, if not a legal obligation, at the very least a lesser nationalisation of interests among EU Member States in favour of a progressive “federalisation” within the Union.

## II.4 EU MILITARY OPERATIONS

The relevance of the conflict of attribution between EU law and the UN Charter, from the point of view of France and UK as EU Member States and UNSC permanent members at the same time, is especially sharpened with regards to the military operations of the EU, in the context of the CFSP/CSDP. Whilst military operations of international organisations are subject to specific rules according to the UN Charter<sup>168</sup>, the European Union has developed, as integral part of the CFSP<sup>169</sup>, the Common Security and Defence Policy<sup>170</sup>, which is, in a nutshell, a crisis management tool<sup>171</sup> that

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<sup>167</sup> General Agreement on Tariffs and Trade (GATT 1994), 1867 UNTS 187, 33 ILM 1153, 1994, Article XXI (c).

<sup>168</sup> See *infra*.

<sup>169</sup> Art. 42(1) TEU.

<sup>170</sup> Art. 42 – 46 TEU. The CSDP was first incorporated (under the name of European Security and Defence Policy) into the EU treaties in 1999, with the Treaty of Amsterdam. Since 2003, the European Union has adopted a European Security Strategy in order to underline and specify the objectives and purposes of the CSDP, whereas the Lisbon Treaty has provided a clear legal institutional framework for the Policy.

<sup>171</sup> “A means to inject some measure of stability in conflict zones”: MATTELAER A., *The CSDP Mission Planning*

runs along three directives: military conflict management, civil crisis management, and conflict prevention<sup>172</sup>. The instruments of the CSDP allow the European Union, following decisions of the European Council<sup>173</sup> and the Council<sup>174</sup>, to autonomously deploy military contingents outside the borders of the Union. The use of such military, as well as civilian, assets would be “*for peace-keeping, conflict prevention and strengthening international security*”<sup>175</sup>. The conflict of attribution thus lies in the role of the Security Council with regards to military operations to restore international peace, namely its primary responsibilities to authorise, or block, a military mission of an international organisation<sup>176</sup>, should the latter be inconsistent with international humanitarian law or the UN Charter itself. As a consequence, the position of France and UK at the UNSC, especially concerning their veto power, may play in favour of EU military operations notwithstanding any possible breach of international law on the matter, as it happened<sup>177</sup>.

The Common Security and Defence Policy allows the European Union, in the framework of the CFSP, to launch civilian and military operations abroad for peace-keeping, conflict prevention, and management of crisis. Decisions under the CSDP are taken by the Council acting unanimously following a proposition of the High Representative or a Member State<sup>178</sup> and implemented via the civilian and military capabilities made available to the Union by Member States<sup>179</sup>. Major guidelines of the CSDP are provided by the European Security Strategy, first adopted by the European Council in 2003 on a proposal of the then High Representative of the EU Javier Solana<sup>180</sup> and later regularly updated up to the third progression report for the period 2020-2025. The European Security Strategy identifies the global threats to the security of the Union, such as terrorism and the proliferation of weapons of mass destruction, and the strategic objectives underlying the CSDP, such as the promotion of an international order based on effective multilateralism. In addition to the decisions of the European Council and the Council, the TEU stresses the role of other organs, such as the European Defence Agency<sup>181</sup> and the Permanent Structured Cooperation (PESCO)<sup>182</sup>, whose tasks are carried

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*Process of the European Union: Innovations and Shortfalls*, In: Vanhoonacker, Sophie, Hylke Dijkstra and Heidi Maurer (eds). *Understanding the Role of Bureaucracy in the European Security and Defence Policy*, European Integration online Papers (EIoP), Special Issue 1, Vol. 14, 2010, 3, accessible at <http://eiop.or.at/eiop/texte/2010-009a.htm> (last accessed Dec 12, 2015).

<sup>172</sup> See Art. 43(1) TEU.

<sup>173</sup> Art. 42(2) TEU, for decisions concerning the erection of a common defence of the Union.

<sup>174</sup> Art. 42(3)(4)(5), Art. 43(2). Art. 44(1) TEU.

<sup>175</sup> Art. 42(1) TEU.

<sup>176</sup> Art. 53 UN Charter; see *infra*.

<sup>177</sup> See *infra*.

<sup>178</sup> Art. 42(4) TEU.

<sup>179</sup> Art. 42(3) TEU.

<sup>180</sup> EUROPEAN COUNCIL, *A secure Europe in a better world: European Security Strategy*, Brussels, 2003, Dec. 12 (hereinafter “ESS”).

<sup>181</sup> Art. 45 TEU.

<sup>182</sup> Art. 46 TEU.



out following Council's decisions by qualified majority<sup>183</sup>, contrary to the general rule. Since 2003, over 37 missions have been launched under the aegis of the CSDP, in Europe, the Middle-East, and Africam with currently around 4,000 staff military and civilian staff deployed<sup>184</sup>. 18 missions are still ongoing, including 7 military missions<sup>185</sup>. As a result, the swift development of the CSDP in recent years has contributed to erect the European Union as the most active and influential global security actor besides the UN<sup>186</sup>.

The CSDP is the newest achievement in EU external relations and as such is still far from providing precise answers particularly with regards to the obligations of Member States in this context<sup>187</sup>, although ever evolving as shown by the recent deployment of the European Peace Facility, in March 2021, to further enhance financial support to military operations and assistance measures in the framework of conflict and crisis management<sup>188</sup>. The wording of the TEU, where it states that the Member States “*shall*” make their national – military and civilian – capabilities available to the Union and “*shall undertake progressively to improve their military capabilities*”<sup>189</sup>, imposes duties vague in their scope, and silent in their implications<sup>190</sup>, in spite of an apparent linear obligation vis-à-vis the CSDP. Moreover, Section 2 of the TEU on the CSDP also contains specific exemptions, in order to save Member States' commitments and obligations under the NATO Treaty or to preserve the status of neutrality of other Member States<sup>191</sup>. Nonetheless, the TEU does impose duties with regards to the CSDP, which is, at any rate, an integral part of the CFSP and thus binding in its determinations to the same extent of the latter<sup>192</sup>. CSDP decisions, whether they aim at deploying civilian or military contingents, reflects EU positions and determinations made by the competent organs involved in the decision-making process, such as the Council, the European Defence Agency and the High Representative for what concerns the proposals. Therefore, EU missions are attributable to the EU, notwithstanding the use of capabilities and assets pertaining to Member States<sup>193</sup>.

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<sup>183</sup> Art. 45(2), 46(3) TEU.

<sup>184</sup> EUROPEAN EXTERNAL ACTION SERVICE (EEAS), Ongoing Missions and Operations, 2015, October, accessible at <http://www.eeas.europa.eu/csdp/missions-and-operations> (last accessed Dec 12, 2015).

<sup>185</sup> *Ibidem.*, <https://www.eeas.europa.eu/eeas/missions-and-operations> (last accessed August 14<sup>th</sup>, 2022).

<sup>186</sup> See for instance EMERSON M. et al., *Upgrading the EU's Role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy*, Brussels: Centre for European Policy Studies (CEPS), 2011.

<sup>187</sup> For detailed information on the CSDP, see REHRL J., GLUME G., *Handbook on CSDP Missions and Operations: The Common Security and Defence Policy of the European Union*, Federal Ministry of Defence and Sports of the Republic of Austria, Armed Forces Printing Centre, 2015.

<sup>188</sup> Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528.

<sup>189</sup> Art. 42(3) TEU.

<sup>190</sup> KOUTRAKOS P., *supra* note 50, 64.

<sup>191</sup> Art. 42(2) TEU.

<sup>192</sup> See *supra*, para I.2.

<sup>193</sup> The statement refers only to the decisional process. CSDP missions leave, indeed, many questions open, particularly as to the status of EU forces and the responsibility in case of a breach of humanitarian law. See WESSEL R. A., *Division of International Responsibility between the EU and its Member States in the Area of Foreign, Security and Defence Policy*, 3 Amsterdam Law Forum, 3, 2011.

CSDP is an important instrument for the maintenance of international peace and for crisis management, and may offer an added value to the UN peace-keeping missions, due to the great civilian and military capabilities of European states. CSDP missions, so far, focused on Eastern Europe and Africa, and have been coordinated with the UN particularly in the latter area<sup>194</sup>. European institutions and official documents have often stressed the importance of the empowerment of the CSDP with a view to an enhanced EU-UN cooperation. In particular, the above-mentioned European Security Strategy fostered the cooperation with the UN and other international organisations in order to promote international peace by means of “effective multilateralism<sup>195</sup>”. To this end, the document affirmed that the use of force in CSDP missions outside of EU territory had to be based exclusively on the UN Charter and UNSC Resolutions<sup>196</sup>. One of the first CSDP missions, namely the EU military mission to the DRC (called “Artemis”), was dispatched at the explicit request of the UN Secretary-General and upon enforcement mandate by the UN Security Council<sup>197</sup>. The aim of the mission was to provide military personnel during the time gap before the specific UN mission (MONUC) could take charge of the area<sup>198</sup>. Other EU missions took place upon UNSC mandate (Somalia, Congo, Chad and Bosnia). Nevertheless, the EU never provided CSDP military capabilities to UN-led peace-keeping operations<sup>199</sup>, but rather engaged in independently conducted missions authorised by the UNSC. In other words, whilst the EU has consistently stressed the importance of cooperation with the UN, it has been reluctant to subordinate its troops to UN control.

Several EU documents and meetings have, over time, specified the object of the CSDP, which switched from the traditional purpose of building a common European defence to the more ambitious tasks highlighted in the TEU and the ESS. In particular, the European Council meeting in Helsinki in 1999 affirmed that the principles underpinning the security and defence policy of the EU included the “*autonomous capacity of the Union to take decisions and to launch and conduct EU-led military operations in response to international crisis*”<sup>200</sup>. This has been the overriding purpose of the CSDP/ESDP since the endorsement by the French and British governments at Saint-Malo in 1998<sup>201</sup>.

