The Rule of Law, Fundamental Rights, the EU's Common Foreign and Security Policy and the ECHR: Quartet of Constant Dissonance?

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Abstract

The rule of law defect in the Treaties caused by the jurisdictional carve-out in Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU regarding the CFSP can be fully rectified only by an ordinary Treaty revision pursuant to Art. 48 TEU. While the ECJ has considerably extended its jurisdiction into the CFSP area, it could there, from its own power, only approximate without completely realising the rule of law value of Art. 2 TEU. Yet, the Court has recently missed the opportunity to extend that jurisdiction to all cases in which a CFSP act arguably violates fundamental rights. That would have been possible on the basis of its power under Art. 275(2) TFEU to monitor compliance with Art. 40 TEU, read together with the prohibition of adopting legislative acts in the CFSP. Instead, the ECJ introduced an indeterminate political question doctrine into EU law. Therefore, the CFSP obstacle to the EU's accession to the ECHR, which the ECJ wrongly assumed in Opinion 2/13, has not been entirely removed. It remains to be seen how the EU Member States will internally solve that last remaining impediment to compliance with Art. 6(2) TEU. This they promised to the other Convention States in 2023, with whom they preliminarily agreed on a Revised Draft Accession Agreement that overcomes all the other objections in the ECJ's Opinion 2/13. The article suggests that the Member States should jointly and in concert with the three competent EU institutions submit the present Revised Draft Accession Agreement as it is, without further delay, to the ECJ under Art. 218(11) TFEU and convince the Court of removing its unnecessary CFSP obstacle to the EU's ECHR accession in one way or another.

Keywords: Common Foreign and Security Policy, ECHR Accession by EU, ECJ Jurisdiction, Rule of Law, Human Rights

A. The Judiciary, Foreign Policy and Human Rights: Squaring the Circle

Does the rule of law extend to the EU's Common Foreign and Security Policy (CFSP)? In particular: Is the compatibility of CFSP acts with human rights effectively guaranteed? Considering that Art. 2 TEU counts the rule of law and respect for human rights among the foundational values of the EU, the obvious answer to these two questions would seem to be "of course". However, Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU largely exclude the CFSP from the jurisdiction of the ECJ in order to avoid the Court's constitutionalising and integrationist

tendencies from conquering the Member States' last reserve of (jointly exercised) sovereignty.[1] This begs the question if the rule of law and with it, human rights protection can be ensured without court supervision.

I. Techniques of Judicial Abstention in Foreign Relations Cases

Foreign policy, due to its specific conditions, is generally less welcoming to judicial interventions than other policy areas: On the international law stage that is still dominated by power politics, actors must speak with one voice to make themselves heard (concentration), and that usually is the voice of their political branches which are better equipped for this purpose, in terms of both their functionality and their legitimacy. Also, since one actor can mostly not achieve its goals unilaterally, but only in coordination and cooperation with other actors, they all need political as well as legal flexibility to produce proper results.

Therefore, constitutional systems around the world have developed various techniques for ensuring the necessary concentration and flexibility in the conduct of foreign relations, such as the political question doctrine in the U.S.,[2] the "acte de gouvernement" concept in France,[3] the deferential judicial review of foreign policy acts in Germany[4] and the deference of EU Courts to the political choices in complex issues of international politics regarding restrictive measures.[5] Yet, the question remains whether the particularly far-reaching exclusion of the CFSP from the jurisdiction of the EU judicature constitutes too much concentration and flexibility in favour of the EU's political branches in the foreign policy area, for a system based on the rule of law. It creates an accountability gap[6] that obviously brings a false note into the quartet of the rule of law, fundamental rights, the CFSP and the ECHR.

1 *Eeckhout*, Jean Monnet Working Paper 1/15, pp. 33 f.; *Koutrakos*, ICLQ 2018/1, p. 2.
2 *Bradley*, pp. 5 f., 75, 306 f. and 339. See also *Martinez*, in: Rosenfeld/Sajo (eds.), pp. 573 f. But see also the vigorous criticism by *Franck*, who answers the question in the title of his book with a resounding "yes".
3 See the sketch in ECtHR, Nos. 17131/19 et al., *Tamazout and Others v. France*, judgment of 4 April 2024, paras. 84 ff.
4 See, e.g., BVerwG, judgment of 25 November 2020 – 6 C 7.19 = NJW 2021, 1610, on the legal obligations of the German government regarding U.S. drone strikes in Yemen via the Ramstein Air Base in Germany.
5 ECJ, Case C-440/14 P, *National Iranian Oil Company v. Council*, ECLI:EU:C:2016:128, paras. 77 ff. See also the Opinion of the *AG Ćapeta* in Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2023:901, para. 117 with further references. However, the political choices meet legal limits where they affect the fundamental rights of individuals: GC, Case T-212/22, *Prigozhina v. Council*, ECLI:EU:T:2023:104.
6 *Cremona*, European Papers 2017/2, p. 673.

II. EU Accession to the ECHR: Obstacle Created by ECJ's Lack of Jurisdiction over CFSP

Another question is whether the exclusion of CFSP acts from the EU Courts' jurisdiction will definitely thwart the EU's accession to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms.[7] Since the entry into force of Art. 6(2) TEU in 2009, the Union actually has a primary-law based obligation to accede to the ECHR.[8] The first attempt to fulfil this obligation produced a draft accession agreement in June 2013, after more than three years of negotiations between the Commission and an Ad Hoc Negotiation Group of the Council of Europe's Steering Committee for Human Rights (CDDH). But this draft agreement miserably failed at the ECJ, to which it had been submitted by the Commission pursuant to Art. 218(11) TFEU: The full Court opined that it was incompatible with the Treaties in several respects, disregarding in particular the specific characteristics and autonomy of EU law.[9]

In the current context, the ECJ's objection against the jurisdictional arrangements regarding the CFSP is particularly important. The draft accession agreement did not in any way limit the jurisdiction of the European Court of Human Rights over CFSP acts. In its request for the opinion, the Commission asserted that the ECJ's jurisdiction in CFSP matters was "sufficiently broad to encompass any situation that could be covered by an application to the ECtHR".[10] But the ECJ did not agree. Since at that time it had not yet defined the limits of its own jurisdiction over CFSP acts, the Court could only state "that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice."[11] This was a specific characteristic of EU law[12] that created a situation in which "the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights. (…) Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR."[13] Yet, it was incompatible with earlier case law of the ECJ to confer the judicial review of EU acts

7 Of 4 November 1950, ETS No. 5, as amended; consolidated version available at https://rm.coe.int/1680a2353d (28/10/2024).
8 See in this sense AG Ćapeta, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2023:901, para. 145.
9 ECJ, Opinion 2/13, *ECHR*, ECLI:EU:C:2014:2454. For a thorough critique of Opinion 2/13, see *Eeckhout*, Jean Monnet Working Paper 1/15; *Halleskov Storgaard*, HRLR 2015/3, pp. 485 ff.; *Odermatt*, Leuven Centre for Global Governance Studies Working Paper No. 150.
10 ECJ, Opinion 2/13, *ECHR*, ECLI:EU:C:2014:2454, para. 251.
11 *Ibid.*, para. 252.
12 *Ibid.*, para. 253.
13 *Ibid.*, paras. 254 f.

or omissions, if only regarding compatibility with international law, exclusively to an international court outside the EU framework.[14] This is why the draft agreement failed to have regard to the specific characteristics of EU law concerning the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.[15]

This part of the opinion, which deviates from the view of the Advocate General[16] and brings a second false note into the quartet of the rule of law, fundamental rights, the CFSP and the ECHR, seems to be based on inter-institutional jealousy: The ECtHR must not be granted jurisdiction where it is denied to the ECJ. In other words: Primary law (implicitly) requires that the ECJ must have the chance to rectify human rights violations before they are taken to the Convention level. However understandable the ECJ's frustration, its "all or nothing" approach to the judicial review of CFSP acts is incompatible with Art. 6(2) TEU because it thwarts the EU's accession to the ECHR[17] and does a disservice to human rights protection and the rule of law more generally. As long as a Treaty revision completely eliminating the jurisdictional limitation of Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU remains unlikely, it is better for both human rights and the rule of law that the EU's CFSP acts are subject to direct judicial review at least by the ECtHR. This is also the only way for the EU to fulfil the obligation to accede to the ECHR, pursuant to Art. 6(2) TEU – unless the ECJ abandons its CFSP-related objection to that accession.

As a matter of fact, the ECtHR already has jurisdiction to review the compatibility of the EU's CFSP acts with Convention rights, if only indirectly: Anyone who plausibly claims to be the victim of a violation of rights set forth in the ECHR by one or more EU Member States can lodge an individual application against that or those States (Art. 34 ECHR). When a CFSP act that interferes with Convention rights is implemented by a Member State, the victim can challenge it in the courts of that Member State, and after unsuccessfully exhausting the national remedies, apply to the ECtHR.[18] Absent national implementation measures, the victim can lodge an individual complaint pursuant to Art. 34 ECHR against any Member State or all Member States claiming that they have failed to provide adequate remedies against CFSP acts interfering with their Convention rights,[19] in violation of Art. 6(1)

14 *Ibid.*, para. 256.
15 *Ibid.*, para. 258.
16 View of the AG Kokott, Opinion 2/13, *ECHR*, ECLI:EU:C:2014:2475, paras. 193 ff.
17 See *Polakiewicz/Panosch*, in: Seitz/Straub/Weyeneth (eds.), p. 1040.
18 See, e.g., the German court decision determining that the transfer of a suspected pirate to Kenia by a German navy unit that was part of the EU mission ATALANTA in the Gulf of Aden was illegal (OVG Nordrhein-Westfalen, judgment of 18 September 2014 – 4 A 2948/11, available at: https://openjur.de/u/731026.html (28/10/2024). See also ECtHR, No. 55721/07, *Al-Skeini and Others v. UK*, judgment of 7 July 2011.
19 CFSP acts as such will not often directly interfere with fundamental rights (*Polakiewicz/Panosch*, in: Seitz/Straub/Weyeneth (eds.), p. 1038). See ECtHR, No. 6422/02, 9916/02, *Segi and Gestoras Pro Amnistía and Others v. 15 EU Member States*, decision of 23 May 2002, declaring the applications inadmissible.

ECHR or the pertinent substantive Convention right in conjunction with Art. 13 ECHR.

The ECJ-created CFSP obstacle to ECHR accession by the EU will be addressed again at the end, in light of the ECJ's new case law on the jurisdictional limitation regarding the CFSP.[20]

B. The Rule of Law as the Corner Stone of the EU Constitution: Acquis under the Treaty of Lisbon

One of the founding fathers of the European integration project, *Walter Hallstein*, characterised the European Community as a "creation of law". This was the decisive innovation that distinguished it from earlier attempts to unite Europe: neither violence, nor subjugation was used as a means, but an intellectual, a cultural force: the law. The majesty of law was to achieve what blood and iron had been unable to do for centuries. For only self-willed unity through submission to law could create a lasting peace order in Europe.[21]

Against this background, the rule of law takes on special significance among the fundamental values common to the Union and Member States that are enshrined in Art. 2 TEU. This was also recognised by the EU legislature in the following formulation: "While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa."[22]

In substance, the ECJ has followed *Hallstein* when it characterised the European Community as a "Community based on the rule of law"[23] and later the European Union as a "union based on the rule of law".[24] Invariably, the Court has emphasised one essential element of the rule of law in the EC/EU – the comprehensive judicial protection of natural and legal persons against acts of the EU institutions as well as national measures relating to the application to them of an EU act.[25] This general

20 See below F.

21 *Hallstein*, p. 53.

22 Recital (6) of the preamble to Regulation (EU; Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L 433 I, p. 1.

23 ECJ, Case 294/83, *Les Verts*, ECR 1986, 1339, para. 23; Opinion 1/91, *EEA I*, ECR 1991, I-6079, para. 21; Joined Cases C-402/05 P and C-415/05 P, *Kadi I*, ECLI:EU:C:2008:461, para. 281.

24 ECJ, Joined Cases C-584/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518, para. 66; Case C-650/18, *Hungary v. European Parliament*, ECLI:EU:C:2021:426, para. 34; Case C-743/19, *European Parliament v. Council*, ECLI:EU:C:2022:569, para. 35.

25 ECJ, Case 294/83, *Les Verts*, ECR 1986, 1339, para. 23; Case C-50/00 P, *Unión de Pequeños Agricultores*, ECR 2002, I-6677, paras. 38 ff.; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518, para. 66; Case C-64/16, *Associação Sindi-*

principle of Union law has been codified as a fundamental right in Art. 47(1) of the EU Charta of Fundamental Rights (CFR).[26] Apart from the individual right to a judicial remedy, the fulfilment by the ECJ of its objective general task, as defined in Art. 19(1) subpara. 1 sentence 2 TEU, namely to "ensure that in the interpretation and application of the Treaties the law is observed", is an indispensable condition for the effective implementation of the rule of law: The law does not "rule", if its observation is not ensured in each and every case, and Art. 19(1) subpara. 2 TEU makes the Member States and their courts responsible for achieving this goal, alongside the EU. Accordingly, the ECJ has characterised Art. 19 TEU in its supranational and national component as giving "concrete expression to the value of the rule of law stated in Article 2 TEU".[27]

In the current primary Union law *acquis* based on the Treaty of Lisbon,[28] the rule of law value and the ensurance task of the ECJ as its necessary ingredient obviously extend to all areas of EU activities and EU policies, both the supranational ones and the intergovernmental CFSP as well as the Common Security and Defence Policy (CSDP) as its integral part.[29] This is indicated by the systematic position of Art. 2 TEU among the common provisions of the TEU and Art. 19(1) TEU among the provisions on the Union's institutions that act for it in all policy areas. It is put beyond doubt by the following articles of the Treaties pertaining to external action, including action within the CFSP:

- Art. 3(5) TEU specifically obliges the Union to uphold and promote its values (including the rule of law) in its relations with the wider world (sentence 1) and, more specifically, to "contribute (…) to the strict observance and the development of international law, including respect for the principles of the United Nations Charter (sentence 2)." The latter part of sentence 2 can be qualified as a codification of the principle of friendliness toward international law and as an indication that the EU's rule of law concept comprises the international rule of law.[30]
- Art. 21(1) subpara. 1 TEU, the first of the general provisions on the Union's external action that cover both supranational acts and CFSP acts,[31] stipulates that EU action on the international scene "shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: (…) the rule of law, the universality and indivisibility of human rights and fundamental freedoms (…) and respect for the princi-

cal dos Juízes Portugueses, ECLI:EU:C:2018:117, para. 31; Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, para. 49.