<sup>194</sup> WALLENSTEEN P., BJURNER A., *Regional Organisations and Peacemaking: Challengers to the UN?*, Routledge, 2014, 95.

<sup>195</sup> *Ibidem*; ESS, *supra* note 152: “[t]he EU should support the United Nations as it responds to threats to international peace and security”.

<sup>196</sup> BISCOP S., DRIESKENS E., *The European Security Strategy: Confirming the choice for collective and comprehensive security*, in VOUTERS J., HOFFMEISTER F., RUYTS T., *The United Nations and The European Union: An ever stronger partnership*, Asser Press, 2006, 267.

<sup>197</sup> WALLENSTEEN, *supra* note 189., 94.

<sup>198</sup> *Ibidem*.

<sup>199</sup> *Ibid.*, 96.

<sup>200</sup> EUROPEAN COUNCIL, Presidency Conclusions, Helsinki, 1999, Dec 10,11, accessible at [http://www.europarl.europa.eu/summits/hel1\\_en.htm](http://www.europarl.europa.eu/summits/hel1_en.htm); REHRL, *supra* note 182, 14.

<sup>201</sup> Declaration of Saint-Malo, Joint Declaration on European Defence, issued at the British-French Summit, Saint-Malo, 1998, Dec 4, Art. 2: “[...] the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises”.

In 2003, the ESS took another step towards the legitimacy of EU autonomous military action by changing the nature of the CSDP from a reactive measure (“in response”) to a preventive tool<sup>202</sup>. Accordingly, since 2005, the EU has developed the “Battlegroups” concept, in order to provide early and rapid military crisis responses<sup>203</sup> via force packages provided by the Member States. Although Battlegroups have never been deployed to date, the Battlegroup concept is symptomatic of the intent of the EU to engage preventively in conflict areas<sup>204</sup>. The reluctance of the EU to provide military capabilities to the UN-led peace operation may thus be explained in light of the idea of EU autonomous action, despite the primary responsibility of the UN for the maintenance of international peace and security. Indeed, the numerous reference to the “principles of the Charter of the United Nations<sup>205</sup>”, rather than the provisions of the UN Charter<sup>206</sup>, may well endorse the above conclusion<sup>207</sup>.

Autonomous action under the CSDP may have led to EU military missions out of a proper authorisation by the UN Security Council, contrary to the rule set out in Article 53 of the UN Charter that bans any unauthorised enforcement action under regional agreements or by regional agencies with the sole exceptions of actions against an enemy state<sup>208</sup>. Notwithstanding the original economic mandate of the EU, the development of the CSDP and the deployment of EU missions mentioned above have led the UN Security Council to address the Union as a regional organisation under the meaning of Chapter VIII<sup>209</sup> of the UN Charter<sup>210</sup> short after the first peacekeeping missions under the late ESDP. Indeed, even in the absence of proper internal conflict management systems<sup>211</sup>, the activeness of the EU in both assisting UN missions and deploying missions itself allows for the inclusion of the Union in the roster of regional organisations under Chapter VIII<sup>212</sup>. The UN Charter

<sup>202</sup> ESS, *supra* note 152; REHRL, *supra* note 159, 14.

<sup>203</sup> Battlegroups are deployed within 10 days upon request and sustained for 30 days (renewable up to 120 days).

<sup>204</sup> EUROPEAN COUNCIL, Headline Goal 2010, 2004, June 17, 18, accessible at <http://www.consilium.europa.eu/uedocs/cmsUpload/2010%20Headline%20Goal.pdf>.

<sup>205</sup> See Art. 3(5) TEU, Art. 21 (1) TEU, Art. 42 (1) TEU; see also Protocol (No. 10) on Permanent Structured Cooperation Established by Article 42 of the Treaty on European Union

<sup>206</sup> EU Treaties explicitly mention the “provisions of the Charter of the United Nations” only in Declaration no. 13 on the Common Foreign and Security Policy, annexed to the TEU.

<sup>207</sup> See for instance WESSEL R. A., BLOCKMAN S., *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations*, Springer Science & Business Media, 2012, 299.

<sup>208</sup> Art. 53(2) UN Charter.

<sup>209</sup> UN SECURITY COUNCIL, S/Res/713, 1991, September 25; UN SECURITY COUNCIL, S/Res/727, 1992, January 8. To be noted that the Security Council treated the EU as a regional arrangement according to the meaning of Chapter VIII before the creation of the CSDP, occurred with the Treaty of Amsterdam in 1999.

<sup>210</sup> Traditionally, regional arrangements in the meaning of Chapter VIII were classified according to their primary task and activity. Nevertheless, this system of classification has been abandoned in consideration of peacekeeping activities conducted by economic organisations, such as the ECOWAS in Liberia and Sierra Leone and the European Communities in the DRC. WALTER C., *Regional Arrangements and the United Nations Charter*, Max Planck Encyclopedia of Public International Law, 2009.

<sup>211</sup> Which define a regional arrangement according to Article 52 UN Charter.

<sup>212</sup> VAN VOOREN B., WESSEL R. A., *EU External Relations Law: Text, Cases and Materials*, Cambridge University Press, 2014, 434; ANTONIADIS A., SCHUETZE R., SPAVENTA E., *The European Union and Global Emergencies: A Law and Policy Analysis*, Bloomsbury Publishing, 2011, 81-81; WHITE N. D., *The EU as Regional Security Actor within the International Legal Order*, in M. Trybus and White (eds.), *European Security Law*, Oxford University Press,

framework assigns the primary responsibility for the maintenance of peace to the UN Security Council, whereas the role of international organisation in such context is, on the contrary, integral<sup>213</sup>. It has been pointed out that CSDP autonomous missions may help the UN in those cases where the latter would be otherwise paralysed: for instance, Russia could veto a UN operation to Georgia, but not an autonomous CSDP mission<sup>214</sup>. Nevertheless, EU autonomous action, which can include military missions under the CSDP, could entail a friction between the autonomy of EU legal order and the rules of the UN Charter with regards to the use of force in order to manage a situation of international crisis. In such a scenario, the authority that would be called upon to sort out the situation is the UN Security Council, by virtue of the powers conferred by Chapter VII of the Charter should the organ make a determination under Article 39 in case the use of force of an international actor configure a threat to the peace. Therefore, France and UK would be confronted, once again, with a conflict of attribution, given their role within the Security Council and within the CSDP at the same time. Such conflict of attribution is related, as duly explained above, to the dual role of France and UK, and not to the question as to the legitimacy of autonomous enforcement operations of international organisations. For instance, the African Union is characterised by a military power similar to that of the EU. The Common African Defence and Security Policy, adopted by the AU in 2004, is also largely modelled on the CSDP/ESDP<sup>215</sup>, and as such encompasses a list of internal and external threats to African states to be dealt with also by means of preventive measures<sup>216</sup>. Notwithstanding the similarities with the CSDP, no African state is permanently represented at the UN Security Council and thus the AU has no power, directly or indirectly, to drive any veto holder to prevent a Resolution condemning AU illegal missions from entering into force, unlike the EU with respect to France and the UK. France and UK are hence the subjects of a conflict of attribution as long as they may orient the decisions of the UNSC, when called to make determinations on the consistency of EU measures with international law, because of the compliance with EU measures themselves<sup>217</sup>.

The conflict of attribution with regards to military missions of the EU is not merely theoretical: it happened in practice when the EU engaged, amidst tensions, in EULEX mission in Kosovo; and later in the early phases of deployment of EUNAVFOR Operation Sophia against human trafficking in the Mediterranean Sea. After the NATO campaign against Serbia on March 1999, Kosovo was put

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2007, 329-349.

<sup>213</sup> ODELLO M., PIOTROWICZ R., *International Military Missions and International Law*, Martinus Nijhoff Publishers, 2011, 50-51.

<sup>214</sup> BOIN A., EKENGREN M., RHINARD M., *The European Union as Crisis Manager: Patterns and Prospects*, Cambridge University Press, 2013, 71.

<sup>215</sup> *Ibidem*; TOURAY O. A., *The Common African Defence and Security Policy*, 104 *African Affairs*, 457, 2005, 642-644.

<sup>216</sup> *Ibidem*, 650.

<sup>217</sup> *Supra*, para I.2.

under an *interim* administration of the UN following the adoption of Resolution 1244<sup>218</sup>. The UN was represented by a Special Representative of the Secretary-General (SRSG)<sup>219</sup>, vested with all legislative, executive and judiciary powers concerning Kosovo. The *interim* administration would have ceased with the entry into force of the Constitution of Kosovo, largely modelled on the Comprehensive Proposal for the Kosovo Status Settlement of March 2007<sup>220</sup>, also known as “Ahtisaari Plan” after the name of the appointed UN Special Envoy for the Future Status Process of Kosovo<sup>221</sup>. Under Resolution 1244, an International Civilian Presence and an International Military Presence were provided until the implementation of the plan by Kosovo. NATO and the UNMIK (the UN mission to Kosovo) were entrusted with military tasks<sup>222</sup>, whereas an ESDP Rule of Law Mission would have been in charge of civilian management of executive, legislative and judiciary activities of Kosovo<sup>223</sup>. The Ahtisaari Plan provided for a transition period at the end of which Resolution 1244 would have been replaced by the Constitution of Kosovo and the UNMIK by the ESDP mission, with a significant transfer of responsibilities and tasks<sup>224</sup>. To this end, the EU had already established, since 2006, the European Union Planning Team (EUPT)<sup>225</sup>, which was actively co-operating with the UNMIK<sup>226</sup>. The deployment of EUPT was based on an invitation by the SGSR<sup>227</sup>, who detained the legal authority over Kosovo due to Resolution 1244. The ESDP Rule of Law Mission was conditional upon a declaration of independence of Kosovo, and the endorsement of the Plan. Nevertheless, the US strongly insisted on a unilateral declaration of independence by Kosovo<sup>228</sup>, whereas five EU Member States had announced they would not recognise Kosovo in such an event<sup>229</sup>. Such a disagreement would have rendered impossible for the EU to deploy the ESDP mission, due to the unanimity required<sup>230</sup>. The failure to engage in the administration of Kosovo would have been seen, nonetheless, as a weakness of the common foreign policy of the EU with regards to a territory which is geographically in Europe, and could have led to a split in the positions of EU Member States

<sup>218</sup> UN SECURITY COUNCIL, S/RES/1244, 1999, Jun 10.

<sup>219</sup> *Ibid.*, para 6.

<sup>220</sup> For a detailed review of the events concerning the independence of Kosovo and the involvement of the UN and the EU see MUHARREMI R., *The European Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law*, 70 ZaoRV, 2010, 357-380.

<sup>221</sup> United Nations Secretary-General Press Release, SG/A/955, 2005, Nov 15, accessible at <http://www.un.org/press/en/2005/sga955.doc.htm> (last accessed Dec 8, 2015).

<sup>222</sup> Comprehensive Proposal For the Kosovo Status Settlement, 2007, Feb 2, accessible at <http://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>, art. 14, 15.

<sup>223</sup> *Ibidem*, art. 13.3.

<sup>224</sup> MUHARREMI, *supra* note 215, 365.

<sup>225</sup> COUNCIL JOINT ACTION 2006/304/CFSP, OJ L 112/19, 2006, Apr 10.

<sup>226</sup> *Ibidem*, art. 1.2.

<sup>227</sup> As stated in the Preamble of the Council Joint Action.

<sup>228</sup> MUHARREMI, *supra* note 215, 366.

<sup>229</sup> The five states being Spain, Cyprus, Slovakia, Greece, and Romania.

<sup>230</sup> DZIHIC V., KRAMER H., *Kosovo After Independence: Is the EU's EULEX Mission Delivering on its Promises*, Friedrich-Ebert Stiftung, 2009, July, 7.

similarly to the situation on the occasion of the US invasion of Iraq in 2003<sup>231</sup>. Therefore, the Council amended, in 2008, the Joint Action of 2006 and established the EULEX mission<sup>232</sup>, anticipating any possible opposition by rushing to action before the declaration of independence of Kosovo. Apart from the enlarged mandate of the EULEX compared to that of the ESPD Rule of Law Mission under the Ahtisaari Plan, EULEX was openly criticised for its inconsistency with international law.

The Council Joint Action of 2008 authorised EULEX to exercise a number state functions in lieu of Kosovan authorities, or at any rate “*independently or in support of the competent Kosovo authorities*”<sup>233</sup> and even “*through reversing or annulling operational decisions taken by the competent Kosovo authorities*”<sup>234</sup>. International law allows the exercise of state functions by another state provided that the hosting state has given valid consent<sup>235</sup>, or in case such exercise has been mandated by the Security Council acting under Chapter VII of the UN Charter<sup>236</sup>. EULEX was not mandated by Resolution 1244, thus the EU mission would have required a new mandate from the Security Council as a legal basis for its installation in the territory of Kosovo<sup>237</sup>. An *ex post* ratification of EULEX occurred only later under the condition that the mission would have operated in compliance with Resolution 1244 and under the authority of the UN<sup>238</sup>. For what concerns the consent of local authorities, it must be first noted that, notwithstanding Kosovo acceptance of EULEX mission<sup>239</sup>, the Joint Action establishing the latter made no reference to Kosovo authorities established by the Constitution of Kosovo, but relied on the acceptance of the ESPD Rule of Law mission made by means of acceptance of the Ahtisaari Plan in spite of the profound differences between the mandate of the two missions<sup>240</sup>. Therefore, EULEX had no legal basis under the constituting legal documents of the Republic of Kosovo<sup>241</sup>. Secondly, and more importantly, EULEX was established during the period of UN *interim* administration of Kosovo according to Resolution 1244. Notwithstanding the adoption of the Ahtisaari Plan and the constituent documents of the Republic of Kosovo, that would have occurred shortly afterwards, the UN maintained that Resolution 1244 was mandated under Chapter VII of the Charter and still in force until repealed by Security Council<sup>242</sup>. As a consequence, the SGSR exclusively retained all legislative and executive powers in the territory. The declaration

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<sup>231</sup> POND E., *The EU's Test in Kosovo*, 31 The Washington Quarterly, 4, 2008, 97-112, 98-99.

<sup>232</sup> COUNCIL JOINT ACTION 2008/124/CFSP, OJ L 42/92, 2008, Feb 4.

<sup>233</sup> *Ibidem*, art. 3(h).

<sup>234</sup> *Ibidem*, art. 3(b).

<sup>235</sup> See, for instance, CASSESE A., *International Law*, Oxford University Press, 2005, 51.

<sup>236</sup> See, for instance, BROWNLIE I., *Principles of Public International Law*, Oxford University Press, 2003, 369.

<sup>237</sup> DZIHIC, *supra* note 225, 15.

<sup>238</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 2008, Nov 24, para 50.

<sup>239</sup> *Ibidem*, Annex I.

<sup>240</sup> MUHARREMI, *supra* note 215, 371-372.

<sup>241</sup> *Ibidem*.

<sup>242</sup> Report of the UN Secretary-General, *supra* note 233, para 4.

of independence would have merely limited the tasks of the UNMIK, but not its legal capacity<sup>243</sup>. Therefore, EULEX required the invitation or the consent of the UN under Resolution 1244<sup>244</sup>. In conclusion, EULEX had no legal basis to exercise its mandate under international law, and was thus established only in accordance with EU law<sup>245</sup>.

EULEX was eventually brought under the supervision of the UN and under a “status neutrality”<sup>246</sup>. The agreement between EULEX and the UNMIK was the condition for the approval of the mission by Serbia and Russia<sup>247</sup>: thus, a trade-off between members of the Security Council, for the purpose of a ratification, instead of a condemnation, of the EULEX mission in its new clothes.

While immediately following operation, EUNAVFOR Atalanta, launched in 2008 and still active, after many renewals of its original mandate, in Somalia, was fully based on a number of pre-existing UN Resolutions, similarly to one of the last operations – Irini – of 2020 deployed in full accordance with a UNSC mandate<sup>248</sup>, Operation Sophia in the Mediterranean Sea was established, as of 2015, without a prior authorisation by the UN Security Council.

The European Union has, as argued earlier, autonomous power to deploy military operations outside of its borders. Such missions, though, ought to seek either the consent of the third state, or a UN Security Council mandate (unless deployed for the purposes of self-defence *ex* Article 51 of the Charter), else the mission would be against the Charter itself<sup>249</sup>. The wording of the Council Decision of 2015 referenced, aside from a number of international convention including the UN Convention on the Law of the Sea, adherence to “any Security Council Resolution<sup>250</sup>”: while such a reference satisfied the requirements of the UNCLOS convention with regards to those activities to be performed on the high seas<sup>251</sup>, the absence of a prior UNSC mandate would not be consistent with the Decision in the part where, “*in accordance with any applicable Security Council Resolution or consent by the coastal state concerned*” it compelled to “*take all necessary measures [...] in the territory of that State*<sup>252</sup>”. The UN Security Council adopted only on October that year a Resolution, n. 2292

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<sup>243</sup> MUHARRENI, *supra* note 215, 368.

<sup>244</sup> *Ibidem*; DZIHIC, *supra* note 225, 15; in this view, also Oliver Ivanovic, the State Secretary at the Serbian Ministry for Kosovo: see *Ivanovic: UN Approval Required for EULEX*, BLIC online, 2008, Oct 20, accessible at <http://english.blic.rs/News/3143/Ivanovic-UN-approval-required-for-EULEX> (last accessed Dec 12, 2015).

<sup>245</sup> The Head of EULEX was also the Head of the International Civilian Representative (ICR), established pursuant to the Ahtisaari Plan, which rightfully exercised the tasks set out its functions on the basis of the invitation contained in the declaration of independence of Kosovo. Hence, the UN maintained that Resolution 1244 was in force until repealed.

<sup>246</sup> Report of the UN Secretary-General, *supra* note 233, para 16.

<sup>247</sup> DZIHIC, *supra* note 225, 16.

<sup>248</sup> KLOCKER C., *The UN Security Council and EU CSDP Operations: Exploring EU Military Operations from an Outside Perspective*, UCL Press, Europe and the World: a Law Review 17, 5(1), 2021.

<sup>249</sup> HESSE P., *UN Security Council Resolutions as a Legal Framework for Multinational Military Operations*, in Heike Krieger and Robin Geiss eds., *The “Legal Pluriverse” Surrounding Multinational Military Operations*, Oxford University Press 7, 2020.

<sup>250</sup> COUNCIL DECISION 2015/778 CFSP, 2015, *supra* note 181, art. 1.

<sup>251</sup> *Ibid.*, art. 2(2).

<sup>252</sup> *Ibid.*, art. 2(2)(c).

authorising “all measures commensurate to the specific circumstances<sup>253</sup>” in combating human trafficking aboard vessels in the Mediterranean Sea, highlighting a narrower authorisation compared to the wording of the earlier Council Decision establishing the EU mission in the area. It is worth noting that while the UN Resolution did not make any express reference to the already existing Operation Sophia, but just a generic reference to actions within regional organisations as per Chapter VII<sup>254</sup>, France and UK representatives praised the scope and efficiency of the Operation during the very meeting during which Resolution 2292 was adopted<sup>255</sup>.

Operations EULEX and Sophia, while representing only two instances among several military missions established under the CSDP following a prior authorisation of the UN Security Council, substantiate two recent examples of a different pace in the decisions surrounding the establishment of military operations within the EU and the required authorisations by the UNSC, resulting in quicker deployment of CSDP missions and *a posteriori* Resolution by the UNSC, contrary to the normal practice and less harmonious with the framework of the UN Charter. Such a circumstance may well exert pressure on the Security Council to follow prior determinations made within the CFSP to avoid paralysis or unwanted criticism, especially considering the power of France (and other EU members sitting in the Council) inside the UNSC, to the extent of pointing discussion towards the decision already made in a different context.

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<sup>253</sup> UN SECURITY COUNCIL S/Res/2240, 2015, October 9<sup>th</sup>.