26 See the Explanation on Art. 47 CFR, OJ 2007 C 303, p. 17.

27 ECJ, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 32.

28 Of 13 December 2007, OJ 2007 C 306, p. 1.

29 Art. 42(1) sentence 1 TEU.

30 On the EU external rule of law mandate, see *Hillion*, Columbia J. Eur. Law 2023/2, pp. 230 ff.

31 See also Art. 21(3) subpara. 1 TEU.

ples of the United Nations Charter and international law." This again alludes to the international rule of law.

- Art. 23 TEU once more explicitly commits the Union to compliance with Art. 21 TEU when taking action within the framework of the CFSP.

The ECJ has confirmed that the Treaty of Lisbon brought about a fundamental structural reform of the Treaties that integrated the CFSP into the general framework of EU law, even though it remained subject to special rules and procedures. This reform has made the pre-Lisbon rules on the CFSP and the Court's own pertinent case law irrelevant for assessing the current scope of the powers of the EU and its institutions, including the ECJ, in the CFSP area.[32] The ECJ has also confirmed that "the inclusion of the CFSP in the EU constitutional framework means that the basic principles of the EU legal order also apply in the context of that policy. These include, in particular, respect for the rule of law and fundamental rights, values expressed in Art. 2 TEU and given concrete expression in Art. 19 TEU, which require that both EU and Member State authorities be subject to judicial review."[33]

This extension of the rule of law to the CFSP is consistent with the recognition that the internal and the international rule of law are cut from the same cloth: States as well as supranational organisations like the EU need to adhere to both its internal and external components, if they want to remain faithful to the rule of law. The qualification of the rule of law as a "universal" value by the 2nd recital of preamble of the TEU confirms this, because it not only denotes that the value's internal component is recognised around the globe, but also that its international component rules the universal, i.e., global level. The international rule of law must not be taken less seriously than the internal rule of law, not least because lawlessness there tends to breed lawlessness here. This was confirmed in substance by the ECJ when it determined that a third State with international legal personality constituted a legal person in the sense of Art. 263(4) TFEU and was thus capable of bringing actions for annulment where the other conditions laid down in that provision were satisfied.[34] That held true even if the EU did not have access to the courts of that third State to challenge the latter's decisions negatively affecting the EU: "The obligations of the European Union to ensure respect for the rule of law cannot in any way be made subject to a condition of reciprocity as regards relations between the European Union and third States."[35]

32 ECJ, Case C-134/19 P, *Bank Refah Kargaran*, ECLI:EU:C:2020:793, paras. 47 f.
33 ECJ, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2024:725, para. 68.
34 ECJ, Case C-872/19 P, *Bolivarian Republic of Venezuela*, ECLI:EU:C:2021:507, paras. 23 ff. For a critique, see *Poli*, CMLR 2022/4, pp. 1057 ff.
35 *Ibid.*, para. 52. The GC has meanwhile dismissed the action by Venezuela as unfounded: GC, Case T-65/18 RENV, *Bolivarian Republic of Venezuela,* ECLI:EU:T:2023:529. Most recently, the ECJ confirmed the capacity of the Front Polisario to bring an action for annulment pursuant to Art. 263(4) TFEU (ECJ, Joined Cases C-779/21 P and C-799/21 P, *Front Polisario*, ECLI:EU:C:2024:835, paras. 63 ff.).

C. Legal Constraints on CFSP Acts

I. Consistency in Legal Constraints on Internal and External Action

The CFSP does not take place in a legal vacuum. Rather, all the legal constraints on EU acts in general also limit the EU institutions in their external action, including in the area of the CFSP. This is a compelling consequence of the need to ensure consistency between the different – supranational and intergovernmental – areas of EU external action and between these and the Union's internal policies.[36] Accordingly, the law that "rules" the CFSP and is to be observed by the EU when conducting that policy consists of both EU law, comprising primary Union law (the Treaties and the CFR) and possibly applicable secondary law, and public international law, as far as it binds the EU. However, while the EU's internal and external (including CFSP) actions are equally subject to legal constraints, they are not necessarily subject to the same ones.

II. Supranational Constraints Deriving from EU Law

There is no doubt that, as a general rule, CFSP acts, like other acts of EU institutions, are subject to constraints deriving from EU law. The question will, however, always be whether a certain provision of primary or secondary Union law is also outward-looking in the sense that it is intended not only to constrain internal EU acts, but also external EU acts, including CFSP acts. This evokes the long-lasting discussion on the extraterritorial application of the human rights enshrined in the ECHR that are intended to bind the Convention States only with regard to everyone within their – primarily territorial – jurisdiction (Art. 1 ECHR). There is extensive and controversial case law of the ECtHR in this regard.[37]

In contrast, there is little case law of the ECJ on the extraterritorial application of the fundamental freedoms and fundamental rights of EU law. But the ECJ has recognised that Art. 52 TEU and Art. 355 TFEU, the provisions on the territorial scope of the Treaties, did not exclude that rules of Union law might apply to professional activities outside Union territory, provided that there was a sufficiently close link between those activities and the relevant rules of Union law.[38] In so far as the CFR contains rights corresponding to Convention rights, the meaning and scope, including the extraterritorial scope, of the former shall be the same as that of the latter.[39] The ECJ has also accepted the extraterritorial scope of Art. 101 TFEU.[40] Tak-

36 Art. 21(1) subpara. 2 TEU.
37 See ECtHR, Press Unit, Factsheet Extraterritorial jurisdiction of States Parties to the European Convention on Human Rights, July 2018, available at: https://www.echr.coe.int/documents/d/echr/FS_Extra-territorial_jurisdiction_ENG (28/10/2024); ECtHR, No. 8019/16, 43800/14 and 28525/20, *Ukraine and The Netherlands v. Russia*, decision of 30 November 2022, paras. 553 ff., *Giegerich*, EuGRZ 2023/1–8, pp. 24 ff.
38 ECJ, Case C-214/94, *Boukhalfa*, ECR 1996, I-2253, para. 14.
39 Art. 52(3) CFR. See *Giegerich*, EuGRZ 2023/1–8, pp. 32 f.
40 ECJ, Case C-413/14 P, *Intel*, ECLI:EU:C:2017:632, paras. 40 ff.

ing into consideration that the Union's action on the international scene shall be guided by the rule of law (Art. 21(1) subpara. 1 TEU) and that the Union shall pursue CFSP acts "in order to (...) (b) consolidate and support … the rule of law", there is no doubt that the ordinary constraints of primary and secondary EU law at least *prima facie* also apply to CFSP acts.

It is particularly obvious that CFSP acts should be subject to the fundamental rights enshrined in the CFR. Not only does Art. 2 TEU identify respect for human rights as another foundational value of the EU, besides the rule of law, and the interdependence of both values has specifically been recognised by the Union's legislature.[41] But Art. 21(1) TEU also turns human rights into specific precepts for guiding the Union's action on the international scene, and Art. 21(2)(b) TEU obliges the EU to consolidate and support human rights, besides the rule of law, in all fields of international relations. Moreover, Art. 3(5) sentence 2 TEU commits the Union to contribute to the protection of human rights in its relations with the wider world. Finally, and most importantly, Art. 51(1) CFR binds the institutions, bodies, offices and agencies of the Union to the provisions of the Charter and obliges them to respect the rights, observe the principles and promote the application thereof in accordance with the powers conferred on them by the Treaties, including the powers conferred by the provisions of Chapter 2 of Title V of the TEU regarding the CFSP.[42] This has expressly been confirmed by the ECJ.[43] According to the ECJ's case law, the CFR binds the EU institutions even when they act entirely outside the EU legal order,[44] thus underlining the importance of ensuring that fundamental rights are always respected by the EU, wherever, whenever and however it conducts itself.[45]

III. Constraints Deriving from Public International Law – Mitigated by Judicial Abstention Techniques

As regards public international law (that primarily, but not only regulates external action), the EU is bound by the international agreements that it has concluded and that Art. 216(2) TFEU incorporates into Union law. This provision makes those agreements binding on the EU institutions, whereas it follows from Art. 218 (11) TFEU that they must be compatible with primary law. Read together, these two provision accord those agreements a rank between primary and secondary law. In this context, it does not matter whether the EU entered into the agreements based

41 See above B. See also 3rd recital of the preamble of the Universal Declaration of Human Rights (fn. 68): "Whereas it is essential (…) that human rights should be protected by the rule of law".

42 *Van Elsuwege*, CMLR 2021/6, pp. 1736 f.

43 ECJ, Case C-263/14, *European Parliament v. Council*, ECLI:EU:C:2016:435, para. 47; Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2024: 725, para. 68.

44 ECJ, Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising*, ECLI:EU:C:2016:701, paras. 55 ff.

45 See AG Ćapeta, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2023:901, para. 115 with fn. 77.

on Art. 37 TEU (*i.e.*, agreements whose subject-matter belongs to the CFSP) or on a supranational basis in the TFEU (*i.e.*, agreements whose subject-matter belongs to other EU policy areas) or on a combination of both (*i.e.*, agreements whose subject-matter belongs to both CFSP and other EU policies – cross-Treaty [formerly cross-pillar] mixity).[46] Rules from the two other sources of international law, *i.e.*, customary international law and general principles of law,[47] that bind the Union have been treated by the ECJ like rules deriving from agreements concluded by the EU.[48] Recently, the ECJ invoked Art. 3(5) sentence 2 TEU (that was only inserted by the Treaty of Lisbon) to support its practice.[49] According to the ECJ's case law, both primary and secondary Union law provisions have to be interpreted in conformity with the EU's international obligations, wherever possible.[50]

In view of their internal rank between primary and secondary EU law, rules deriving from all three sources of public international law can be used as standards of review for all EU acts (including, as a general rule, CFSP acts) by the ECJ and by national courts cooperating with it via the preliminary reference procedure (Art. 267 TFEU). But such use is conditional on the direct applicability or effect of those rules.[51] According to the ECJ, a provision of an international agreement concluded by the EU "must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure".[52] This indicates that the ECJ does not only consider the clarity, precision and unconditionality of the specific provision in order to determine its direct effect (as it does regarding ordinary Union law provisions),[53] but also and primarily, if the nature, structure and broad logic of the respective agreement precludes its provisions from being used as a standard of review

46 On cross-pillar or cross-Treaty mixity, see *Giegerich*, in: Pechstein/Nowak/Häde (eds.), Art. 216 AEUV, paras. 78 ff.

47 See Art. 38 (1) lit. b, c of the Statute of the International Court of Justice of 26 June 1945 (1 UNTS XVI).

48 ECJ, Case C-162/96, *Racke*, ECR 1998, I-3655, paras. 45 f.; C-366/10, *Air Transport Association of America*, ECLI:EU:C:2011:864, paras. 101 ff. See *Giegerich*, in: Pechstein/Nowak/Häde (eds.), Art. 216 AEUV, paras. 48 ff., 256 ff.

49 ECJ, Case C-366/10, *Air Transport Association of America*, ECR 2011, I-13755, para. 101; Case C-363/18, *Organisation juive européenne*, ECLI:EU:C:2019:954, para. 48.

50 *Casolari*, in: Cannizzaro/Palchetti/Wessel (eds.), pp. 402 ff.; *Giegerich*, in: Pechstein/Nowak/Häde (eds.), Art. 216 AEUV, paras. 220, 256.

51 See the overview by *von Arnauld*, in: von Arnauld/Bungenberg (eds.), § 1 paras. 107 ff.

52 ECJ, Case C-240/09, *Lesoochranárske zoskupenie VLK*, ECR 2011, I-1255, para. 44.

53 It is on this basis that the ECJ has denied the direct effect of several provisions of the Aarhus Convention: Case C-240/09, *Aarhus Convention*, ECR 2011, I-1255, para. 45; Joined Cases C-401/12 P to C-403/12 P, *Vereniging Milieudefensie*, ECLI:EC:C:2015:4, paras. 52 ff.; Joined Cases C-404/12 P and C-405/12 P, *Stichting Natuur en Milieu*, ECLI:EU:C:2015:5, paras. 44 ff.; Case C-612/13 P, *ClientEarth*, ECLI:EU:C:2015:486, paras. 25 ff. See the critique by *Ankersmit/Pirker*, Review of EU legislation under EU international agreements revisited: Aarhus receives another blow, European Law Blog, November 17, 2015, available at: https://www.europeanlawblog.eu/pub/review-of-eu-legislation-under-eu-international-agreements-revisited-aarhus-receives-another-blow/release/1 (28/10/2024).

for EU acts.[54] On this basis, which could be called the functional equivalent of the political question doctrine,[55] the ECJ has, *e.g.,* consistently denied the direct applicability of WTO law in both its own cases and national court cases, with few exceptions.[56] It has also denied the direct applicability of the provisions of the UN Convention on the Law of the Sea.[57]

While this ECJ case law on the restrictive use of rules of international law as standards of review has so far only concerned the review of supranational EU acts, it would also have to be applied to the review of CFSP acts. This is because it is based on the constitutional objective of maintaining the institutional balance, *i.e.*, the adequate distribution of functions between the EU's political and judicial institutions.[58] Excluding courts from the enforcement of international legal obligations is a practice also used by many treaty partners of the EU. On the other hand, there is an obvious tension with the rule of law, if courts refuse the application of clear, precise and unconditional provisions of international agreements that would ensure the EU acts' compatibility with international law, for the sole purpose of preserving the Union's room for political manoeuvre at the international level.[59] This legal trick raises the chances of the EU's political branches to get away with violations of international law. It has increasingly been employed by the political branches in the form of "no direct effect clauses" that are inserted either in the EU's agreements[60] or in the Council decisions pursuant to Art. 218(6) TFEU that conclude the agreements which bind the courts.[61]

However, the ECJ has at least mitigated the detrimental consequences of that "no direct effect" approach by insisting that Union law provisions have to be interpreted in conformity also with those international obligations of the EU that are not directly applicable.[62] A further mitigation results from the Court's use of WTO provisions for reviewing national acts in infringement proceedings initiated by the

54 ECJ, Case 104/81, *Kupferberg*, ECR 1982, 3641, para. 22; Case C-308/06, *Intertanko*, ECR 2008, I-4057, para. 45; Case C-366/10, *Air Transport Association of America*, ECR 2011, I-13755, para. 53.