<sup>254</sup> *Ibid.*, para 7.

<sup>255</sup> KLOCKER C., *supra* note 244, 10.



## CHAPTER III

### THE EU IN THE UNSC: FROM INFLUENCE TO REFORM

#### III.1 THE LEGITIMACY OF EU INFLUENCE ON THE SECURITY COUNCIL

The EU exercises a deep influence on the UN Security Council, through its Member States represented, temporarily or permanently, therein, due to a substantial identity of objects and purposes of EU external action and the UN Charter and an independent conduct of all activities to achieve those objects<sup>256</sup>. The consideration that EU Member States tend to uphold EU interests and positions while acting as sovereign states in the UN Security Council does not, *ipso facto*, imply an illegitimate influence of the Union contrary to the mandate of UNSC members according to the Charter. State sovereignty may well entail, epistemologically, that states pursue national interests that may be due to their membership in international organisations or to associative ends of all sorts. However, state sovereignty implies, likewise, that such national conducts are not open to scrutiny nor, above all, obey to a legal obligation from a separate institution. In this view, EU influence on the UN Security Council may be deemed to be illegitimate, as it stems, to a certain extent, from legal obligations of Member States towards the Union. Not only does the EU impose obligations on its Member States also for what concerns their participation to the UN Security Council<sup>257</sup>, but EU interference in states' sovereign rights is also in constant development and is likely to further enlarge in the future. Thus, the risk is that EU influence on the work of the Security Council may turn from occasional, due to national commitments to EU interests from Member States, to institutional, in case the CFSP will be enhanced to such an extent that Member States have to abide by EU law in their external relations as they already do in their domestic conducts for what is regulated by the central institutions of the Union<sup>258</sup>.

EU progressive intrusion in Member States sovereign rights proceeds essentially along two directions. On the one hand, EU advancements have often brought states to amend their national legislations in a EU-compliant manner, either to implement rules and directives or to allow the ratification of European Treaties<sup>259</sup>. As a result, EU and Member States' legislations are more and more intertwined, so that future national policies will be likely to partially depend on constitutional

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<sup>256</sup> See *supra*, para I.2.

<sup>257</sup> See *supra*, para II.2.

<sup>258</sup> Either by amendment of the EU treaties, or by *de facto* evolutive interpretation of the current treaties following the doctrine of implied powers, see for instance ECKHOUT P., *The Doctrine of Implied Powers*, *supra* note 163, 71-118.

<sup>259</sup> See also *supra*, para II.2, for what concerns domestic amendments in order to grant full implementation of the provisions of the Rome Statute.

or other domestic constraint based on the progressive absorption of EU law<sup>260</sup>. On the other hand, continuous integration within the EU and the allocation of competences to EU institutions is arguably aiming at, and rapidly evolving into, a *sui generis* organisation of states with precise federative traits<sup>261</sup>. The enlargement of the *acquis communautaire* has, so far, brought commentators to acknowledge the nature of confederation of the European Union, intended as a transfer of specific powers to a higher authority by confederated entities which maintain their legal autonomy and identity<sup>262</sup>, to such an extent that some wondered whether the Union would have already attained the status of federation with the entry into force of the Treaty of Laeken<sup>263</sup>, later dismissed and substituted with the less ambitious Treaty of Lisbon. Since the authoritative statements as to the autonomy of the Union's legal order in the *arrêts* Van Gend en Loose<sup>264</sup> and Costa v Enel<sup>265</sup> in 1963 and 1964, the European Court of Justice has been one of the major actor of the Union's evolution towards a federal and state-like legal entity, by means of jurisprudential advancements such as supremacy and direct effect, which had no normative basis in the treaties<sup>266</sup>. As a consequence of the devolution of several rights and powers to the Union, including exclusive competences and treaty-making capacity, not only has the specificity and autonomy of EU legal order been acknowledged<sup>267</sup>, but the relevance of international law for the regulation of the relationship between the Union and its Member States has lost importance in the perception of European commentators<sup>268</sup>, as if the autonomy of Member States should be regarded as a fact of internal law within the Union's legal order<sup>269</sup>. European doctrine thus confirms the trend of the Union towards a federal state-like entity as, for instance, former President of the European Commission José Manuel Barroso optimistically foresaw as a reality within the next

<sup>260</sup> For instance, Ireland had to substantially change its constitutional regulation of family law in order to sign and ratify EU treaties.

<sup>261</sup> VON BOGDANDY A. SMRKOLJ M., *supra* note 75; BENLOLO-CARABOT, *supra* note 6, 689; BONVICINI G., *L'Unione Europea Attore di Sicurezza Regionale e Globale*, Franco Angeli (eds.), 2010, 55; KELEMEN R.D., *Build to Last? The Durability of EU Federalism*, in S. Meunier and K. McNamara (eds.), *Making History: State of the European Union*, 8, Oxford University Press, 2007, 52.

<sup>262</sup> A confederation is commonly understood as “a system of government or administration in which two or more distinct political units keep their separate identity but transfer specified powers to a higher authority for reasons of convenience, mutual security, or efficiency”; MCCORMICK J., *The European Union: Politics and Policies*, Westview Press, 1999, 85.

<sup>263</sup> See for instance BLANKART C. B., MUELLER D. C., *A Constitution for the European Union*, MIT Press, 2004, 239 ss.

<sup>264</sup> *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case C-26/62, 1963, ECLI:EU:C:1963:1.

<sup>265</sup> *Flaminio Costa v. E.N.E.L.*, Case C-6/64, 1964, ECLI:EU:C:1964:66.

<sup>266</sup> DE WITTE B., *Direct Effect, Supremacy, and the Nature of Legal Order*, in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law*, Oxford University Press, 1999, 179, 209.

<sup>267</sup> BENLOLO-CARABOT, *supra* note 6, 856-857.

<sup>268</sup> *Ibidem*; DUBOUT E., “La relativité de la distinction des normes du droit de l'Union européenne et du droit international”, in CREMONA M. (ed.), *Development in EU External Relations Law*, Oxford University Press, 2008, 11.

<sup>269</sup> The authors mentioned *supra* (note 228) argue that the autonomy of the Union not only defines the latter as a legal order in international law, but also that this very autonomy must be protected from the intrusion of both international law and Member States' law, in order to preserve the precious advancements of the EU. As a consequence, they suggest to see the relationship between the EU and international law “*d'une façon purement dualiste*”.

few years<sup>270</sup>. Today, even though the Union has traditionally maintained a “wisely agnostic attitude”<sup>271</sup> as to its precise nature, the prevailing understanding of the EU vis-à-vis international law is that of “an autonomous legal order of an internal/municipal law character with federal features”<sup>272</sup>. Should the above trend become a legal reality, EU influence on the Security Council would become institutional and endemic, shifting the balance of the conflict of attribution in stark favour of the Union. Above all, such evolution would determine, in abstract terms, a shift of power within the Security Council, namely from France to the Union, in case the latter acquires a truly legally binding power over the Member State on international security matters. This change in governance within the UN would then depend on a EU development, instead of an amendment of the UN Charter. Therefore, progressive integration within the EU could lead, theoretically, to an illegitimate tacit amendment of the UN Charter with regards to one of its constitutive principles, namely the respect and promotion of state sovereignty in the pursuit of international peace and security. Such a scenario would have carried much of a greater relevance, had the UK not withdrawn from the Union<sup>273</sup>, in terms of shifting the balance of representation within the UN Security Council in evident favor of the prerogatives and interests of the European Union.

Not only would an institutionalisation of EU succession in France’s sovereign rights implicate an illegitimate amendment of the UN Charter for what concerns governance in the UNSC, but the process of transformation of the European Union from an international organisation to a federation of states is also, despite its significant advancements, not possible according to general legal theory. It is the constituent instrument of each and every organisation to determine its nature and its portion of sovereignty<sup>274</sup>: in the case of the EU, an international treaty establishing an international organisation<sup>275</sup>. In this light, progressive acquisition and jurisprudential advancements such as *primauté* would not suffice to turn the Union into a state-like entity, since they correspond to powers that, albeit supranational, stem from the constitutive treaties. On the contrary, only a new constituent power could change the nature of the EU<sup>276</sup> from that of an international organisation to a federate

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<sup>270</sup> BARROSO J. M., Speech on the State of the Union, 2012, September 12, available at [http://ec.europa.eu/soteu2012/index\\_en.htm](http://ec.europa.eu/soteu2012/index_en.htm) (last accessed Dec 15, 2015).

<sup>271</sup> DE WITTE B., *The European Union as an International Legal Experiment*, in De Burca and Weiler (eds), *The Worlds of European Constitutionalism*, Cambridge University Press, 2012, 41.

<sup>272</sup> VON BOGDANDY, *supra* note 75.

<sup>273</sup> See *infra*.

<sup>274</sup> BEHRENDT C., BOUHON F., *Introduction à la Théorie Général de l'Etat: Manuel*, Larcier, 2009, 154-155.

<sup>275</sup> One author pointed out that advancements within a legal order, such as progressive integration within the EU and the refinement of its institutions, policies, and laws, are meant to attain stability in that order's legal nature, to achieve “maturity”, rather than to change that nature, which would be impossible without a new constituent power. In this light, the EU is “not a state in the making: it is the most ambitious and successful of international organisations”, MORAVCSIK A., SCHIMMELFENNING F., *Liberal Intergovernmentalism*, in Antje Wiener and Thomas Diez (eds.), *European Integration Theory*, Oxford University Press, 2009, 67-87, 74.

<sup>276</sup> *Ibidem*.

state-like entity, notwithstanding the accuracy of many empirical studies that identify the Union as a juridical *unicum* and position it half-way between an international organisation and a state<sup>277</sup>. *A fortiori*, the EU may not, given its nature, legally alter the relationship between the UN Security Council and its members, out of a specific devolution of state prerogatives from its Member States or a modification of the UN Charter. An evolution of the Union in this sense would be *ultra vires* given the legal foundations of the EU with respect to both its Member States and international law, albeit mandated by EU law itself.