55 See AG Capeta, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2023:901, para. 113 with footnote 75.

56 ECJ, Case C-377/02, *Van Parys*, ECR 2005, I-1465, paras. 37 ff. (with further references).

57 ECJ, Case C-308/06, *Intertanko*, ECR 2008, I-4057, paras. 45 ff. See the critique by *Mendez*, EJIL 2010/1, pp. 99 ff.

58 See *Giegerich*, in: Pechstein/Nowak/Häde (eds.), Art. 216 AEUV, paras. 239, 241 f.

59 For a critique, see *Eeckhout*, pp. 375 ff.

60 See, e.g., Art. 30.6 of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, of 30 October 2016, OJ 2017 L 11, p. 23; COMPROV.16 of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, of 30 December 2020 – with exceptions, OJ 2020 L 444, p. 14.

61 See *Giegerich*, in: Pechstein/Nowak/Häde (eds.), Art. 216 AEUV, paras. 240.

62 ECJ, Case C-53/96, *Hermès*, ECR 1998, I-3603, paras. 28, 35; Case C-431/05, *Merck Genéricos*, ECR 2007, I-7001, para. 35; Case C-240/09, *Aarhus Convention*, ECR 2011, I-1255, paras. 45 ff.

Commission under Art. 258 TFEU in order to prevent Member States from driving the EU into a breach of its treaty obligations.[63]

Regarding constraints on EU external action, including CFSP action, by international human rights law, the EU is party to only two human rights treaties: the Convention on the Rights of Persons with Disabilities[64] and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.[65] Despite the clear mandate in Art. 6(2) TEU, the Union has not yet acceded to the ECHR.[66] However, it is definitely bound by human rights obligations, hard-law ones deriving from customary international law[67] as well as soft-law ones deriving from the Universal Declaration of Human Rights (UDHR).[68] In substance, this is confirmed by Art. 3(5) sentence 2 TEU that obliges the Union to contribute to "the protection of human rights … as well as the strict observance and the development of international law, including respect for the principles of the United Nations Charter." The EU's first and most important step for thus contributing is to respect those hard and soft international human rights rules itself in an exemplary manner.

It is interesting to note that the EU legislature has established "a framework for targeted restrictive measures to address serious human rights violations and abuses worldwide".[69] For the purposes of defining "serious human rights violations and abuses", these secondary acts refer to customary international law as well as twelve human rights treaties, eleven of which the EU has not acceded to. This can be taken as evidence of the Union's intention to respect the substantive provisions of these treaties as a codification of customary international law, but at least as a duty of honour.

International human rights obligations, regardless of whether they are derived from treaty provisions or rules of customary international law, are usually concrete enough to be directly applicable, but there is little pertinent ECJ case law.[70] As

63 ECJ, Case C-66/18, *Commission v. Hungary*, ECLI:EU:C:2020:792, paras. 68 ff.; see also the pertinent Opinion by the AG Kokott, Case C-66/18, *Commission v. Hungary*, ECLI:EU:C:2020:172, paras. 60 ff., and the critique by *Fontanelli*, ESIL Reflections 2021/2.

64 Of 13 December 2006, UNTS vol. 2515, p. 3. See OJ 2010 L 23, p. 35.

65 Of 11 May 2011, CETS No. 210. See OJ 2023 LI 143, p. 1.

66 See below F.

67 See the references above in fn. 48.

68 *UNGA*, Resolution 217 A (III) of 10 December 1948. The continuing importance of the Universal Declaration was acknowledged by *UNGA*, Resolution 78/194 of 19 December 2023.

69 Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998, both of 7 December 2020, OJ 2020 LI 410, p. 1.

70 In a case in which a government had invoked Member State obligations pursuant to Art. 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966, UNTS, Vol. 993, p. 3, as justification for restricting enrolment in university courses on the basis of nationality, the ECJ treated the provision as directly applicable in favour of the government, but rejected the latter's argument (Case C-73/08, *Bressol*, ECR 2010, I-2735, paras. 83 ff.). In another case, the ECJ applied the customary law principle/right of self-determination of the people of Western Sahara to conclude that an

a general rule, however, the Court has limited its standard of review regarding compliance with principles of customary international law: Since these do not have "the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether … the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles".[71] Similarly, the ECtHR also grants Convention States a broad margin of appreciation regarding the correct interpretation and application of norms of general international law, since these are often controversial.[72] In its most recent *Western Sahara* judgment, however, the ECJ has obviously tightened its standard of review regarding compatibility of EU external action in the common commercial policy with the principles of public international law (i.e., the principles of self-determination and relative effect of treaties in the concrete case). It dismissed arguments of both the Commission and the Council that it should sanction only "manifest errors of assessment" and confirmed the judgment of the General Court which had annulled a Council decision on the conclusion of an agreement with Morocco. On the other hand, the ECJ maintained the effects of that decision for twelve months. It also made it relatively easy for EU organs to bring the agreement in line with international legal standards within that period.[73]

D. Exclusion of Judicial Review of CFSP Acts

Those international and supranational legal constraints lose much of their potency, if they are not judicially enforceable. This is why the ECJ has time and again emphasised that the effective judicial review of the compatibility of EU acts with higher-ranking law and the complete system of legal remedies and procedures that enable the Court to exercise that review, either directly or in cooperation with national courts, are essential for maintaining the rule of law.[74] It has further emphasised the particular importance of ensuring the compatibility of EU acts

agreement between the EU and Morocco could not be interpreted as applying to the territory of Western Sahara, in view of the rule of interpretation codified in Art. 31(3)(c) of the Vienna Convention on the Law of Treaties of 23 May 1969, UNTS, Vol 1155, p.331 (C-104/16 P, *Front Polisario*, ECLI:EU:C:2016:973, paras. 87 ff.). See along the same lines ECJ, Joined Cases C-779/21 P and C-799/21 P, *Front Polisario II*, ECLI:EU:C:2024:835, paras. 120 ff.

71 ECJ, Case C-366/10, *Air Transport Association of America*, ECLI:EU:C:2011:864, para. 110, invoking Case C-162/96, *Racke*, ECR 1998, I-3655, para. 52. For a critique, see *von Arnauld*, in: von Arnauld/Bungenberg (eds.), § 1 para. 113.

72 See, e.g., ECtHR, No. 51357/07, *Naït-Liman v. Switzerland*, judgment of 15 March 2018, paras. 173 ff.

73 ECJ, Joined Cases C-779/21 P and C-799/21 P, *Front Polisario II*, ECLI:EU:C:2024:835, paras. 133 f., 177. See *Odermatt*, Whose Consent? On the Joined Cases C-779/21 P, Commission v Front Polisario, and C-799/21 P, Council v Front Polisario, Verfassungsblog, 5 October 2024, available at: https://verfassungsblog.de/commission-v-front-polisario/ (28/10/2024).

74 ECJ, Case C-650/18, *Hungary v. European Parliament*, ECLI:EU:C:2021:426, para. 34.

with individual rights under EU law, including both internal market freedoms and fundamental rights.[75]

Therefore Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU that largely exclude the jurisdiction of the ECJ regarding the CFSP are in obvious conflict with firstly the rule of law and human rights values of Art. 2 TEU, read together with Art. 19(1) TEU, and secondly the parallel principles that are to guide the EU's external action, including CFSP action pursuant to Art. 21(1), 23 TEU.

I. Valid Component of Primary Law?

The contrast is so pronounced, the differences are so irreconcilable that the question arises as to whether Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU are valid components of the Treaties at all. These provisions have gradually been made part of primary law since the Treaty of Maastricht of 1992 that for the first time introduced the CFSP and simultaneously excluded it from the jurisdiction of the ECJ.[76] The Treaty of Amsterdam of 1997 made clear that the Court was also tasked with enforcing the European institutions' obligation to respect fundamental rights, but only insofar as it had jurisdiction otherwise, and thus not with regard to the CFSP.[77] The Treaty of Nice of 2002 maintained this system.[78] The Treaty of Lisbon then introduced the current provisions which permit broader court involvement than before.[79]

In contrast to all this, the comprehensive judicial protection of fundamental rights *vis-à-vis* the EC/EU institutions as an essential element of the European integration project based on the rule of law and committed to the preservation of human rights had already been contained, although not yet fully elaborated, in the original EEC Treaty.[80] It had moreover been expressed and further developed by the case law of the ECJ.[81] This begs the question of whether the aforementioned

75 ECJ, Case C-50/00 P, *Unión de Pequeños Agricultores*, ECR 2002, I-6677, paras. 38 f.; Joined Cases C-402/05 P and C-415/05 P, *Kadi I*, ECLI:EU:C:2008:461, paras. 281 ff., 326; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518, paras. 97 ff.; Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, paras. 35 f.

76 See Art. J – J.11 TEU on the one hand and Art. L TEU on the other hand which excluded Art. J ff. TEU from the scope of the Court's jurisdiction.

77 Art. 46(d) TEU (1997).

78 Art. 46 TEU (2002).

79 *Hillion*, A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy, (January 30, 2014). available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2388165 (28/10/2024).

80 See Art. 164 of the Treaty Establishing the European Economic Community of 25 March 1957, available at: https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:11957E/TXT [in German] (28/10/2024), the predecessor of Art. 19(1) TEU.

81 ECJ, Case 294/83, *Les Verts*, ECR 1986, 1339 para. 23 (on the rule of law and comprehensive judicial protection of rights enshrined in Community law); Case 29/69, *Stauder*, ECR 1969, 419 para. 7; Case 4/73, *Nold*, ECR 1974, 491 paras. 13 ff.; Case 44/79, *Hauer*, ECR 1979, 3727 paras. 15 ff. (on fundamental rights as unwritten general principles of primary Community law whose observance is ensured by the Court).

amendments to the Treaties could be invalid, just as amendments to a national constitution can be unconstitutional and void, if they are incompatible with the core concepts of that constitution.[82] However, an affirmative answer to the question would be difficult to justify, in view of the fact that the ordinary revision procedure in Art. 48(2)–(5) TEU corresponds to the Treaty-making procedure. Both entrust the final decision to all the Member States that have to ratify the Treaty revision as well as the completely new Treaty in accordance with their respective constitutional requirements: The Member States acting jointly are at the same time the holders of the constitution-making and the constitution-amending power of the EU.[83]

Yet, the Court in Opinion 1/91 indicated that an amendment to Art. 238 EEC Treaty (Art. 217 TFEU) could not cure the incompatibility with primary law of the court system in a planned association agreement that would have jeopardised the ECJ's own monopoly regarding the authoritative interpretation of Community law. The ECJ opined that "conflicts with Article 164 of the EEC Treaty [Art. 19(1) TEU] and, more generally, with the very foundations of the Community" could not be cured by amending Art. 238 EEC Treaty (Art. 217 TFEU).[84] But it has never followed up on that statement which had anyhow been theoretical because it had only answered an argument made by the Commission.

Ultimately, an affirmative answer to the question asked in the headline would remain theoretical because the Court has no jurisdiction over the validity of primary law, including Treaty amendments that have become primary law by way of the ordinary revision procedure. While it has exercised jurisdiction with regard to the simplified revision procedure pursuant to Art. 48(6) TEU, this was limited to ensuring that the conditions for use of that procedure had been fulfilled and did not extend to substantive review of the amendment.[85] It is therefore inconceivable that the ECJ would nullify Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU in order to affirm its unrestricted jurisdiction with respect to the CFSP.

II. The Fundamental Rule, Its Exception and the Reverse Exceptions that Prove the Rule

The ECJ has always insisted on reconciling differences between Treaty provisions in a way that corresponds to the core values of the EU, wherever possible. Thus, it held that Art. 297 and 307 EC Treaty (Art. 347 and 351 TFEU) "cannot (…) be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU Treaty [Art. 2 TEU] as a foundation of the Union. Article 307 EC Treaty [Art. 351 TFEU] may in no circumstance permit any challenge to the principles that from part of the very foundations of the Community legal order, one of which is the pro-

82 See, e.g., Art. 79(3) of the German Basic Law.
83 See *Franzius*, in: Pechstein/Nowak/Häde (eds.), Art. 48 EUV paras. 71 ff.
84 ECJ, Opinion 1/91, *EEA I*, ECR 1991, I-6079, para. 71.
85 ECJ, Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, paras. 30 ff.

tection of fundamental rights, including review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights."[86] But since Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU clearly exclude the CFSP from the Court's jurisdiction, this deliberate decision by the Member States as the masters of the Treaties cannot simply be disregarded.