The *acquis* of the European Union, allegedly aiming at the creation of a new federal legal entity, may not evolve out of the sphere of competence of the Union which is, itself, limited by the original sovereignty of both states and the international community. Assuming the equivalence between organised social orders and law, which are the two components of each and every legal order<sup>278</sup>, a difference can be drawn between “original” legal orders (*ordres juridiques originaires* or *propres*) and “derived” legal orders (*ordres juridiques dérivés* or *secondaires*)<sup>279</sup>. Original legal orders<sup>280</sup> correspond to an organised social order which does not derive its existence from another organised social order. Examples are States and the International Community<sup>281</sup>: they are pre-existent with regards to law, and they do not derive their sovereignty from any other legal order. In other words, their legal orders are postulates: the coexistence of a state and its legal order, and of international law and the international community, is necessary, because law could not exist without those two organised legal orders<sup>282</sup>. Derived legal orders, instead, derive their existence from an original legal order (or from another derived order): therefore, their existence as legal orders is not necessary, but depends on the creation of a new organised social order within one of the two necessary legal orders. The natural consequence is that the sovereignty of a derived legal order, *id est* the European Union,

<sup>277</sup> VON BOGDANDY A., *Neither an International Organisation Nor a Nation State: The EU as a Supranational Federation*, The Oxford Handbook for the European Union, 2012, accessible at <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199546282.001.0001/oxfordhb-9780199546282-e-53> (last accessed Dec 15, 2015).

<sup>278</sup> ROMANO S., *L'Ordinamento Giuridico*, Sansoni, 1946, 38. Romano's theory postulates the identity between organised social order and law and their necessary coexistence in every legal order, as opposed to Kelsen's “pure legal theory” for which a legal order consists of a sum of norms laid down hierarchically up to a *Grundnorm*; see KELSEN H., *General Theory of Law and State*, The Lawbook Exchange Ltd., 1945.

<sup>279</sup> Santi Romano's book has been translated in all European languages except English, thus the use of the French terms. For an overview of Romano's theory in English, see FONTANELLI F., *Santi Romano and L'Ordinamento Giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations*, 2 Transnational Legal Theory, 1, 2011, 67-117. One of the finest Italian jurists of the 20<sup>th</sup> century, Norberto Bobbio, attributed the lack of English translation of the above-mentioned booklet to the “ignorance of the anglo-american juridical culture, not as a value judgement, but as a fact”, BOBBIO N., *Teoria e Ideologia nella Dottrina di Santi Romano*, in *Dalla Struttura alla Funzione*, Edizioni di Comunità, 1977, 168.

<sup>280</sup> In Romano's terminology, a legal order is called “institution”, to better underline the necessary correlation between organised social order and law.

<sup>281</sup> ROMANO, *supra* note 278, 32-33.

<sup>282</sup> Without state, there would be no law between individuals; without the international community, there would be no law out of the state. International law and state law are the two necessary legal orders, that give shape to the brocard *ubi societas ibi ius*.

is thus subject to the limitations to sovereignty of the legal order it is derived from, according to the principle *nemo plus iuris transferre potest quam ipse habet*. The European Union is established by an international treaty, and is thus an international organisation, which could only turn into a state-like entity, and fully take over those competences and prerogatives of France and the other Members States represented in the UN organs, by virtue of the exercise of a new constituent power; which seems even more remote a possibility after January 2020 and the withdrawal of UK from the Union. A *tout court* succession of states may therefore not happen in the near future, missing the EU the nature of state itself and being it possible for any Member State to invoke withdrawal<sup>283</sup>, and therefore an empowerment of CFSP instruments may not legitimately turn into a power of the EU to bind the UN organs and the Security Council especially, unless France subsumes EU interests and positions and voluntarily commits to their enforcement in the UNSC acting as a sovereign state. It is, in other words, EU nature and legal instruments themselves which prevents the Union from a full takeover of state prerogatives, and thus define the EU relationship with the UN and the Security Council as a legitimate influence of a significant global player, rather than an attempt to overstep its prerogatives in a state-like manner.

### **III.2 EU SEAT IN THE UNSC AND THE EFFECTS OF UK WITHDRAWAL**

Until very recent times, such a devolution as described above would have, however, seemed as a possible step in the process of progressive integration within the EU and, in a certain light, even carrying some positive effects. In 2011, the European Parliament adopted a Resolution<sup>284</sup> where envisaging a single EU seat at the UN Security Council was seen as a “central, long-term goal of the European Union<sup>285</sup>”, after stressing the need for an urgent reform of the UNSC in terms of enhanced representation and efficiency. The position of the European Parliament followed, and sparked further, debates over a potential twofold reform of the UN Security Council in order to accommodate a unified European seat and improve its efficacy through a renovation of its working methods, namely the use of veto. Shortly after the establishment of the European Union, the idea of a EU seat actually met greater support among the non-EU members of the UN, concerned by an excess of European

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<sup>283</sup> Art. 50 TEU.

<sup>284</sup> Resolution Adopted by the European Parliament on the EU as a Global Actor: Its role in Multinational Organisations, 2011, May 11<sup>th</sup>, accessible at Global Policy Forum: <https://archive.globalpolicy.org/events/past-events/50251-resolution-adopted-by-the-european-parliament-on-the-eu-as-a-global-actor-its-role-in-multilateral-organizations.html> (last accessed: August 14<sup>th</sup>, 2022).

<sup>285</sup> *Ibidem*.

representation in the Security Council with two EU permanent members<sup>286</sup>.

At present, notwithstanding the novelties of UK withdrawal from the EU, and ensuing diminished influence of the EU as an organisation on the Security Council, discussion around a EU seat have resumed after January 2019 with Germany occupying a non-permanent seat in the UNSC<sup>287</sup> - although the UN General Assembly Resolution on April 2022<sup>288</sup> on convening the Assembly within ten working days after any use of veto in the UNSC “to hold a debate on the situation as to which the veto was cast<sup>289</sup>”, probably prompted by fears of Security Council’s paralysis with regards to Russian invasion of Ukraine<sup>290</sup>, has now compelled a reasonable use of the veto and thus diminished the relevance of a potential EU-compliant veto as discussed in the previous chapter. Before the withdrawal of the UK from the Union, officially occurred in January 2020, EU progressive integration was evolving at a rapid pace with a continuous devolution of state competences by its Member States. At the time, a reform of the UNSC in order to grant a seat to the EU could be perceived as convenient for the purpose of legitimating a *de facto* situation in which decisions on international security that would affect two permanent members and veto-holders at the UNSC were preliminary discussed, with a certain level of commitment, at the EU level. Even in current times, a reform of the UNSC in this sense would still be desirable under several points of view: it would help the UNSC gaining back some of its lost representativeness, by including one of the major global player according to political, economic and military engagement; it would breach the perception of the UN Charter as untouchable, to the benefit of other possible reforms, along the line drawn by UN Secretary General António Guterres in 2017<sup>291</sup>; finally, it would make the growing EU influence on the UNSC dependant upon a reform of the UNSC itself, rather than on the integration of France within the EU.

In 2016, on the eve of the so-called *Brexit* vote, the United Kingdom were shaped on CFSP common positions and decisions on joint action with regards to a number of domains, ranging from trade to immigration policies<sup>292</sup>, and the CFSP was further consolidating its “global strategy<sup>293</sup>”: however, the referendum vote could be seen as a milestone of an internal process running counter to the process of integration of the European Union, when considering the traditional detachment of the UK compared the much more integrated founding member France with respect to the EU, and a

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<sup>286</sup> See for instance WISE E., *Debate over EU Security Council seat “Premature”*, Politico, 1995, November 1.

<sup>287</sup> See for instance JANSEN T., *EU in the World: An EU United Nations Security Council Seat*, in EU in the World, Conference for the Future of Europe, 2021.

<sup>288</sup> See *supra* note 150.

<sup>289</sup> *Ibidem*.

<sup>290</sup> Spokespersons of UNSC members have, however, rallied to state that the measure was not intended against Russia.

<sup>291</sup> UN GENERAL ASSEMBLY, *Restructuring of the United Nations Peace and Security Pillar*, Report of the Secretary General, A/72/525, 2017, October 13<sup>th</sup>.

<sup>292</sup> WHITMAN R., *The EU and EU Foreign, Security and Defence Policy after Brexit: Integrated, Associated, or Detached?*, National Institute Economic Review, 2016, No. 238, 43.

<sup>293</sup> HIGH REPRESENTATIVE OF THE EUROPEAN UNION, *Shared Vision, Common Action, A Stronger Europe: A Global Strategy for the European Union’s Foreign and Security Policy*, 14392/16, 2016, November 14<sup>th</sup>,

necessary turn to prioritise key bilateral relationships<sup>294</sup> such as with the US in pursuing diplomatic objectives and defining external strategies<sup>295</sup>; as further shown by the delays, and general reticence, of the United Kingdom in negotiating formal arrangements with the EU on foreign, security, and defence policy relationship<sup>296</sup>, on which Art. 50 TEU is silent. UK had been, by comparison, a very modest actor within EU CSDP missions in terms of participation as lead state<sup>297</sup>, and, most importantly, the least inclined among Member States for what concerns proposal of CFSP's full inclusion within EU legal order and more in general about EU role in domestic policies<sup>298</sup>. It was argued that UK's endorsement of EU's membership enlargement was motivated by the assumption that a larger Union would have slowed down the process of integration, especially with regards to external action and foreign policies<sup>299</sup>, and that support to the development of the EU third pillar was mainly based on the opportunity of "amplifying its own foreign policy voice"<sup>300</sup>.