Yet, the exclusion is not absolute, but has exceptions:[87] The first exception preserves the ECJ's jurisdiction to monitor compliance with Art. 40 TEU that erects an impenetrable wall of separation between the supranational competences conferred on the EU by the TFEU and its intergovernmental competences for implementing the CFSP pursuant to the TEU. That exception was already included in the Treaty of Maastricht.[88] The second exception relates to restrictive measures against natural or legal persons that necessarily have a CFSP component, in accordance with Art. 215 TFEU. The Court remains competent to rule on actions for annulment brought by sanctioned persons under Art. 263(4) TFEU against restrictive measures, even where the sanctions (such as travel restrictions) are imposed by the Member States on the sole basis of the CFSP decision, and not by way of an EU regulation (such as asset freezes),[89] with regard to which the jurisdiction of the Court is anyhow unrestricted.[90] This second exception codifies the *Kadi I* judgment of the ECJ that underlined the importance of the judicial protection of fundamental rights in the individualised sanctions context.[91]

The ECJ generally tends to interpret rules broadly and exceptions narrowly, which might prompt it to broaden the exclusion of its jurisdiction while narrowing down the exceptions – a counterintuitive approach for a court, all the more since it would run counter to the EU's rule of law and human rights values and principles. In the present context, closer inspection reveals that the exclusionary "rule" in reality constitutes an exception to or a carve-out from the older and particularly fundamental rule of Art. 19(1) TEU, while the "exceptions" are in fact "claw-back" provisions,[92] preserving at least some elements of that fundamental rule.[93] Despite its essential importance for the rule of law and human rights, the fundamental rule of Art. 19(1) TEU technically enjoys no higher rank, since both Art. 19(1) TEU and Art. 24(1) subpara. 2 last sentence TEU, Art. 275 TFEU are equivalent elements of

86 ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi I*, ECLI:EU:C:2008:461, paras. 303 f.
87 Art. 24(1) subpara. 2 last sentence TEU uses the term "exception".
88 Art. L lit. c TEU that referred to Art. M TEU, the predecessor of Art. 40(1) TEU.
89 See *Cremona*, European Papers 2017/2, p. 688.
90 ECJ, Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para. 106.
91 *Breitler*, Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?, European Law Blog, 13 October 2022, available at: https://www.europeanlawblog.eu/pub/jurisdiction-in-cfsp-matters-conquering-the-gallic-village-one-case-at-a-time/release/1 (28/10/2024).
92 The terms carve-out and claw-back were used by AG Wathelet in his opinion in Case C-72/15, *Rosneft*, ECLI:EU:C:2016:381, paras. 38 ff.
93 See *Van Elsuwege*, CMLR 2021/6, pp. 1739 ff.; *Blaschke*, Saar Blueprint 05/2024 DE, p. 12 ff.

primary Union law. But in reconciling the fundamental rule and the exception, one has to keep in mind that Art. 19(1) TEU is obviously closer to the EU values in Art. 2 TEU than the jurisdictional exclusion that actually introduces a fundamental contradiction into the Treaties. This contradiction was the price to pay to Member States' sovereignty concerns for allowing the closer integration of the CFSP into the EU institutional system while mistrusting the ECJ. It heavily tilts the balance in favour of Art. 19(1) TEU which requires effective judicial protection to the widest possible extent while reminding the ECJ to exercise the necessary judicial restraint.

The ECJ has not yet determined if and to what extent Art. 218(11) TFEU constitutes a third claw-back provision. It assigns jurisdiction to the ECJ to give opinions as to whether an agreement envisaged by the EU is compatible with the Treaties, possibly also covering agreements on CFSP matters to be concluded on the basis of Art. 37 TEU. On the other hand, the jurisdictional carve-out cannot be completely ignored in this context either.[94] It remains to be seen how the Court deals with this problem.

E. ECJ Rulings on Jurisdiction in CFSP Cases Preserve Rule of Law Essentials

It is noteworthy that the ECJ raised the question of jurisdictional limits regarding the CFSP on its own motion in several cases. It has thereby tried to maintain as much as possible of its jurisdiction regarding the CFSP by narrowing down the carve-out and broadening the claw-backs, in each context invoking the fundamental rules of Art. 2, 19 (1) TEU as well as Art. 47 CFR as justification. This corresponds to the Court's handling of another limitation of its general jurisdiction in Art. 269 TFEU which it also interpreted restrictively. The ECJ there argued that this narrow interpretation of Art. 269 TFEU contributed to "the observance of the principle that the European Union is a union based on the rule of law which has established a complete system of legal remedies and procedures designed to enable the Court of Justice of the European Union to review the legality of acts of the EU institutions".[95] The Court's approach to avoid jurisdictional *lacunae* as far as possible is consistent with its general task to "ensure that in the interpretation and application of the Treaties the law is observed."[96] It also helps preserve the unity of EU law, because gaps in the ECJ's jurisdiction would likely be filled by national courts that might hand down diverging decisions.

94 For a discussion, see *Giegerich*, in: Pechstein/Nowak/Häde (eds.), Art. 218 AEUV paras. 226 ff. See also *Koutrakos*, ICLQ 2018/1, p. 16. But see *Eckes*, ELJ 2016/4, p. 501 who qualifies Art. 218(11) TFEU as a general claw-back provision, referring to the ECJ's Opinion 2/13. But the draft accession agreement whose compatibility with primary law the Court evaluated there was based on Art. 6(2) TEU and not a CFSP provision.

95 ECJ, Case C-650/18, *Hungary v. European Parliament*, ECLI:EU:C:2021:426, para. 34.

96 *Van Elsuwege*, CMLR 2021/6, p. 1733.

I. Restrictive Interpretation of the Jurisdictional Carve-Out

1. International Agreement with Mauritius on Transfer of Pirates (2014)

In the first pertinent instance, the ECJ affirmed its jurisdiction in a case concerning an action for annulment brought by the European Parliament (EP), supported by the Commission, under Art. 263 TFEU against a CFSP decision of the Council.[97] The latter concerned the signing and conclusion of an agreement on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force (EU NAVFOR) in the operation Atalanta off the Somali coast to Mauritius. The Council Decision was based on Art. 37 TEU as well as Art. 218(5) and (6) TFEU. The EP challenged it because of alleged procedural mistakes made by the Council in violation of Art. 218 TFEU.

The EP first argued that the agreement had wrongly been categorised as relating exclusively to the CFSP and therefore been concluded by the Council without any involvement of the EP. This argument was rejected as unfounded by the ECJ. The EP secondly argued that the Council had infringed Art. 218(10) TFEU by failing to inform it immediately and fully at all stages of the negotiation and of the conclusion of the agreement. Since the Court had identified the pertinent agreement as relating exclusively to the CFSP, it could not rule on the EP's second plea before affirming its jurisdiction that was contested by the Council. It started by emphasising that "the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be interpreted narrowly." The ECJ then pointed out that the procedural rules set forth in Art. 218 TFEU which regulated the conclusion of all agreements by the EU, CFSP and others, were not precluded from its jurisdiction, even if, in the concrete case, the agreement fell within the CFSP. The Court therefore held that it had jurisdiction to rule on the second plea.[98] Since it considered that plea to be well founded, it annulled the contested CFSP decision of the Council, but maintained the latter's effects pursuant to Art. 264(2) TFEU.[99]

As a result, the ECJ will exercise jurisdiction over CFSP acts, if their illegality results from non-CFSP provisions of the Treaties. In these cases, the Court does exercise jurisdiction over acts adopted on the basis of CFSP provisions in the sense of Art. 275(1), second variant TFEU, but only to the extent in which they are also regulated by non-CFSP provisions, such as Art. 218 TFEU. Such review is important for maintaining the institutional balance – or separation of powers – at EU level, a

97 ECJ, Case C-658/11, *European Parliament v. Council*, ECLI:EU:C:2014:2025. See *Van Elsuwege*, CMLR 2015/5, pp. 1379 ff.

98 *Ibid.*, paras. 69 ff.

99 See also the later parallel case concerning an agreement with Tanzania: ECJ, Case C-263/14, *European Parliament v. Council*, ECLI:EU:C:2016:435. In this case, the jurisdiction of the Court had no longer been contested.

major rule-of-law ingredient, and the Court can decide those cases without touching the politically sensitive CFSP provisions.

2. Elitaliana (2015)

The second pertinent case concerned an appeal against an order of the General Court dismissing an action for annulment of measures adopted by the European Union Rule of Law Mission in Kosovo (Eulex Kosovo) as well as a claim for damages.[100] Eulex Kosovo had been established by a CFSP Decision of the Council as a civilian mission within the CSDP. In substance, the plaintiff challenged the award of a public contract for helicopter services to a competing tender, arguing that it had infringed the rules of EU public procurement law.

The question of jurisdiction according to Art. 24(1) subpara. 2 last sentence TEU, Art. 275 TFEU, which the General Court had not considered, was raised by the ECJ of its own motion. Interestingly, both the Commission and the Council agreed that the ECJ had jurisdiction to hear the case, in contrast to Eulex Kosovo. The Court clarified that the Eulex Kosovo Mission was civilian in nature and the expenditure to which the contract at issue gave rise was to be charged to the EU budget, in accordance with Art. 41(2) subpara. 1 TEU, so that the provisions of the Financial Regulation (EC, Euratom) No. 1605/2002 applied. Having regard to the specific circumstances of the present case, it concluded that the carve-out from its jurisdiction by Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU could not "be considered to be so extensive as to exclude the Court's jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement."[101] The ECJ's approach reminds of the Mauritius case: Whenever the legality of an act adopted on a CFSP basis is challenged for non-CFSP reasons (such as a violation of a TFEU provision or of a secondary legal act), the jurisdictional carve-out does not apply.

Having thus affirmed its jurisdiction, the ECJ nevertheless dismissed the appeal because the GC had rightly determined that Eulex Kosovo did not have legal personality and could thus not be a party to proceedings before the EU courts. Rather, its measures in the public procurement procedure were attributable to the Commission.[102]

3. H v. Council (2016) and SatCen v. KF (2020)

In the H case, plaintiff lodged an appeal against an order by the GC dismissing as inadmissible for lack of jurisdiction her action for annulment of a decision by the Chief of Personnel of the European Union Police Mission (EUPM) in Bosnia and

100 ECJ, Case C-439/13 P, *Elitaliana v. Eulex Kosovo*, ECLI:EU:C:2015:753.
101 *Ibid.*, para. 49.
102 *Ibid.*, paras. 51 ff.

Herzegovina as well as for damages.[103] The challenged decision had redeployed plaintiff (a seconded Italian magistrate) to another regional office of the EUPM for operational reasons. The EUPM is another civilian mission within the EU's CSDP, based on Art. 28, 43(2) TEU and charged with supporting the competent law enforcement agencies of Bosnia and Herzegovina in the fight against organised crime and corruption, in order to promote the rule of law in the region.[104]

Invoking the two aforementioned judgments in the Mauritius and Elitaliana cases, the ECJ reemphasised that the jurisdictional carve-out introduced a derogation from the general rule in Art. 19(1) TEU that had to be interpreted narrowly. Importantly, in the present case, the Court added "that, as is apparent from both Article 2 TEU, which is included in the common provisions of the EU Treaty, and Article 21 TEU, concerning the European Union's external action, to which Article 23 TEU, relating to the CFSP, refers, the European Union is founded, in particular, on the values of equality and the rule of law … The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law".[105] Effective judicial review is even "of the essence of the rule of law", as the Court emphasised in a later case.[106]

On this background, the ECJ affirmed its jurisdiction in the case concerning a decision that, while related to an operational action of the European Union decided upon and carried out under the CFSP, constituted essentially an act of staff management.[107] The Court's main argument was that pursuant to Art. 270 TFEU, the EU judicature would undoubtedly have jurisdiction to rule on all actions brought by EU staff members having been seconded to the EUPM. Since they remained subject to the Staff Regulations[108] during their secondment to the EUPM, they would fall within the jurisdiction of the EU judicature, in accordance with Art. 91 of the Staff Regulations. Despite some differences between the two categories of personnel, there was no legitimate reason to treat staff seconded by the Member States differently regarding judicial protection. This point refers to the general principle of equality which is one of the fundamental values of the EU (Art. 2 TEU) as well as a fundamental right (Art. 20 CFR).[109]

The Court adduced one last argument in favour of its jurisdiction: "Any other interpretation would, in particular, have the consequence that, where a single act of staff management relating to 'field' operations concerns both staff members seconded by the Member States and staff members seconded by the EU institutions, the

103 ECJ, Case C-455/14 P, *H v. Council*, ECLI:EU:C:2016:569.
104 See para. I.2. of the Mission Statement for EUPM in the annex to Council Joint Action of 11 March 2002 on the European Union Police Mission, OJ 2002 L 70, p. 1.
105 ECJ, Case C-455/14 P, *H v. Council*, ECLI:EU:C:2016:569, para. 41.
106 ECJ, Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para. 73.
107 ECJ, Case C-455/14 P, *H v. Council*, ECLI:EU:C:2016:569, paras. 42 ff. See the critique by *Koutrakos*, ICLQ 2018/1, pp. 11 ff.; *Van Elsuwege*, CMLR 2017/3, pp. 841 ff.
108 Regulation No 31 (EEC), 11 (EAEC) of (18 December 1961, current consolidated version available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501 (28/10/2024).
109 See also *Cremona*, European Papers 2017/2, p. 685.

decision rendered with regard to the former would be liable to be irreconcilable with that rendered by the EU judicature with regard to the latter."[110] This alludes to the fact that the plaintiff in the case at hand had almost simultaneously brought an action for annulment and compensation against the EUPM before an Italian administrative court. The potentially irreconcilable "decision" referred to in the quotation is the decision of such a national court that would become competent to provide judicial protection in case of lack of jurisdiction of the EU judicature. This results from Art. 19(1) subpara. 2 TEU obliging Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (including the CFSP) as well as the principle of sincere cooperation (Art. 4(3) TEU), which include the task of filling gaps in the protection provided by the ECJ. Accordingly, Art. 274 TFEU sets forth that disputes to which the EU is a party shall fall within the jurisdiction of the national courts, save where jurisdiction is conferred on the ECJ.[111]

On this basis, the ECJ concluded that the GC and itself had jurisdiction pursuant to Art. 263 TFEU regarding the action of annulment, and Art. 268, 340(2) TFEU regarding the action for non-contractual liability, "taking into account Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union."[112] On this basis, the GC has recently affirmed its jurisdiction regarding a claim for compensation against the EUCAP Sahel Niger mission.[113]

In the SatCen case, the ECJ has meanwhile reaffirmed more generally that the jurisdictional carve-out in Art. 24(1) subpara. 2 last sentence TEU, Art. 275 TFEU "must be interpreted restrictively and the scope of the derogation which they establish cannot be considered so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management".[114] This means that disputes between bodies of the EU that were established by a CFSP act, such as the European Union Satellite Centre (SatCen), and their staff members are within the jurisdiction of the EU Courts and Art. 263(5) TFEU does not empower the Council "to shield disputes involving the interpretation or application of EU law from the jurisdiction of both the courts of the Member States and the EU courts."[115] This approach is consistent with the two earlier cases (Mauritius and Elitaliana), because the legality of the challenged act again depends on EU law rules outside the CFSP.