The underlying detachment of UK with respect to EU integration and development of CFSP culminated with the 2016 vote, and the 2018 Withdrawal Act (under which only some EU law is yet retained as domestic law, although possibly repealed or amended) after which the law of the European Union does not enjoy primacy over British law, nor the latter is subject to the scrutiny and the verdicts of the European Court of Justice<sup>301</sup>. For what concerns specifically the relations between the EU and the UN, and in particular the influence of EU law and CFSP decisions on the work of the UN Security Council, the withdrawal of the UK may have produced two different effects: on the one hand, the significance of EU influence over the UNSC is somehow lessened, where only one permanent member and veto-holder could be bound to a certain exercise of its prerogatives due to EU commitment thus maintaining a certain balance of interests among the P5 as originally conceived by the UN Charter; on the other hand, the exit of the United Kingdom may well prompt a faster integration of the other 27 Member States<sup>302</sup>, an enhanced development of the CFSP into a legislative

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<sup>294</sup> WALLACE W., *Losing the Narrative: the United Kingdom and the European Union as Imagined Communities*, International Relations, 2017, N. 31, 198.

<sup>295</sup> *Supra* note 293, 44.

<sup>296</sup> BOND I., *Brexit and External Differentiation in Foreign, Security and Defence Policy*, EU Integration and Differentiation for Effectiveness and Accountability (EUIDEA) 2, 2020.

<sup>297</sup> *CSDP Missions and Operation*, SIPRI Armaments, Disarmament and International Security Yearbook 2004–2015, Oxford University Press. European External Action Service, 2016, *CSDP Missions and Operation*.

<sup>298</sup> CARDWELL P., *The United Kingdom and the Common Foreign and Security Policy of the EU" from Pre-Brexit "Awkward Partner" to Post-Brexit "Future Partnership"?*, CYELP 13, 2017, 3.

<sup>299</sup> SMITH K., *Enlargement and European Order*, in HILL C., SMITH M., *International Relations and the European Union*, Oxford University Press, 2005, 276.

<sup>300</sup> DIJKSTRA H., VANHOONACKER S., *The Common Foreign and Security Policy*, Oxford Research Encyclopedia of Politics, 2017, 7.

<sup>301</sup> With the exception of certain EU law applicable to Northern Ireland, which remains a *de facto* member of EU Customs Union, see HOUSE OF LORDS EUROPEAN UNION COMMITTEE, 9<sup>th</sup> Report of Session 2019–21: The Protocol on Ireland/Northern Ireland, 2020, June 1<sup>st</sup>, 65.

<sup>302</sup> WHITMAN R., TONRA B., *Western EU Member States Foreign Policy Geo-orientations*, in HADFIELD A., MANNERS I., WHITMAN R., *Foreign Policies of EU Member States: Continuity and Europeanisation*, Routledge, 2017, 38, 43.

tool *tout court*, and a better concerted EU action in those international fora where its Member States are tasked with decision-making competences<sup>303</sup>. Even in the current state, the CFSP could take the chance of focusing on long-term goals, where the UK was less involved, with much more coherence and impact<sup>304</sup>, and in the implementation the European Global Strategy and its urge for a stronger Union<sup>305</sup>. If it is true that *Brexit* has materialised an application of Article 50 TEU which would not have been conceivable until recent times, it is equally true that such withdrawal has shown that the only way to reclaim a member state's own stance and autonomous policy-making both inside and outside of Europe, is to give up entirely on EU membership, which may then be considered unlikely to happen anew in the near future.

### III.3 EU SEAT AT THE UNSC: LEGAL AND POLITICAL IMPEDIMENTS

A UNSC Reform intended to grant a seat to the EU would face a number of impediments, either legal and political. Legal impediments would include the fact that UNSC membership is solely open to states, according to the UN Charter, while on the contrary the EU is an international organisation. A second legal impediment would be that a succession of continuation, from France to the EU, would not be conceivable: the process of integration would take very long before the EU could actually succeed entirely in Member States' sovereignty and, to date, a withdrawal from the Union is recorded (Art. 50 TEU). Therefore, a tacit amendment of the UN Charter, as it happens with the Russian Federation, could not be possible either. Political impediments include the fact that an EU seat would lead to claims from other international organisations for a seat of their own, and this would drastically undermine the consistency of the UN Charter scheme, based on state sovereignty. Also, an opening to an EU seat from the UNSC would cause the stiff opposition of France itself, which would not give up its own seat. Indeed, discussions within the EU around a possible European seat had already met similar opposition, with France and UK rather endorsing a new German seat and other states, such as Italy, arguing against; or the reiterated proposal of Germany to establish a European Security Council, following the principle of rotation, for better coordination between the High Representative and the Member States in the UNSC<sup>306</sup>. Therefore, the perspective of an EU seat would be hard to be agreed on even within the EU, due to the interests of the actors involved. Irrespective of the vote of the

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<sup>303</sup> In this view, see for instance REDWOOD L., *It's not just the UK that will benefit from Brexit – the EU will too*, The Guardian, 2017, June 20<sup>th</sup>, accessible at [www.theguardian.com/commentisfree/2017/jun/20/not-just-uk-benefit-brexit-eu](http://www.theguardian.com/commentisfree/2017/jun/20/not-just-uk-benefit-brexit-eu).

<sup>304</sup> CARDWELL, *supra* note 297, 26.

<sup>305</sup> *Supra* note 293.

<sup>306</sup> KAIM M., KEMPIN R., *A European Security Council: Added Value for EU Foreign and Security Policy?*, Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit, 2019, 7, accessible at <https://www.swp-berlin.org/10.18449/2019C02/> (last accessed August 14<sup>th</sup>, 2022).



European Parliament in 2011<sup>307</sup>, the need for unanimity among Members States when it comes to EU external action still represents a major obstacle to an adequately fast decision-making process in sensitive matters such as international peace and security, and might have been the reason for a substantial lack of EU action in certain areas where political interests prevented such unanimity from forming<sup>308</sup>.

Such scenario, finally, would hamper both the reform of the UNSC and the EU integration as well, the latter being slowed down by the will to save important national prerogatives such as UNSC membership. As a reason both legal and political, an EU seat would render UNSC action uncertain, as based on EU internal decision-making mechanisms, and would anyway affect the promptness of UNSC action, due to the inclusion of such a complex actor as the EU, to the detriment of the requirement of expeditious action set out in various parts of the UN Charter.

In parallel, a reform of the UNSC, which would be needed for the purposes of an EU seat, is highly unlikely, despite being advocated since the very creation of the United Nations for what concerns its composition, working methods, and voting procedure<sup>309</sup>. The issue of representativeness, furthermore, has older roots considering the yet limited number of seats at the UNSC compared to the increase of UN members<sup>310</sup>, and results in a severe underrepresentation of Africa, Asia, and South America. Several instances of reform of the UN Security Council have been addressed by *ad hoc* working groups, proposing expansions of the Council as well as regulations on the use, or *tout court* abolishment of, the veto power. Such a reform could, however, only be possible by means of amendment of the UN Charter, which would require a qualified majority in the General Assembly and would serve as the occasion to address a number of other potential reforms, discussed among all UN members, with a plausible “pandora’s box” effect<sup>311</sup>. The UN General Assembly in 2015 has unanimously adopted a Resolution detailing all proposals for reform<sup>312</sup>, followed by many statements, especially by the G4 states (Japan, Germany, Brazil and India) confirming their continuing strive to reform the UN Security Council, although an actual proposal of amendment of the UN Charter has yet to see the light and is possibly unconceivable for the time being. On the one hand, the historical stagnation in terms of reforming the UNSC could allow, in the long-term, the European Union to become an ideal candidate for a permanent seat, should it truly evolve into a state-like federative entity; on the other hand, and less idealistically, transformations in the international contexts will

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<sup>307</sup> *Supra* note 284.

<sup>308</sup> For instance, with regards to 2015 conflicts in Syria, see KAIM M., KEMPIN R., *supra* note 306.

<sup>309</sup> WOUTERS J., RUYS T., *Security Council Reform: a New Veto for a New Century?*, in *Veto Power in the Security Council at the Beginning of the 21<sup>st</sup> Century*, JSTOR, Egmond Institute, 2005, 19.

<sup>310</sup> *Ibidem*.

<sup>311</sup> SIHVO L., *Pandora’s Box: Reviewing the UN Security Council in the Light of British and French Experience 1945-1963*, *Nordic Journal of International Law* 66, 1997, 273.

<sup>312</sup> UN GENERAL ASSEMBLY, A 69/L. 560, 2015, September 14<sup>th</sup>.

simply happen faster than any edifying work on a reform of Security Council.

In conclusion, the EU has, since the Maastricht Treaty, progressively acquired a higher role and influence over the work of the UN Security Council, through the action of France and UK therein permanently represented, to the point that a reform of the UN Charter would have seem even desirable to allocate a EU seat and meet the needs of representativeness that the Union had *de facto* garnered in the UNSC. At the same time, recent events – namely, the withdrawal of the UK from the Union – together with underlying considerations on the legal status of the European Union, ultimately represent unsurmountable impediments to such a scenario.

## CONCLUSIONS

The uniqueness of the European process of integration into a Union has led to a certain degree of separation between EU and non-EU literature on the topic of the relationship with the UN, and the Security Council in particular. EU literature, in this domain, tends to focus on the urge for a better representation of the EU within the UNSC, to the point of advocating for a EU seat notwithstanding the entire array of legal and political impediments; while non-EU literature has generally studied the EU within the wider framework of international organisations, pinpointing each excess of the EU with respect to international law and the UN Charter, such as the activism of the European Court of Justice with regards to the implementation of UNSC sanctions. A factual observation, nonetheless, points to the acquired global role of the EU and to the unquestionable influence that it exercises on the UNSC by means of its Member States represented therein.

The persisting influence of the EU, with further development of the CFSP on the way such as the very recent deployment of the European Peace Facility in 2022, on UNSC determinations, has the twofold effect of potentially undermining the consistency of the UN Charter by pooling a sovereignty that belongs to states and bind such states to a certain EU-compliant exercise of their prerogatives at the UN level where they should act as states; at the time, the frailty of the Union as an international organization, from which Member States can rule out by invoking a relatively laconic article in the constitutive treaty of the Union itself, leads to caution when discussing a reform of the paramount UN Charter for the sole purpose of meeting the needs of integration of an international organisation, although endowed with legislative powers, exclusive competences, as well as institutional and judicial organs.