110 ECJ, Case C-455/14 P, *H v. Council*, ECLI:EU:C:2016:569, para. 57.
111 See *Hillion/Wessel*, in: Blockmans/Koutrakos (eds.), pp. 81 ff.; *Van Elsuwege*, CMLR 2021/6, pp. 1754 ff.
112 ECJ, Case C-455/14 P, *H v. Council*, ECLI:EU:C:2016:569, para. 58.
113 GC, Case T-371/22, *Montanari v. EUCAP Sahel Niger*, ECLI:U:T:2024:494. See *Kunst*, Bringing a claim of compensation for harm suffered as a result of alleged psychological harassment by the Head of Mission and his Deputy before the EU Courts: Montanari v Eucap Sahel Niger (Case T-371/22), EU Law Analysis, 30 July 2024, available at: http://eulawanalysis.blogspot.com/2024/07/bringing-claim-of-compensation-for-harm.html (28/10/2024).
114 ECJ, Case C-14/19 P, *SatCen v. KF*, ECLI:EU:C:2020:492, para. 66.
115 *Ibid.*, paras. 62 ff.

II. Broad Interpretation of the Claw-Backs

In two cases, the ECJ has interpreted the claw-backs broadly and thereby extended its jurisdiction in the context of restrictive measures to further types of proceedings beyond the expressly mentioned actions for annulment under Art. 263(4) TFEU.

1. Rosneft v. Her Majesty's Treasury (2017)

The case arose from restrictive measures pursuant to Art. 215(2) TFEU imposed in 2014 in view of Russia's actions destabilising the situation in Ukraine. Rosneft, a Russian company, had specifically been listed in the annexes to both the Council's CFSP decision and the ensuing regulation as an entity subject to some of the restrictions imposed by those acts. Rosneft brought an – ultimately unsuccessful – action for annulment against the CFSP decision and the regulation, as far as it was concerned, before the GC[116] and almost simultaneously an application for judicial review before the High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court). This court requested a preliminary ruling from the ECJ concerning the validity and interpretation of specific parts of the challenged CFSP decision and regulation.[117] The first question it asked, however, was whether the ECJ had jurisdiction to give a preliminary ruling under Art. 267 TFEU on the validity of the CFSP decision, because otherwise the referring court would have to consider its own jurisdiction to make such a ruling, in accordance with Art. 19(1) subpara. 2 TEU.[118]

The ECJ explained that the first question was admissible, because answering it was necessary to enable the referring court to decide on its own jurisdiction. The validity of the restrictive measures depended on the validity of both the CFSP decision and the regulation, the former being required as a basis for enacting the latter.[119] If only the regulation was struck down, but the decision left intact, the Member States would, pursuant to Art. 29 TEU, continue to be required to ensure that their national policies conformed to the restrictive measures established pursuant to the decision. In this context, the ECJ obviously quoted with approval the consideration of the referring court "that were decisions of the Council adopted within the framework of the CFSP not to be open to challenge, that could undermine the fundamental right of access to justice, and (…) that it is a requirement of Article 19 TEU that effective judicial protection be ensured in the fields covered by EU

116 See the dismissal of Rosneft's appeal by the ECJ, Case C-732/18 P, *Rosneft v. Council*, ECLI:EU:C:2020:727.

117 ECJ, Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236. For a critique, see *Poli*, CMLR 2017/6, p. 1799 ff.; *Van Elsuwege*, Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case, Verfassungsblog, 6 April 2017, available at: https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/ (28/10/2024).

118 *Ibid.*, paras. 51 ff.

119 See Art. 215(1), (2) TFEU.

law."[120] All in all, the validity of the decision – and thus the ECJ's jurisdiction to rule on it – was relevant in the context of the case.

As to the substance of the question, the ECJ pointed out that Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU formulated two exceptions to the jurisdictional carve-out, the first one enabling it to monitor compliance with Art. 40 TEU, without any procedural limitation, so that it could also give a preliminary ruling in that regard.[121] In contrast, the second exception regarding restrictive measures in Art. 275(2) TFEU expressly refers to the conditions laid down in Art. 263(4) TFEU, thereby apparently limiting the procedural avenues of the EU judiciary for reviewing the legality of decisions on restrictive measures against natural or legal persons to actions for annulment in the sense of Art. 263 TFEU.

But this appearance is misleading, as the ECJ explains in detail:[122] Preliminary references pursuant to Art. 267 TFEU, complementary to direct actions under Art. 263 TFEU, were an indispensable element in the Treaties' complete system of legal remedies and procedures that enabled the EU judiciary to ensure the legality of EU acts. The purpose of Art. 24(1) subpara. 2 last sentence TEU and Art. 275(2) TFEU, if read together, was not to determine the type of procedure under which the Court might review the legality of certain decisions, but rather the type of decision subject to judicial review within any appropriate procedure. Given that the implementation of a CFSP decision providing for restrictive measures against natural or legal persons was in part the responsibility of the Member States, a reference for a preliminary ruling on the validity of that measure played an essential part in ensuring effective judicial protection. In view of the binding force of the CFSP decision under Art. 29 TEU for Member States, access to judicial review of such a decision was indispensable where it prescribed the adoption of restrictive measures against natural or legal persons.

The ECJ then quoted Art. 2, 21 and 23 TEU, which reaffirmed the importance of the rule of law value also for the CFSP, as well as Art. 47 CFR, and recalled "that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law".[123] While Art. 47 CFR could not confer jurisdiction on the Court, where the Treaties excluded it, the article implied that such exclusion in the field of the CFSP should be interpreted strictly. It would be inconsistent with the principle of effective judicial protection against acts relating to restrictive measures against natural or legal persons – which the Treaties obviously wanted to permit – to exclude preliminary references in their regard.

Lastly, the ECJ rejected the proposition that national courts could fill the jurisdictional gap on EU level and decide on their own on the validity of CFSP decisions imposing restrictive measures on natural or legal persons, if they were prevented

120 ECJ, Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para. 54.
121 *Ibid.*, paras. 60 ff.
122 *Ibid.*, paras. 66 ff.
123 *Ibid.*, para. 73.

from making preliminary references to the Court.[124] Referring to the *Foto-Frost* case,[125] the ECJ underlined the necessity to preserve the coherence of the system of judicial protection, the unity of the EU legal order and the fundamental requirement of legal certainty, which would all be called in question if national courts made different rulings on the legality of the same CFSP decision imposing restrictive measures. Preventing such an undesirable outcome by including the preliminary reference procedure in the claw-back provision of Art. 275(2) TFEU obviously was the key argument for the Court in support of its broad interpretation. On the other hand, the ECJ indicated that while its monopoly on the invalidation of EU acts, according to *Foto-Frost*, was imperative also with respect to CFSP decisions, this was, of course, true only "where the Treaties confer on the Court jurisdiction to review their legality."[126] This means that the ECJ will do all it can to extend its jurisdiction over CFSP acts as far as is justifiable, in order to meet the concerns of *Foto-Frost*. But it accepts for the sake of effective judicial protection, that where its jurisdiction is definitely excluded, the gaps must be filled by the national courts, even at the cost of drawbacks regarding the *Foto-Frost* concerns.

Thus, the ECJ ultimately affirmed its jurisdiction to give preliminary rulings on the validity of CFSP decisions imposing restrictive measures on natural or legal persons.[127]

2. Bank Refah Kargaran (2020)

Appellant Bank that had been subject to restrictive measures pursuant to Art. 215(2) TFEU brought an action for annulment against the pertinent CFSP decisions and regulations which was successful in the GC.[128] It subsequently brought an action for damages against the EU for the harm caused by the annulled restrictive measures. The GC dismissed the action for lack of jurisdiction because the claw-back did not cover actions for non-contractual liability regarding restrictive measures to the extent in which the alleged harm was caused by CFSP decisions taken pursuant to Art. 29 TEU, but only to the extent in which the harm was caused by regulations pursuant to Art. 215 TFEU. Although the appellant did not challenge that finding as such, the ECJ reconsidered the question of jurisdiction of its own motion as a matter of public policy.[129]

After acknowledging that the claw-back in Art. 275(2) TFEU did not expressly mention the jurisdiction of the ECJ regarding action for damages pursuant to

124 *Ibid.*, paras. 77 ff.
125 ECJ, Case 314/85, *Foto-Frost*, ECR 1987, 4199.
126 ECJ, Case C-732/18 P, *Rosneft v. Council*, ECLI:EU:C:2020:727, para. 78.
127 For a critique of the ECJ's "integrationist logic" in *Rosneft*, see *Koutrakos*, ICLQ 2018/1, p. 23 ff.
128 GC, Case T-24/11, *Bank Refah Kargaran v. Council*, ECLI:EU:T:2013:403.
129 ECJ, Case C-134/19 P, *Bank Refah Kargaran v. Council*, ECLI:EU:C:2020:793, paras. 23 ff. See the positive reviews by *Jahn*, EuR 2021/4, p. 511 ff. and *Poli*, CMLR 2022/4, p. 1050 ff.

Art. 268 TFEU, the Court reaffirmed that the derogation from its general jurisdiction under Art. 19 TEU introduced by Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU had to be interpreted restrictively. The ECJ then emphasised that actions for damages played an important role in the EU system for the effective judicial protection of the individual.[130] It also referred to the rule of law as a founding value of the EU, that extended to the CFSP, and the right of effective judicial protection in Art. 47 CFR as its essential component.[131] It would create *lacunae* in the judicial protection of natural or legal persons affected by restrictive measures, if they could bring actions for annulment against the pertinent CFSP decisions and regulations as well as actions for damages regarding harm caused by the restrictive measures imposed by the regulations, but not regarding harm caused by the restrictive measures provided for in the CFSP decisions. This would disrupt the necessary coherence of the EU system of judicial protection.[132]

Lastly, the ECJ rejected the Council's objection that extending jurisdiction to actions for damages regarding harm caused by restrictive measures provided for in illegal CFSP decisions pursuant to Art. 29 TEU was unnecessary, because full judicial protection of the natural or legal persons concerned was already ensured if the latter could bring an action for damages regarding harm caused by the regulations pursuant to Art. 215 TFEU, since the regulations reproduced, in essence, the CFSP decisions.[133] In its reasoning, the Court pointed out that CFSP decisions on restrictive measures against natural or legal persons and regulations under Art. 215 TFEU to implement them were not necessarily identical. Thus, travel restrictions often included in CFSP decisions were not implemented by regulations based on Art. 215 TFEU, for lack of EU competence, but by the Member States. Moreover, CFSP decisions publicly designating persons subject to restrictive measures could cause harm in the form of opprobrium and suspicion that justified bringing an action for compensation. Without that possibility, judicial protection would therefore be incomplete.

All in all, the ECJ found that the GC had erred in law by partly denying its jurisdiction. The Bank's appeal was nevertheless dismissed because that legal error was harmless, since the operative part of the GC's judgment that had dismissed the action was well founded on other legal grounds.[134]

III. The Two Most Recent Cases (2024)

Two further very recent ECJ cases raise other aspects of the general question how to reconcile the requirements of upholding the rule of law and human rights with the jurisdictional carve-out and claw-backs in Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU. In both proceedings, the Advocate General delivered her opin-

130 *Ibid.*, paras. 31 ff.
131 *Ibid.*, paras. 35 f.
132 *Ibid.*, paras. 37 ff.
133 *Ibid.*, paras. 40 ff.
134 *Ibid.*, paras. 49 ff.

ions on 23 November 2023 and the Court (sitting as Grand Chamber with the same composition) handed down its judgments on 10 September 2024.

1. Neves 77 Solutions SRL

This case is about restrictive measures imposed by the EU against Russia in 2014, in response to the Russian violation of Ukrainian sovereignty and territorial integrity in Crimea and the Donbas.[135]

Based on the pertinent CFSP decision of the Council and national implementing legislation,[136] the Romanian tax authority confiscated payments which plaintiff Neves had received for brokering the sale of Russian radio sets from the United Arab Emirates to India in 2019 and imposed a fine for having violated the EU sanctions. Neves challenged these sanctions in the Romanian courts, arguing that they were disproportionate and therefore violated its right to property guaranteed by Art. 1 of Protocol No. 1 to the ECHR. The appellate court requested a preliminary ruling from the ECJ pursuant to Art. 267 TFEU. After rearrangement and reformulation by the ECJ, the national court's questions essentially ask whether the pertinent CFSP decision prohibited brokering transactions concerning goods constituting military equipment that were never imported into the territory of a Member State; and whether that CFSP decision, read in the light of the right to property enshrined in Art. 17 CFR, the principle of legal certainty and the principle that penalties must be defined by law, must be interpreted as precluding a national measure confiscating the entire proceeds of a brokering transaction, which is implemented automatically by national law.[137]

At the outset, the ECJ considers whether it has jurisdiction to interpret a provision of general scope, such as the prohibition on brokering services in the CFSP decision, in view of Art. 24(1) subpara. 2 TEU and Art. 275(1) TFEU, which it again qualifies as a derogation from the rule of general jurisdiction in Art. 19 TEU that had to be interpreted narrowly.[138] It then addresses the two claw-backs ("exceptions") in Art. 24(1) subpara. 2 TEU and Art. 275(2) TFEU, permitting the Court to monitor compliance with Art. 40 TEU and to provide protection against individualised restrictive measures. The second claw-back does not apply because the scope of the pertinent provision of the CFSP decision in the case at hand "is defined by

135 AG Ćapeta, Case C-351/22, *Neves 77 Solutions SRL*, ECLI:EU:C:2023:907; ECJ, Case C-351/22, *Neves 77 Solutions SRL*, ECLI:EU:C:2024:723.

136 There was no applicable provision in the pertinent regulation in this case, probably because of a drafting error that had omitted brokering services from the text of that regulation. That gap in the Regulation was later closed (fn. 135, paras. 34 ff.).

137 ECJ, Case C-351/22, *Neves 77 Solutions SRL*, ECLI:EU:C:2024:723, paras. 62, 75. As the AG pointed out, the confiscation of proceeds from prohibited transactions was a legal consequence imposed by Romanian law and not the CFSP decision (fn. 134, para. 42).

138 ECJ, Case C-351/22, *Neves 77 Solutions SRL*, ECLI:EU:C:2024:723, para. 35.

reference to objective criteria, not to identified natural or legal persons", thus constituting a measure of general scope, and not an individualised sanction.[139]

However, the first claw-back is helpful here: In monitoring compliance with Art. 40 TEU, the Court can undoubtedly also give preliminary rulings.[140] If the Council had included the prohibition on brokering services in the regulation that was based on Art. 215(1) TFEU, giving effect to the provisions of the CFSP decision, the ECJ would have had full jurisdiction.[141] That the Council had failed to do so infringed an obligation that was imposed on it by Art. 215(1) TFEU ("the Council … shall adopt"), in order to ensure uniform application of that prohibition at EU level.[142] The ECJ then determines that in monitoring compliance with Art. 40 TEU, it was its responsibility to ensure that the Council could not circumvent the Court's jurisdiction regarding a regulation under Art. 215(1) TFEU by failing to adopt that regulation, contrary to its primary law obligations.[143] In substance, the Court here decides that the Council had abused its CFSP powers to reach a result – prohibition on brokering services – which it was required to pursue by way of a regulation under Art. 215(1) TFEU, thus transgressing the red line of Art. 40(1) TEU. The failure to adopt such a regulation could not impair the Court's jurisdiction to ensure the judicial protection of third parties, including through the reference procedure pursuant to Art. 267 TFEU, in respect of all provisions that should have been included in that regulation, all the more since the reference procedure was essential for ensuring "the very unity of the EU legal order" and "the fundamental requirement of legal certainty".[144]

The ECJ supports its solution by citing Art. 2, 21 and 23 TEU that refer to the rule of law as one of the EU's founding values and reaffirms that "[t]he very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the very essence of the rule of law". The preliminary ruling procedure provided for in Art. 19(3)(b) TEU and Art. 267 TFEU was the keystone of the judicial system within the EU and essential to preserve that value.[145] As a result, the ECJ concludes, contrary to the opinion of the Advocate General, that it had jurisdiction to give the preliminary ruling requested by the national court, "having regard to Articles 19, 24 and 40 TEU and Article 215(1) TFEU, read in the light of Articles 2 and 21 TEU".[146] It then explains in detail that the Council was required to include the prohibition on providing brokering services in the regulation according to Art. 215(1) TFEU, which it indeed belatedly did by adopting Regulation 2023/1214.[147]

139 *Ibid.*, paras. 37 f.
140 *Ibid.*, para. 43.
141 *Ibid.*, para. 39.
142 *Ibid.*, paras. 42, 46.
143 *Ibid.*, para. 45.
144 *Ibid.*, paras. 48 ff.
145 *Ibid.*, paras. 51 f.
146 *Ibid.*, para. 53.
147 *Ibid.*, paras. 55 ff.

In substance, the ECJ gives the following answers: The pertinent provision of the CFSP decision had to be interpreted as meaning that the prohibition on providing brokering services was applicable even where the military equipment that was the subject of the brokering transaction was never imported into the territory of a Member State. That provision, read in the light of Art. 17 CFR, the principle of legal certainty and the principle that penalties must be defined by law, had to be interpreted as not precluding a national measure confiscating the entire proceeds of a prohibited brokering transaction, even if the confiscation was implemented automatically.[148]

This judgment is another step toward ensuring effective judicial protection against interferences in fundamental rights, as required by the EU's rule of law principle as well as Art. 6(1), 13 ECHR. It is also important for using the first claw-back (monitoring compliance with Art. 40 TEU) to ensure the protection of fundamental rights, even though the objective of that claw-back is primarily institutional – to safeguard the wall of separation between the supranational competences of the EU under the TFEU and its intergovernmental competences under the TEU's CFSP chapter. Yet, Art. 40(1) TEU has the side-effect of preventing the (ab-)use of CFSP competences for interferences with fundamental rights that are reserved to the exercise of competences under the TFEU. But, as we shall see, the first claw-back has a much greater potential regarding the protection of fundamental rights from interferences by CFSP acts that has so for remained untapped by the ECJ.[149]

2. KS and KD v. Council

These joined cases again concern Eulex Kosovo and an action for damages pursuant to Art. 268, 340(2) TFEU, this time for breach of fundamental rights enshrined in the ECHR and the CFR.[150] Eulex Kosovo had been charged with ensuring that serious crimes committed in the context of the Kosovo conflict in 1998/9 were properly investigated. Plaintiffs claim that Eulex Kosovo had not adequately fulfilled this task with regard to the murders and disappearances of their family members (as had indeed been confirmed by the internal Human Rights Review Panel) and therefore violated their rights enshrined in Art. 2, 3, 6(1) and 13 ECHR as well as in Art. 2, 4 and 47 CFR. The GC dismissed their actions for manifest lack of jurisdiction, which was challenged by plaintiffs' appeals. These appeals were supported by the Commission and seven Member States, whereas the Council, the European External Action Service and two other Member States requested their dismissal. While the ECJ had affirmed its jurisdiction over actions pursuant to Art. 268, 340(2) TFEU regarding restrictive measures in *Bank Refah*, the appeals raised the novel question whether the Court's jurisdiction over non-contractual liability claims also exists

148 *Ibid.*, paras. 72 ff.
149 See below under 3.
150 AG Ćapeta, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2023:901; ECJ; Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2024:725.

outside that context (but in a case that involved fundamental rights no less than restrictive measures).

In her opinion, the AG affirmed the jurisdiction of the EU courts in cases like the ones at hand and therefore proposed that the ECJ refer them back to the GC for judgment on the admissibility and the substance of the action.[151] The ECJ does not go as far as the AG proposed, allowing the appeals only in part.[152] The Court again qualifies the jurisdictional carve-out in Art. 24(1) subpara. 2 TEU and Art. 275(1) TFEU as a derogation from the rule of general jurisdiction in Art. 19 TEU that had to be interpreted narrowly.[153] It then states that it was common ground that the acts and omissions referred to in the action brought by KS and KD did not concern the two claw-backs ("exceptions") in Art. 24(1) subpara. 2 TEU and Art. 275(2) TFEU.[154] It is a pity that nobody urged the court to use the first claw-back (monitoring compliance with Art. 40 TEU) to ensure the protection of fundamental rights also in this case, as in *Neves 77 Solutions SRL*, which would have been possible, as will be demonstrated below.[155]

In any event, the ECJ determines that while basic principles of the EU legal order extended to the CFSP, including respect for the rule of law and fundamental rights which required that both EU and Member State authorities be subject to judicial review, the CFSP was subject to specific rules and procedures, which included the jurisdictional carve-out. That limitation of the Court's jurisdiction could be reconciled with both Art. 47 GRC and Art. 6, 13 ECHR. Art. 47 CFR could not confer jurisdiction where the Treaties excluded it. Moreover, the principles of conferral[156] and of institutional balance[157] that bound the ECJ also applied in the CFSP area.[158] Accordingly, the claim that acts or omissions of an EU institution, body, office or agency infringed fundamental rights was not in itself sufficient to establish the jurisdiction of the EU Courts, because otherwise the jurisdictional carve-out in Art. 24 (1) subpara. 2 last sentence TEU and Art. 275(1) TFEU would be deprived of its effectiveness in part and the principles of conferral and of institutional balance infringed.[159]

The ECJ then acknowledged that its interpretation of Art. 47 CFR must not fall below the level of protection established in Art. 6(1), 13 ECHR, as interpreted by the ECtHR.[160] Art. 6(1) ECHR constituted *lex specialis* in relation to Art. 13 ECHR, and neither right was absolute. Regarding Art. 6(1) ECHR, the ECJ specifically cited the Grand Chamber judgment of the ECtHR in the case *H.F. and Others*

151 AG Ćapeta, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2023:901.
152 ECJ, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2024:725.
153 *Ibid.*, para. 62.
154 *Ibid.*, paras. 63 f., 122.
155 See below under 3.
156 Art. 5(1), (2) TEU.
157 Art. 13(2) TEU.
158 ECJ, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2024:725, paras. 68 ff.
159 *Ibid.*, para. 73.
160 *Ibid.*, para. 77. See Art. 52(3) CFR.

v. France.[161] There, the Strasbourg Court had indeed stated that "it is not the task of the Court to interfere with the institutional balance between the executive and the courts of the respondent State, or to make a general assessment of the situations in which the domestic courts refuse to entertain jurisdiction".[162] It is also true that *H.F. and Others v. France* concerned the constitutional limitation of the jurisdiction of the domestic courts regarding executive acts that could not be detached from the conduct by that State of its international relations. The case concerned the refusal by France to repatriate French citizens that had been detained in Syria as relatives of foreign terrorist fighters.

However, it is quite surprising and utterly misleading that the ECJ fails to mention that *H.F. and Others v. France* does not concern Art. 6(1) ECHR (which was inapplicable because "civil rights and obligations" were not involved) and that in the very paragraph which it cites, the ECtHR continued as follows: "The question of sole importance is whether the individuals concerned had access to a form of independent review of the tacit decisions to refuse their repatriation requests by which it could be ascertained that those decisions were based on legitimate and reasonable grounds, devoid of arbitrariness, in the light of the positive obligations which stemmed in the present case, in the exceptional circumstances set out above, from the right to enter national territory under Article 3 § 2 of Protocol No. 4." Since this was not the case, the ECtHR held that France had violated that provision. The ECJ's assumption that the ECtHR would consider the jurisdictional carve-out as compatible with Art. 6(1) ECHR is therefore problematic, to say the least. After all, the Strasbourg Court otherwise interprets Art. 6(1) ECHR as requiring judicial protection at least against arbitrary interferences with Convention rights even in the high politics context of sanctions imposed by the UN Security Council.[163]

On that partly shaky basis, the ECJ concludes that the GC had rightly decided that neither Art. 24(1) subpara. 2, last sentence TEU and Art. 275 TFEU, read in the light of Art. 47 CFR, Art. 6(1) and 13 ECHR, and Art. 2, Art. 3(5) and Art. 6, 19, 21 and 23 TEU nor the pleading of breaches of fundamental rights, justified, in themselves, a finding by that court that it had jurisdiction.[164] In other words, there is no general fundamental rights exception to the jurisdictional carve-out. In this context, the ECJ also rejects the argument made by the Commission that Art. 6(2) sentence 1 TEU, introducing an obligation for the EU to accede to the ECHR, required acceptance of such an exception. To refute that argument, the Court refers to Art. 2 of Protocol No. 8 according to which ECHR accession should not affect the competences of the EU or the powers of its institutions.[165] It is unclear whether this pas-

161 *Ibid.*, para. 78, citing ECtHR, Nos. 24384/19 and 44234/20, *H.F. and Others v. France*, judgment of 14 September 2022.

162 ECtHR, Nos. 24384/19 and 44234/20, *H.F. and Others v. France*, judgment of 14 September 2022, para. 281.

163 ECtHR, No. 5809/08, *Al-Dulimi and Montana Management Inc. v. Switzerland*, judgment of 21 June 2016.

164 ECJ, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2024:725, para. 81.

165 *Ibid.*, para. 82.

sage can be interpreted positively, in the sense that it indicates the ECJ's willingness to abandon its objection in Opinion 2/13 that the jurisdiction of the ECtHR regarding CFSP acts must not be broader than its own jurisdiction. For upholding that objection while at the same time rejecting a general fundamental rights exception to the jurisdictional carve-out will for all practical purposes prevent the EU's accession to the ECHR.

In the following part of the judgment, the ECJ develops a two-step approach for determining whether it has jurisdiction to decide on an "action concerning acts or omissions falling within the scope of the CFSP".[166] The first step is to ascertain whether the situation is covered by one of the two claw-backs in Art. 24(1) subpara. 2 sentence 1 TEU, Art. 27(2) TFEU (which is not the case here). The second step is "to assess whether (…) the jurisdiction of the Court of Justice of the European Union may be based on the fact that the acts and omission at issue are not directly related to the political or strategic choices made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP, and in particular the CSDP. (…) [I]f the acts and omissions at issue are not directly related to those political or strategic choices, the Court of Justice … has jurisdiction to assess the legality of those acts or omissions or to interpret them. By contrast, if those acts or omissions are directly related to those political or strategic choices, that institution must declare that it lacks jurisdiction." More specifically, the EU Courts do not have jurisdiction to assess the legality of, or interpret acts or omissions "directly related to the conduct, definition or implementation of the CFSP, and especially the CSDP, that is to say, in particular the identification of the European Union's strategic interests and the definition of both the actions to be taken and the positions to be adopted by the European Union as well as of the general guidelines of the CFSP, within the meaning of Articles 24 to 26, 28, 29, 37, 38, 42 and 43 TEU."[167] In other words, the ECJ adopts a kind of "political question doctrine" that has long troubled the federal courts in the US because of its indeterminacy.[168] Presumably, the Court will transfer its new doctrine to annulment actions against CFSP act under Art. 263 TFEU.