In this framework, a reform of the UNSC towards a EU seat, and a succession of EU over France, are equally unlikely and the relationship between the UN and the EU, still producing important results for the collectivity, is destined to be shaped by partnership agreements and diplomatic discussions for the time being, while the EU keeps evolving into a legal *unicum* without like unique recognition in the legal instruments of international law.

As a consequence, the conflict of attribution, explained in theory and in practice, will remain unaddressed by a solid reform of international law.

## BIBLIOGRAPHY

### Books

ANTONIADIS A., SCHUETZE R., SPAVENTA E., *The European Union and Global Emergencies: A Law and Policy Analysis*, Bloomsbury Publishing, 2011

BEHRENDT C., BOUHON F., *Introduction à la Théorie Général de l'Etat: Manuel*, Larcier, 2009

BENLOLO-CARABOT M., CANDAS U., CUJO E., *Union Européenne et Droit International*, CEDIN, Editions Pedone, 2012

BLANKART C. B., MUELLER D. C., *A Constitution for the European Union*, MIT Press, 2004

BOIN A., EKENGREN M., RHINARD M., *The European Union as Crisis Manager: Patterns and Prospects*, Cambridge University Press, 2013

BONVICINI G., *L'Unione Europea Attore di Sicurezza Regionale e Globale*, Franco Angeli (eds.), 2010

BOUVIER J., *A Law Dictionary: Adapted to the Constitution and the Laws of the United States of America*, T. and J. W. Johnson (eds.), Vol. 1, 1843

CAMPBELL D., *A Bird in the Bush: Failed Policies of the George W. Bush Administration*, Algora Publishing, 2005

CANNIZZARO E., *The European Union as an Actor in International Relations*, Kluwer Law International, 2002

CASSESE A., *International Law*, Oxford University Press, 2005

CRAWFORD J. et al., *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Martinus Nijhoff Publishers, 2008

- CURTIN D. M., WESSEL R. A., *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Intersentia, 2005
- EECKHOUT P., *EU External Relations Law*, Oxford University Press, 2011
- EECKHOUT P., *External Relations of the European Union*, Oxford University Press, 2004
- HADFIELD A., MANNERS I., WHITMAN R., *Foreign Policies of EU Member States: Continuity and Europeanisation*, Routledge, 2017
- HAFNER G., BUFFARD I., *International Law between Universalism and Fragmentation: Festschrift in honor of Gerard Hafner*, BRILL, 2008
- HILL C., SMITH M., *International Relations and the European Union*, Oxford University Press, 2005
- JORGENSEN K. E., LAATIKAINEN K. V., *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power*, Routledge Handbooks, 2013
- KELSEN H., *General Theory of Law and State*, The Lawbook Exchange Ltd., 1945
- KOUTRAKOS P., *EU International Relations Law*, Bloomsbury Publishing, 2015
- KOUTRAKOS P., *The EU Common Security and Defence Policy*, Oxford University Press, 2013
- KRAUSE J., RONZITTI N., *The EU, the UN, and Collective Security: Making Multilateralism Effective*, Routledge, 2012
- KUIJPER P. J. et al., *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford University Press, 2013
- LAGRANGE E., *La Représentation Institutionnelle dans l'Ordre International: Une Contribution à la Théorie de la Personnalité Morale des Organisations Internationales*, Kluwer Law International, 2002

MCCORMICK J., *The European Union: Politics and Policies*, Westview Press, 1999

MCGOLDRICK D., *The Permanent International Criminal Court: Legal and Policy Issues*, Bloomsbury Publishing, 2004

ODELLO M., PIOTROWICZ R., *International Military Missions and International Law*, Martinus Nijhoff Publishers, 2011

ORAKELASHVILI A., *Research Handbook on the Theory and History of International Law*, Research Handbook in International Law, Edward Elgar Publishing, 2011

PINGEL I., *Les Sanctions contre les Etats en Droit Communautaire*, Editions Pedone, 2006

RASCH M. B., *The European Union at the United Nations: The Functioning and Coherence of Eu External Representation in a State-Centric Environment*, BRILL, 2008

REHRL J., GLUME G., *Handbook on CSDP Missions and Operations: The Common Security and Defence Policy of the European Union*, Federal Ministry of Defence and Sports of the Republic of Austria, Armed Forces Printing Centre, 2015

ROMANO S., *L'Ordinamento Giuridico*, Sansoni, 1946

SCHMIDT L., *The European Union and the Use of Force*, BRILL, Volume 17, 2020

VAN VOOREN B., WESSEL R. A., *EU External Relations Law: Text, Cases and Materials*, Cambridge University Press, 2014

WALLENSTEEN P., BJURNER A., *Regional Organisations and Peacemaking: Challengers to the UN?*, Routledge, 2014

WESSEL R. A., LARIK J., *EU External Affairs Law, Text, Cases, and Materials*, Oxford: Hart Publishing, 2<sup>nd</sup> edition, 2020

WESSEL R. A., BLOCKMAN S., *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations*, Springer Science & Business Media, 2012

WOUTERS J., RUYS T., *Security Council Reform: a New Veto for a New Century?*, in *Veto Power in the Security Council at the Beginning of the 21<sup>st</sup> Century*, JSTOR, Egmond Institute, 2005

### Articles

BISCOP S., DRIESKENS E., *The European Security Strategy: Confirming the choice for collective and comprehensive security*, Asser Press, 2006.

BOBBIO N., *Teoria e Ideologia nella Dottrina di Santi Romano*, in *Dalla Struttura alla Funzione*, Edizioni di Comunità, 1977

BOND I., *Brexit and External Differentiation in Foreign, Security and Defence Policy*, EU Integration and Differentiation for Effectiveness and Accountability (EUIDEA) 2, 2020

BONE J., *American Threat to Quit East Timor over Treaty Clash*, New York Times, 2002, May 21

CARDWELL P., *The United Kingdom and the Common Foreign and Security Policy of the EU* "from Pre-Brexit "Awkward Partner" to Post-Brexit "Future Partnership"?, CYELP 13, 2017

CHOMSKY N., *Libya and the World of Oil*, New York Times Syndicate, 2011, April 5

DE WITTE B., *Direct Effect, Supremacy, and the Nature of Legal Order*, in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, Oxford University Press, 1999

DE WITTE B., *The European Union as an International Legal Experiment*, in De Burca and Weiler (eds), *The Worlds of European Constitutionalism*, Cambridge University Press, 2012

DIJKSTRA H., VANHOONACKER S., *The Common Foreign and Security Policy*, Oxford Research Encyclopedia of Politics, 2017

DZIHIC V., KRAMER H., *Kosovo After Independence: Is the EU's EULEX Mission Delivering on*

*its Promises*, Friedrich-Ebert Stiftung, 2009, July

FALK R. A., *Predatory Globalization: A Critique.*, Polity Press, 1999

FASSBENDER B., *The Better Peoples of the United Nations? Europe's Practice and the United Nations*, 15 *The European Journal of International Law*, 5, 2004

FONTANELLI F., *Santi Romano and L'Ordinamento Giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations*, 2 *Transnational Legal Theory*, 1, 2011, 67-117

GROUX J., MANIN P., *Les Communautés Européennes dans l'ordre international*, OPOCE, Collection Perspectives Européennes, 1984

HATUEL-RADOSHITZKY M., *Criticism of the UN Security Council Veto Mechanism: Ramifications for Israel*, 765 *INSS Insight*, 2015

HESSE P., *UN Security Council Resolutions as a Legal Framework for Multinational Military Operations*, Oxford University Press 7, 2020.

HILL C., *The European Powers in the Security Council: Differing Interests, Differing Arenas*, in *The European Union at the United Nations : Intersecting Multilateralism*, LAATIKAINEN K.V. and SMITH K. (Eds.), 2006

HILLION C., WESSEL R., *Restraining External Competences of EU Member States under CFSP*, in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, 2008

HILPOLD P., *EU Law and UN Law in Conflict: the Kadi Case*, 13 *Max Planck Yearbook of United Nations Law*, 2009

HUMAN RIGHTS WATCH, *US Proposals to Undermine the International Criminal Court through a UN Security Council Resolution*, Global Policy Forum, 2002

JANSEN T., , *EU in the World: An EU United Nations Security Council Seat*, in *EU in the World*,



Conference for the Future of Europe, 2021

KAFALA T., *The Veto and How to Use it*, BBC News Website, 2003, Sept 17

KAIM M., KEMPIN R., *A European Security Council: Added Value for EU Foreign and Security Policy?*, Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit, 2019

KELEMEN R.D., *Build to Last? The Durability of EU Federalism*, in S. Meunier and K. McNamara (eds.), *Making History: State of the European Union*, 8, Oxford University Press, 2007

KLOCKER C., *The UN Security Council and EU CSDP Operations: Exploring EU Military Operations from an Outside Perspective*, UCL Press, *Europe and the World: a Law Review* 17, 5(1), 2021.

LEBEN C., *A propos de la Nature des Communautés Européennes*, 14 Droits, 1991

LOBE J., *Bush Threatens the Future of Peacekeeping*, *Foreign Policy*, 2002, June 8

MACPHERSON B., *Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings*, *American Society of International Law*, 7 Insights, 9, 2002

MATTELAER A., *The CSDP Mission Planning Process of the European Union: Innovations and Shortfalls*, *European Integration online Papers (EIoP)*, Special Issue 1, Vol. 14, 2010

MORAVCSIK A., SCHIMMELFENNING F., *Liberal Intergovernmentalism*, in Antje Wiener and Thomas Diez (eds.), *European Integration Theory*, Oxford University Press, 2009, 67-87

MUHARREMI R., *The European Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law*, 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2010

NEUHOLD H., *European Common Foreign and Security Policy*, in *Max Planck Encyclopedia of Public International Law (MPEPIL)*, 2013

OKHOVAT S., *The United Nations Security Council: Its Veto Power and its Reform*, CPACS Working

Paper 15/1, 2011

PETERS A., *The Security Council's Responsibility to Protect*, International Organisations Law Review 8, 2011.

POND E., *The EU's Test in Kosovo*, 31 The Washington Quarterly, 4, 2008

REDWOOD L., *It's not just the UK that will benefit from Brexit – the EU will too*, The Guardian, 2017, June 20

SIHVO L., *Pandora's Box: Reviewing the UN Security Council in the Light of British and French Experience 1945-1963*, Nordic Journal of International Law 66, 1997

TOURAY O. A., *The Common African Defence and Security Policy*, 104 African Affairs, 457, 2005

UNITED NATIONS, *Security Council Rejects Draft Proposing Extension of United Nations Mission in Bosnia and Herzegovina*, UN Press Release, 2002, June 30

UNITED NATIONS, United Nations Secretary-General Press Release, SG/A/955, 2005, Nov 15

VON BOGDANDY A., SMRKOLJ M., *European Community and Union Law and International Law*, Max Planck Encyclopedia of Public International Law (MPEPIL), 2011

VON BOGDANDY A., *Neither an International Organisation Nor a Nation State: The EU as a Supranational Federation*, The Oxford Handbook for the European Union, 2012

WALLACE W., *Losing the Narrative: the United Kingdom and the European Union as Imagined Communities*, International Relations, 31, 2017

WALTER C., *Regional Arrangements and the United Nations Charter*, Max Planck Encyclopedia of Public International Law (MPEPIL), 2009

WESSEL R. A., *Division of International Responsibility between the EU and its Member States in the Area of Foreign, Security and Defence Policy*, 3 Amsterdam Law Forum, 3, 2011

WHITE N. D., *The EU as Regional Security Actor within the International Legal Order*, in M. Trybus and White (eds.), *European Security Law*, Oxford University Press, 2007, 329-349

WHITMAN R., *The EU and EU Foreign, Security and Defence Policy after Brexit: Integrated, Associated, or Detached?*, National Institute Economic Review, 2016

WISE E., *Debate over EU Security Council seat “Premature”*, Politico, 1995, November 1

### **International Documents**

TEU, Consolidated Version of the Treaty on European Union, OJ C 326/41, 2012

TFEU, Consolidated Version of the Treaty on the Functioning of the European Union, OJ 326/47, 2012

Comprehensive Proposal For the Kosovo Status Settlement, 2007, Feb 2

COUNCIL COMMON POSITION 2003/444/CFSP, OJ L 150/67, 2003, Jun 16

COUNCIL DECISION 2021/509 CFSP, OJ L 102/24, 2021, March 22

COUNCIL DECISION 2015/778/CFSP, OJ L 122/31, 2015, May 18

COUNCIL JOINT ACTION 2008/124/CFSP, OJ L 42/92, 2008, Feb 4

COUNCIL JOINT ACTION 2006/304/CFSP, OJ L 112/19, 2006, Apr 10

EUROPEAN COMMISSION, *The European Union and the United Nations: The choice of multilateralism*, Communication from the Commission to the Council and the European Parliament, 10 Sep 2003

EUROPEAN COUNCIL, *A secure Europe in a better world: European Security Strategy*, Brussels, 2003, Dec 12

EUROPEAN COUNCIL, Headline Goal 2010, 2004, Jun 17

EUROPEAN COUNCIL, Presidency Conclusions, Helsinki, 1999, Dec 10

EUROPEAN PARLIAMENT, Resolution Adopted by the European Parliament on the EU as a Global Actor: Its role in Multinational Organisations, 2011, May 11

HIGH REPRESENTATIVE OF THE EUROPEAN UNION, *Shared Vision, Common Action, A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy*, 14392/16, 2016, November 14

INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVERIGNTY, *The responsibility to protect*, Dec 2001

JOINT DECLARATION OF SAINT-MALO, British-French Summit, 1998, Dec 4

SHUMAN DECLARATION, 9 May 1950

UNITED NATIONS, *Charter of the United Nations*, 1945, Oct 24, 1 UNTS XVI

UN GENERAL ASSEMBLY, A 77/L. 52, 2022, April 26

UN GENERAL ASSEMBLY, Report of the Secretary General, A/72/525, 2017, October 13

UN GENERAL ASSEMBLY, A 69/L. 560, 2015, September 14

UN GENERAL ASSEMBLY, A 64/L. 67, 2010, Aug 31

UN GENERAL ASSEMBLY, *Rome Statute of the International Criminal Court*, Jul 17, 1998

UN SECRETARY-GENERAL, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 2008, Nov 24

UN SECURITY COUNCIL S/Res/2240, 2015, October 9

UN SECURITY COUNCIL, S/Res/1422, 2002, Jul 12

UN SECURITY COUNCIL, S/Res/1244, 1999, Jun 10

Vienna Convention on the Law of Treaties, 1969, May 23, 1155 UNTS 331

WORLD TRADE ORGANISATION, General Agreement on Tariffs and Trade (GATT 1994), 1994

### **Jurisprudence**

EUROPEAN COURT OF JUSTICE, Case C-455/14 P, *H v Council and Others*, 2016, EU:C:2016:569

EUROPEAN COURT OF JUSTICE, Joined Cases C-405/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation*, 2008, ECR I-6351

EUROPEAN COURT OF JUSTICE, FIRST INSTANCE, Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 2005, ECR II-3533

EUROPEAN COURT OF JUSTICE, FIRST INSTANCE, Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, 2005, ECR II-3649

EUROPEAN COURT OF JUSTICE, Case C-366/10, *Air Transport Association of America and others (ATAA) v Secretary of State for Energy and Climate Change*, 2011, ECLI:EU:C:2011:864

EUROPEAN COURT OF JUSTICE, Case C-61/94, *Commission of the European Communities v Federal Republic of Germany*, 1996, ECLI:EU:C:1996:313

EUROPEAN COURT OF JUSTICE, Case C-6/64, *Flaminio Costa v. E.N.E.L.*, 1964, ECLI:EU:C:1964:66

EUROPEAN COURT OF JUSTICE, Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963, ECLI:EU:C:1963:1

EUROPEAN COURT OF JUSTICE, Joined Cases 21-24/72, *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit*, 1972, ECR 1219

## **Abstract**

### **THE EUROPEAN UNION AND THE UN SECURITY COUNCIL: A CONFLICT OF ATTRIBUTION**

While the relationship between the United Nations and the European Union is a common topic in academic literature, the rapid evolution of the latter into a unique example of progressive integration and establishment of common institutions and binding rules for Member States has rendered somehow difficult a comprehensive approach to the topic, with particular regards to potential conflicts between the two judicial systems in certain domains such as international peace and security.

The transformations occurred within the European Union and the primacy over Member States may have created, in a particular, a theoretical conflict in the attributions of certain states (France, and until recently the United Kingdom) in their roles of sovereign states within the United Nations Security Council and, at the same time, Member States participating in the shared decisions and institutions of the European Union. At present, the European Union is, globally, among the most important contributors to the UN budget and a successful partner in the conduct of peace-keeping operations, after a gradual mutual recognition of the importance of both systems in their constitutive and legislative acts. Notwithstanding the many steps, both legal and political, undertaken to ensure a profitable cooperation, a conflict of attribution may still exist in theory as well as in practice.

Analysing those instances where a divergence between EU common interests and UN Security Council positions has translated into an active role of certain EU institutions possibly overstepping their authority with regards to international obligations and *jus cogens*. Such analysis offers a basis of discussion around the desirability, and legitimacy, of the influence of the European Union on the institutions of the United Nations as well as on the legal and political considerations animating debates on possible reforms within the United Nations, the European Union, or both.

## **DIE EUROPÄISCHE UNION UND DER UN-SICHERHEITSRAT: EIN KONFLIKT DER ZUSCHREIBUNG**

Das Verhältnis zwischen den Vereinten Nationen und der Europäischen Union ist in der akademischen Literatur ein gängiges Thema. Die rasche Entwicklung der Europäischen Union als einzigartiges Beispiel für eine fortschreitende Integration und die Schaffung gemeinsamer Institutionen und verbindlicher Regeln für die Mitgliedstaaten hat jedoch eine umfassende Betrachtung des Themas erschwert, insbesondere im Hinblick auf potenzielle Konflikte zwischen den beiden Rechtssystemen in bestimmten Bereichen wie dem internationalen Frieden und der Sicherheit.

Die Veränderungen innerhalb der Europäischen Union und die Vormachtstellung gegenüber den Mitgliedstaaten haben möglicherweise zu einem theoretischen Konflikt zwischen bestimmten Staaten (Frankreich und bis vor kurzem das Vereinigte Königreich) in ihrer Rolle als souveräne Staaten im Sicherheitsrat der Vereinten Nationen und gleichzeitig als Mitgliedstaaten, die an den gemeinsamen Entscheidungen und Institutionen der Europäischen Union beteiligt sind, geführt. Gegenwärtig ist die Europäische Union weltweit einer der wichtigsten Beitragszahler für den UN-Haushalt und ein erfolgreicher Partner bei der Durchführung von Friedensoperationen, nachdem die Bedeutung beider Systeme in ihren Verfassungs- und Gesetzgebungsakten schrittweise gegenseitig anerkannt wurde. Trotz der zahlreichen rechtlichen und politischen Schritte, die unternommen wurden, um eine gewinnbringende Zusammenarbeit zu gewährleisten, kann es sowohl in der Theorie als auch in der Praxis immer noch zu einem Zuweisungsstreit kommen.

Die vorliegende Arbeit wird sich auf die Divergenzen zwischen den gemeinsamen Standpunkten der EU und den Interessen des UN-Sicherheitsrats in Bezug auf internationale Verpflichtungen und das Jus Cogens konzentrieren, die in einigen Fällen im Laufe der Jahre aufgetreten sind. Eine solche Analyse bietet eine Diskussionsgrundlage für die Frage, ob der Einfluss der Europäischen Union auf die Institutionen der Vereinten Nationen wünschenswert und legitim ist, sowie für die rechtlichen und politischen Erwägungen, die die Debatten über mögliche Reformen innerhalb der Vereinten Nationen, der Europäischen Union oder beider anstoßen.