The ECJ considers its second step not only to be consistent with the wording of as well as the aim pursued by Art. 24(1) subpara. 2 sentence 1 TEU, Art. 275(2) TFEU, but also supported by their context "since it enables the effectiveness of the provisions to be preserved, without, however, unduly prejudicing the right to an effective remedy".[169] In other words, in the eyes of the Court, it strikes the proper balance between two competing aspects of the rule of law principle – safeguarding

166 *Ibid.*, paras. 115 ff.

167 *Ibid.*, paras. 116 ff. See in this sense also *Van Elsuwege*, CMLR 2021/6, p. 1740, citing several opinions of AGs.

168 *Verellen*, A Political Question Doctrine for the CFSP, Verfassungsblog, 24 September 2024, available at: https://verfassungsblog.de/political-question-doctrine/ (28/10/2024). See also *Blaschke*, Zwischen Fortschritt und Widerspruch beim Grundrechtsschutz in der GASP – Das EuGH-Urteil in den verbundenen Rechtssachen C-29/22 P und C-44/22 P, jean-monnet-saar 2024, available at: https://jean-monnet-saar.eu/?p=301478 (28/10/2024).

169 *Ibid.*, para. 119.

the separation of powers and effective judicial protection. Admittedly, its flexibility enables the Court to make readjustments by defining "political or strategic choices" more or less broadly and by being more or less strict in determining whether the contested acts or omission are "directly related" to those choices. This flexibility will, however, impair the predictability of the ECJ's future case law and thus legal certainty.[170] Yet, it is at least conceivable that the ECtHR, after the EU's accession to the ECHR, would grant the Union a certain margin of appreciation regarding the proper balance between separation of powers and effective judicial protection in the foreign relations area. The ECJ's second step is flexible enough to be readjusted to requirements deriving from later case law of the ECtHR, in accordance with Art. 46(1) ECHR. But all this is pure conjecture. The compatibility of the two-step approach with the ECHR, as interpreted by the ECtHR, is far from guaranteed.

When applying its second step to the facts of the case, the ECJ assesses in detail whether the various arguments which plaintiffs presented in support of their claim that Eulex Kosovo had breached their fundamental rights under both the ECHR and the CFR are directly related to political or strategic choices made within the framework of the CFSP. It finds that two of these arguments – the one concerning the lack of financial resources made available to the CFSP mission and the one related to the later removal of the executive mandate of the mission – are, while the four others are not so related.[171] Ultimately, therefore, the ECJ partly sets aside the order of the GC and to this extent refers the case back to the GC for a ruling on the admissibility and, if necessary, the merits of plaintiffs' action.

The Court does not adopt the AG's more sweeping approach according to which the prohibition on EU Courts to replace policy choices made by the competent political institutions in the CFSP cannot prevent these Courts from enforcing the legal limits on those policy choices that exist in any constitutional democracy: "In a Union based on the rule of law, it could not have been the intention of the authors of the Treaties to allow for breaches of fundamental rights in the CFSP. As the breach of a fundamental right cannot be a policy choice, the EU Courts must be able to control whether that limit was crossed."[172] Only in this way could they fulfil their mission pursuant to Art. 19(1) TEU. Thus, Art. 24(1) TEU and Art. 275 TFEU could not exclude the EU Courts' jurisdiction to review any CFSP measure, including a political or strategic one, as to its conformity with fundamental rights.[173] The AG acknowledged, however, that political choices in complex issues of international politics might require judicial deference by lowering the level of scrutiny in the ex-

170 *Havani*, An EU external relations political question doctrine that suffers no human rights exception, European Law Blog, September 25, 2024, available at: https://www.europeanlawblog.eu/pub/kwd8041a/release/1 (28/10/2024).

171 *Ibid.*, paras. 124 ff.

172 AG Čapeta, Joined Cases C-29/22 P and C-44/22 P, *KS and KD*, ECLI:EU:C:2023:901, para. 115.

173 *Ibid.*, para. 116.

ercise of existing jurisdiction. However, that did not justify the exclusion of the EU Courts from their constitutional role to provide protection of fundamental rights.[174]

The AG also discussed the potential implications of the case for the EU's accession to the ECHR, indicating that the ECJ judgment would be of key importance for paving the Union's way to the Strasbourg system.[175] She believed that her proposal to read a fundamental rights exception into the jurisdictional carve-out with regard to actions for damages caused by CFSP measures that violate fundamental rights would ensure that the EU Courts always got a chance to decide cases and rectify violations before these cases went up to the Strasbourg Court, thus dispelling the ECJ's concerns voiced in Opinion 2/13. In contrast to the AG's fundamental rights exception to the jurisdictional carve-out, the ECJ's two-step approach cannot guarantee that the EU Courts have jurisdiction in each and every case in which the ECtHR reviews the compatibility of acts or omission performed in the context of the CFSP.[176]

3. The Way Forward: Extending the ECJ's Jurisdiction to All Fundamental Rights Interferences by CFSP Acts

How far can the ECJ extend its jurisdiction in order to maintain the rule of law, protect fundamental rights vis-à-vis CFSP measures and enable the EU's accession to the ECHR without acting *ultra vires*? Can a general fundamental rights exception to the jurisdictional carve-out, as advocated by the AG, but denied by the ECJ in *KS and KD v. Council*, be justified? My answer is yes, based on a construction which neither the AG nor the ECJ have sounded out.

It was argued in the appeal in *H v. Council* that the second claw-back in Art. 275(2) TFEU (restrictive measures against natural or legal persons) encompassed any CFSP act potentially infringing fundamental rights, but that argument was rightly rejected by the AG and not dealt with by the ECJ.[177] This draws attention to the first claw-back in Art. 275(2) TFEU that has so far been largely neglected:[178] It preserves the Court's jurisdiction to monitor compliance with Art. 40 TEU, the wall of separation between the supranational competences of the EU under the TFEU and its intergovernmental competences under the TEU's CFSP chapter. This first claw-back also has another advantage: Unlike the second one, it is not limited to actions for annulment, so that clearly all procedures available to the EU Courts can be used to enforce Art. 40 TEU, including the reference procedure pursuant to

174 *Ibid.*, paras. 117 ff.
175 *Ibid.*, paras. 145 ff. See already above A.II.
176 See *Gobiet*, The Final Episode of a (Never-Ending) Series? CFSP Damages Claims and the ECHR Accession, European Law Blog, September 25, 2024, available at: https://www.europeanlawblog.eu/pub/edrqzitg/release/1 (22/10/2024).
177 AG Wahl, Case C-455/14 P, *H v. Council*, ECLI:EU:C:2016:2012, paras. 73 ff. See also *Cremona*, European Papers 2017/2, p. 689.
178 But see ECJ, Case C-351/22, *Neves 77 Solutions SRL*, ECLI:EU:C:2024:723 (above E.III.1.).

Art. 267 TFEU that has been used in the *Neves 77 Solutions SRL* case and the action for damages pursuant to Art. 268 TFEU that has been used in the *KS and KD v. Council* case.[179]

Two further provisions are needed to complement the picture – Art. 24(1) subpara. 2 sentence 3 and Art. 31(1) subpara. 1 sentence 2 TEU. In identical wording, both exclude the adoption of legislative acts in the CFSP that are permitted on the basis of the EU's supranational competences under the TFEU. Art. 289(3) TFEU defines "legislative acts" as those legal acts that are adopted by legislative procedure. Since no provision in the CFSP chapter of the TEU prescribes a legislative procedure for the adoption of any act, the adoption of legislative acts in the CFSP in the sense of Art. 289(3) TFEU is excluded from the outset. This would make the double prohibition in Art. 24(1) subpara. 2 sentence 3 and Art. 31(1) subpara. 1 sentence 2 TEU redundant, unless the term "legislative act" is given a different meaning within the CFSP – to which Art. 289(3) TFEU does not present an unsurmountable obstacle, because that definition does not necessarily also apply within the framework of the TEU.[180]

Art. 2(1) and (2) TFEU juxtapose legislation and the adoption of legally binding acts, the latter being also permitted in the CFSP in the form of decisions.[181] According to Art. 52(1) sentence 1 CFR, any limitation on the exercise of fundamental rights and freedoms must be provided for by law. This permits the general conclusion that interferences in fundamental rights require legislation, while mere legally binding acts cannot provide a sufficiently firm legal basis. One exception to this general conclusion is expressly provided by Art. 275(2) TFEU: "restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union." If limitations on the exercise of fundamental rights, apart from the permitted exception of individualised sanctions, require legislation that is not permitted in the CFSP and it turns out that a CFSP act (other than one on individualised sanctions) interferes with fundamental rights, that act constitutes a "legislative act" that is permitted only within the supranational framework of the TFEU. If the Council adopts a "legislative act" in the area of the CFSP by interfering in fundamental rights, it will cross the red line into the supranational sphere of the TFEU, thus violating Art. 40(1) TEU.[182]

The ECJ dealt with this issue in the *Rosneft* case of 2017,[183] where Rosneft had challenged EU sanctions against it in a national court that requested a preliminary ruling. Rosneft argued in particular that the Council had infringed Art. 40 TEU

179 See in this sense ECJ, Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, paras. 62 f.

180 See in this sense *Eeckhout*, pp. 478 ff., whose approach is rejected as incompatible with the wording of the Treaty by *Böttner/Wessel*, in: Blanke/Mangiameli (eds.), Art. 31 TEU paras. 13 f.

181 See, e.g., Art. 24(3), Art. 25 (b), Art. 28(2), Art. 29 sentence 2 and Art. 31(1) subpara. 2 TEU.

182 This reasoning is related to *Eeckhout*'s approach that all measures by the Council intended to have legal effects in relation to third parties are "legislative acts" and subject to the jurisdiction of the ECJ for policing Art. 40 TEU (see above fn. 180).

183 ECJ, Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, paras. 84 ff.

when it defined the restrictive measures in excessive detail in the CFSP decision, thus turning the latter into a "legislative act". The Court rejected that argument by simply referring to the fact that pursuant to Art. 24(1) TEU, the CFSP was subject to specific rules and procedures not including the legislative procedure so that "the adoption of legislative acts, within the meaning of Article 289(3) TFEU, is, in that context, necessarily excluded."[184] Since the CFSP decision had not been adopted under the TFEU, it was not capable of being a legislative act, so that the Council could not have infringed Art. 40 TEU.[185] The Court thus indeed treated the double prohibition in Art. 24(1) subpara. 2 sentence 3 and Art. 31(1) subpara. 1 sentence 2 TEU as redundant.

Yet, the ECJ's approach in the *Rosneft* case is sympathetic to my own position in two respects. Firstly, it assumed that the adoption of legislative acts within the CFSP would be contrary to Art. 40(1) TEU. Secondly, it qualified economic measures adopted under Art. 215(2) TFEU to give effect to restrictive measures imposed by a CFSP decision as "legislation",[186] even though the provision does not prescribe any legislative procedure, thus indicating that EU action interfering with fundamental rights is legislative in substance, if not in form. In other words, the Court does not seem to have completely closed the door on my proposal to use Art. 24(1) subpara. 2 sentence 3, Art. 31(1) subpara. 1 sentence 2 and Art. 40(1) TEU as a basis for the EU Courts' general jurisdiction to protect fundamental rights against infringements by CFSP acts. There is still room for an adjustment of the ECJ's jurisprudence by extending its jurisdiction in CFSP cases to all fundamental rights interferences, the solution advocated in this article.

Since Art. 275(2) TFEU preserves the ECJ's jurisdiction to uphold Art. 40 TEU without limitations, the Court can assess whether a CFSP act also outside the individualised sanctions area interferes with fundamental rights, thus transgressing the red line of the EU's supranational sphere. If the ECJ finds such a fundamental rights interference and transgression, it will declare the CFSP act to be void because it infringes Art. 40(1) TEU as well as the pertinent fundamental right, no matter whether it is also substantively incompatible with that fundamental right. The fundamental rights violation simply results from the fact that the interference was carried out on an improper basis, *i.e.* a CFSP basis. The simultaneous violation of Art. 40(1) TEU and the pertinent fundamental right is important because it enables individual victims to bring an action against the CFSP act without having to show that Art. 40 TEU as such is directly applicable and grants actionable individual rights.

Because the conditions of Art. 263(4) TFEU – direct and individual concern in the sense of the *Plaumann* formula[187] – will not often be fulfilled in cases against CFSP acts other than those imposing individualised sanctions, victims will usually have to challenge such acts in the national courts, the Member States being obliged

184 *Ibid.*, para. 91.
185 *Ibid.*, para. 92.
186 *Ibid.*, para. 89.
187 ECJ, Case 25/62, *Plaumann*, ECR 1963, pp. 95, 107 f.

to provide an adequate and effective judicial remedy pursuant to Art. 19(1) subpara. 2 TEU. If the national courts find that the CFSP act interferes with a fundamental right, they will have to refer the question of that act's validity to the ECJ pursuant to Art. 267 TFEU, in accordance with the *Foto-Frost* case.

Taken together, the two jurisdictional claw-backs of Art. 275(2) TFEU ensure the effective judicial protection against all conceivable fundamental rights interferences by CFSP acts, in accordance with Art. 19(1) TEU, Art. 47(1) CFR and the rule of law value in Art. 2 TEU, as well as Art. 6(1), 13 ECHR.[188] EU law, properly interpreted, already includes a comprehensive fundamental rights exception to the jurisdictional carve-out so that the jurisdiction of the EU Courts extends to all CFSP acts that interfere with fundamental rights. Therefore, the concern expressed by the ECJ in Opinion 2/13 that, after the EU's accession to the ECHR, the ECtHR's jurisdiction to review the human rights conformity of CFSP acts would be broader than its own jurisdiction turns out to be ultimately unfounded. On the other hand, the fundamental rights exception advocated here would not nullify the jurisdictional carve-out, because most CFSP acts will not interfere with fundamental rights.

F. EU Accession to the ECHR: Revised Draft Accession Agreement (2023) in Limbo

In April 2023, the negotiations on the EU's accession to the ECHR (and this time also to the Protocols No. 1 and No. 6), having been resumed by the 46+1 Group[189] in June 2020, produced a preliminary result that is reflected in an Interim Report (for information) of the Council of Europe's CDDH to the Committee of Ministers.[190] The Group examined all the obstacles to the EU's accession identified in the ECJ's Opinion 2/13, including "EU acts in the area of the common foreign and security policy (CFSP) that are excluded from the jurisdiction of the ECJ".[191] In this respect, a position paper presented by the European Commission before the resumption of the negotiations formulated the task as follows: "(…) a solution needs to be found, which allows for reflecting the EU internal distribution of competences for remedial action in the allocation of responsibility for the EU acts at issue for the purpose of the ECHR system."[192]

188 See in this sense already *Giegerich*, in: Kadelbach (ed.), pp. 172 f., on the basis of *Eeckhout*, pp. 478 ff. See also *von Arnauld*, in: von Arnauld/Bungenberg (eds.), § 1 para. 70.

189 After the expulsion of Russia from the Council of Europe in 2022, the remaining 46 Member States and the EU were represented in this Ad Hoc Group.

190 Steering Committee for Human Rights (CDDH), Interim Report, for information, on the negotiations on the accession of the European Union to the European Convention on Human Rights, including the revised draft accession instruments in appendix (CDDH(2023)R_EXTRA ADDENDUM) of 4 April 2023, available at: https://rm.coe.int/steering-committee-for-human-rights-cddh-interim-report-to-the-committ/1680aace4e (28/10/2024).

191 *Ibid.*, para. 6.

192 https://rm.coe.int/eu-position-paper-echr-march-2020/1680a06264 (28/10/2024), para. 5.

The CDDH's Interim Report shows that in March 2023, a unanimous provisional agreement was reached on all the issues raised by Opinion 2/13, except the CFSP issue ("Basket 4 issue").[193] In this regard, "the representative of the EU informed the Group of the EU's intention to resolve the Basket 4 issue internally, and of its expectation that the Group would not be required to address this issue as part of its own work. While the Group has therefore resolved all of the issues that it was currently expected to address, it noted that it would be necessary for all parties to the negotiations to be informed of and consider the manner in which the Basket 4 issue has been resolved before they would be able to give their final agreement to the whole package of accession instruments. Against this background and in order to maintain momentum, the EU undertook to inform the CDDH at appropriate intervals about the status of the EU's internal discussions on Basket 4."[194]

This means that the Revised Draft Accession Agreement with annexes remains in limbo until the EU has succeeded in solving its entirely home-made CFSP problem, because that solution is a necessary ingredient of a package deal which can only be adopted and set in force in its entirety. An attempt by the EU during the negotiations to solve the problem by attributing the EU's CFSP acts to individual Member States for purposes of responsibility under the ECHR was rejected by the non-EU members of the Group.[195] Two other solutions can also be ruled out at this stage:[196] The Accession Agreement will not exclude CFSP acts of the EU from the jurisdiction of the ECtHR, which would privilege the EU over the other parties to the ECHR and undermine the most important goal of the accession, namely to subject the EU's conduct to a comprehensive human rights review by the ECtHR.[197] Nor will the EU be permitted to make a reservation to this effect: Art. 12 of the Revised Draft Accession Agreement expressly prohibits reservations to the Agreement itself, while Art. 2 subjects reservations by the EU to the ECHR to the conditions set forth in Art. 57 ECHR. This provision does not permit reservations of a general character. Any reservation made by the EU in order to exclude CFSP acts entirely from the jurisdiction of the ECtHR would necessarily be "general" and thus impermissible.

Obviously, the EU has been waiting for guidance from the ECJ in the *Neves 77 Solutions SRL* and *KS and KD* cases before presenting its internal solution to the 46+1 Group. Gaps in the judicial protection of human rights do remain at EU level after the two 2024 ECJ judgments in the aforementioned cases. These must be closed before the EU can accede to the ECHR, if the ECJ sticks to its "all or nothing" approach in Opinion 2/13 that the jurisdiction of the ECtHR cannot go further than the jurisdiction of the EU Courts in CFSP matters. Since the ECJ has not extended its jurisdiction to all CFSP cases involving fundamental rights interfer-

193 Steering Committee for Human Rights (CDDH), Interim Report (fn. 190), para. 7.
194 *Ibid.*, para. 8.
195 *Mohay*, Croatian Yearbook of European Law and Policy 2023, pp. 293 ff. See also *Polakiewicz/Panosch*, in: Seitz/Straub/Weyeneth (eds.), pp. 1042 ff.
196 See *Blaschke*, Saar Blueprint 05/2024 DE, pp. 48 f.
197 *Polakiewicz/Panosch*, in: Seitz/Straub/Weyeneth (eds.), p. 1038.

ences, the solution advocated in this article, the only remaining hope is that it will reconsider its "all or nothing" approach taken in Opinion 2/13. The EU and its Member States should take this risk and submit the Revised Draft Accession Agreement in its present form to the Court under Art. 218(11) TFEU.

It should be recalled that according to the current legal situation, the EU Member States are jointly and severally responsible under the ECHR for ensuring equivalent human rights protection *vis-à-vis* the EU, including by providing effective remedies also against CFSP acts.[198] This results from the case law of the ECtHR. According to the *Matthews* case, each EU Member State is individually responsible for the compatibility of primary Union law with the Convention.[199] According to the *Bosphorus* case that concerns responsibility for secondary acts, an EU Member State cannot invoke its obligations under EU law as justification for interfering with Convention rights, unless equivalent human rights protection, both procedurally and substantively, is provided by the EU. Otherwise, the EU Member State will be responsible for all Convention violations it commits when fulfilling its EU law obligations.[200] In the *M.S.S.* case that was decided after the entry into force of the Treaty of Lisbon, the ECtHR emphasised that it had taken "care to limit the scope of the *Bosphorus* judgment to Community law in the strict sense – at the time the "first pillar" of European Union law".[201] This indicates that the EU Member States are currently individually responsible for the compatibility with the ECHR of the EU's CFSP acts, without the benefit of the *Bosphorus* judgment, all the more since in their regard, there is no adequate human rights protection at EU level. If such a case against an EU Member State is filed in Strasbourg, the EU cannot participate to defend itself.[202]

Therefore, all EU Member States as well as the EU have a vested interest in solving the CFSP jurisdiction conundrum in order to enable the EU's accession to the ECHR that will finally relieve them of their current responsibility under the Convention for acts attributable to the EU. They should thus jointly initiate the procedure under Art. 218(11) TFEU regarding the Revised Draft Accession Agreement as it is, together with the three competent EU institutions, without further delay, and convince the ECJ to remove its unnecessary CFSP obstacle to the EU's ECHR accession. Their principal argument should be that the two jurisdictional claw-backs of Art. 275(2) TFEU, taken together, ensure the effective judicial protection against all conceivable fundamental rights interferences by CFSP acts.[203] Alternatively, they should argue that the ECJ's two-step approach developed in the *KS and KD* case is flexible enough to allow it to extend its jurisdiction to most, if not all, cases of Convention rights interferences by CFSP acts that could later end up before the EC-

198 See the overview by *Hillion/Wessel*, in: Blockmans/Koutrakos (eds.), pp. 75 ff.
199 ECtHR, No. 24833/94, *Matthews v. UK*, judgment of 18 February 1999.
200 ECtHR, No. 45036/98, *Bosphorus v. Ireland*, judgment of 30 June 2005.
201 ECtHR, No. 30696/09, *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, para. 338.
202 See *Eeckhout*, Jean Monnet Working Paper 1/15, p. 35.
203 See above E.III.

tHR. They should also underline that it promotes the EU's human rights and rule of law values to submit CFSP acts to the jurisdiction of the ECtHR, even if they are not subject to the prior jurisdiction of the ECJ. Finally, the Member States, as the masters of the Treaties, should remind the ECJ that they revised the primary Union law by the Treaty of Lisbon to the effect that it obliges the EU to accede to the ECHR, notwithstanding the jurisdictional carve-out in respect of the CFSP. Their obvious objective prohibits the ECJ from interpreting primary Union law in a way definitely thwarting that accession.[204] If the Court finds no other suitable solution, it must therefore abandon its CFSP-related objection expressed in Opinion 2/13. There is reason to hope that the ECJ will enable the EU's accession to the ECHR.

After the EU's accession to the ECHR the question will come up how the ECtHR would deal with the jurisdictional carve-out regarding CFSP acts, provided that the ECJ does not completely close the jurisdictional gap in cases involving interferences with Convention rights: Would the Court consider it as incompatible with the Union's obligations in particular under Art. 6 (1), 13 ECHR? The ECtHR has indeed several times reviewed the compatibility of the French *acte de gouvernement* doctrine with the Convention and sometimes found a violation, depending on the circumstances of the concrete case.[205] It is therefore possible that the Strasbourg Court would accept a certain gap in the jurisdiction of the ECJ regarding CFSP acts, if only because in such cases, the gap would be filled by the national courts, in accordance with Art. 19(1) subpara. 2 TEU.

G. Jurisdictional Carve-Out as Rule of Law Contaminant Perpetuates Quartet of Dissonance

Summarising the existing ECJ rulings on the jurisdictional carve-out in Art. 24(1) subpara. 2 last sentence TEU and Art. 275(1) TFEU with its two claw-backs in Art. 275(2) TFEU, the ECJ has jurisdiction over CFSP acts in the following instances: actions for annulment pursuant to Art. 263(4) TFEU against a CFSP act imposing restrictive measures on natural or legal persons (Art. 275(2) TFEU); preliminary rulings pursuant to Art. 267 TFEU on the validity of such a CFSP act requested by a national court (*Rosneft*); actions for annulment pursuant to Art. 263(2) or (4) TFEU where the illegality of the CFSP act results from non-CFSP provisions of the Treaties (*Mauritius*) or secondary law provisions on public procurement (*Elitaliana*); actions for annulment pursuant to Art. 263(4) TFEU against acts of staff management in the context of civilian missions within the CSDP (*H v. Council; SatCen*); actions brought by natural or legal persons pursuant to Art. 268, 340(2) TFEU for compensation of damage caused by an annulled CFSP act imposing restrictive measures (*Bank Refah Kargaran*); preliminary rulings pursuant to

204 See in this sense also *Polakiewicz/Panosch*, in: Seitz/Straub/Weyeneth (eds.), p. 1040.

205 See, e.g, ECtHR, Nos. 24384/19 and 44234/20, *H.F. and Others v. France*, judgment of 14 September 2022, paras. 281 ff. (violation of Art. 3 (2) of Protocol No. 4); Nos. 17131/19, 19242/19, 55810/20 et al., *Tamazout and Others v. France*, judgment of 4 April 2024, paras. 112 (no violation of Art. 6(1) ECHR).

Art. 267 TFEU on the interpretation of a CFSP decision where the Council failed to implement that decision by a regulation based on Art. 215(1) TFEU (that would have been covered by Art. 267 TFEU), contrary to its primary-law obligation (*Neves 77 Solutions SRL*); action for damages pursuant to Art. 268, 340(2) TFEU for breach of fundamental rights enshrined in the ECHR and the CFR, unless the grounds invoked for the claim of violation of fundamental rights are directly related to political or strategic choices made within the framework of the CFSP (*KS and KD*).

All in all, these cases considerably extend the EU Courts' jurisdiction into the CFSP area beyond the expressly stipulated claw-backs. On the other hand, they do not completely eliminate the jurisdictional carve-out, which could only be done through a Treaty revision in the ordinary revision procedure.[206] They do not even ensure that the EU Courts have jurisdiction in all cases in which a CFSP act arguably violates fundamental rights. Accordingly, the ECJ's declaration in Opinion 2/13 remains true "that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice."[207] Since the major part of the CFSP thus remains off limits to the EU Courts, the obvious tension between Art. 24(1) subpara. 2 last sentence TEU and Art. 275 TFEU and the rule of law and human rights values in Art. 2 TEU will continue for the foreseeable future. The EU Courts will in particular be prevented from reviewing the compatibility of CFSP acts (other than restrictive measures against natural or legal persons) with the rules of public international law. This is bad news from the perspective of Art. 2 TEU and the EU's standing as a global rule of law champion,[208] but the defect in the Treaties caused by the jurisdictional carve-out can only be fully rectified by a Treaty revision.

Coming back to the quartet and dissonance metaphors, the EU accession to the ECHR, if permitted by the ECJ in the opinion procedure under Art. 218(11) TFEU that is to be expected, will end much of the dissonance between the EU and the Convention system. But if the ECJ's permission is not based on acceptance of a general fundamental rights exception to the jurisdictional carve-out, which is uncertain, the quartet of dissonance between the rule of law, fundamental rights, the CFSP and the ECHR will continue. This is because the exclusion of the EU courts' jurisdiction with regard to some fundamental rights and most non-fundamental rights illegalities in the CFSP will largely remain in place, in obvious tension with Art. 6(1), 13 ECHR. The national courts cannot fill this jurisdictional gap without creating new tensions with the unity of the EU legal order (*Foto-Frost*). In other words: The jurisdictional carve-out remains a rule-of-law contaminant that must be eliminated by Treaty revision as soon as possible.

206 See *Poli*, CMLR 2022/4, p. 1057, on the necessity of a Treaty revision in order to fully judicialise the CFSP.
207 ECJ, Opinion 2/13, *ECHR*, ECLI:EU:C:2014:2454, para. 252.
208 See *Hillion*, Columbia J. Eur. Law 2023/2, pp. 251 ff.

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