

‘The Good, the Bad and the Ugly’: three levels of judicial control over the CFSP

Christophe Hillion and Ramses A. Wessel

To appear in: S. Blockmans and P. Koutrakos (Eds.), *Research Handbook on EU Common Foreign and Security Policy*, Cheltenham/Northampton: Edward Elgar Publishing, 2018

1. INTRODUCTION

A quarter of a century ago, a book chapter on judicial scrutiny of the then new Common Foreign and Security Policy (CFSP) of the EU would have raised eyebrows. Times have changed.¹ The role of the CJEU in relation to the CFSP is now studied extensively² as the Court’s CFSP case law is fast expanding.³ This remarkable development is not only due to the Member States’ decision partially to lift the judicial immunity from which the CFSP has traditionally benefited.

¹ cf. C Hillion and RA Wessel, ‘Restraining External Competences of EU Member States under CFSP’ in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008).
² See for instance S Griller, ‘The Court of Justice and the Common Foreign and Security Policy’ in A Rosas, E Levits and Y Bot (eds), *Court of Justice of the European Union – Cour de Justice de l’Union Européenne, The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l’Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC Asser Press 2013); G De Baere and P Koutrakos, ‘The Interactions Between the Legislature and the Judiciary in EU External Relations’ in P Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012); L Saltinyté, ‘Jurisdiction of the European Court of Justice over Issues Related to the Common Foreign and Security Policy under the Lisbon Treaty’ (2010) *Jurisprudence* 119 et seq.; A Hinarejos, *Judicial Control in the European Union – Reforming Jurisdiction in the Intergovernmental Pillars* (OUP 2009); C Hillion, ‘A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy’ in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* (Hart Publishing 2014); C Hillion, ‘Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy’ (2016) *European Papers* 55; RA Wessel, ‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’ (2015) *European Foreign Affairs Review* 123; RA Wessel, ‘*Lex Imperfecta*: Law and Integration in European Foreign and Security Policy’ (2016) 2 *European Papers* 439; C Eckes, ‘Common Foreign and Security Policy: The Consequences of the Court’s Extended Jurisdiction’ (2016) *European Law Journal* 492; G Butler, ‘The Coming of Age of the Court’s Jurisdiction in the Common Foreign and Security Policy’ (2017) *European Constitutional Law Review* 673; M Cremona, ‘Effective Judicial Review is of the Essence of the Rule of Law: Challenging Common Foreign and Security Policy Measures before the Court of Justice’ (2017) *European Papers* 671; P Koutrakos, ‘Judicial Review in the EU’s Common Foreign And Security Policy’ (2018) *International and Comparative Law Quarterly* 1; and J Heliskoski, ‘Made in Luxembourg: the Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy’ (2018) *Europe and the World: A Law Review* (forthcoming).

³ References may be found throughout this chapter.

It is also the result of the incremental integration of the policy in the increasingly constitutionalized EU legal order.⁴

However far reaching the constitutionalization of the CFSP may have been, gaps nevertheless remain. In particular, the jurisdiction of the Court of Justice, as it has itself recognized,⁵ is legally limited. Given the many recent studies on that very issue,⁶ this chapter will not repeat the detailed analyses of the relevant recent cases. By examining possible forms of judicial control over CFSP at different levels ('the good, the bad, and the ugly'), this chapter rather aims to discuss the Court's approach to the system of judicial control over the CFSP and to provide a more holistic picture of possibilities and pitfalls. Having recalled the post-Lisbon developments in the CJEU's jurisdiction in relation to the CFSP, the present contribution thus asks whether and, if so, to what extent remaining gaps in the Court's control can be filled by involving other courts – both internally at Member States level, and externally by involving international and/or third countries' courts. Our main argument is that the Court's suspicion in relation to alternative judicial oversight may be legitimate. Yet acknowledged gaps in the EU system of judicial remedies in relation to the CFSP ought to be filled for the Union to meet the requirements of the rule of law.⁷ The incremental acknowledgement of the Court's jurisdiction in relation to CFSP might not suffice, which should as a result leave space for *complementary* solutions.

Yet, judging from the case law, the Court of Justice seems generally reluctant to tolerate any other judicial control over the CFSP. For the CJEU, involvement of international courts (or even domestic courts in third states) entails many risks in relation to safeguarding the autonomy of EU law (hence 'the bad'). This was considered as an obstacle to the Union's accession to the European Convention on Human Rights (ECHR), even if it could have filled at least that judicial gap. The Court thus held that 'jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be

⁴ cf. RA Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) *European Constitutional Law Review* 117; and, more recently, RA Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy' in R Schütze (ed), *Governance and Globalization: International and European Perspectives* (CUP 2018).

⁵ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:2014:2454, para 252: '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'.

⁶ See above (n 2).

⁷ As spelled out in Case 294/83 *Les Verts v European Parliament* EU:C:1986:166.

conferred exclusively on an international court which is outside the institutional and judicial framework of the EU'.⁸

Similarly, while acknowledging that the role of Member States is not in itself a bad idea as it is even supported by the Treaties, it is generally seen as an unattractive substitute ('the ugly') for the harmonizing role of the Court of Justice itself.⁹ The fact that the CFSP is part and parcel of the EU's legal order may explain the underlying Court's claim that it should itself exercise judicial control over this EU policy (hence 'the good'), particularly in view of Article 344 TFEU. Yet this position does not help to fill the constitutional gap, unless it is understood as pressing the Masters of the Treaty to address it by expanding the Court's jurisdiction.

2. 'THE GOOD': THE COURT OF JUSTICE

The Court's view is that it should be the one deciding on the interpretation and validity of all EU law. Indeed, Kirchberg is the place to prevent disparities in EU law from occurring. Yet, since the Treaty of Lisbon, the Court of Justice has been entrusted only with a limited jurisdiction in relation to the CFSP. According to Article 24(1) TEU it

'shall not have jurisdiction with respect to these provisions [i.e. 'specific provisions on the Common Foreign and Security Policy' enshrined in Chapter 2 of the TEU¹⁰] with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty [TEU] and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.'

The latter provision further specifies that

'the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for 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'.

⁸ *ibid*, para 256.

⁹ Obviously, these qualifications are borrowed from the classic 1966 Western movie by Sergio Leone, *The Good, The Bad, and the Ugly* (*Il buono, il brutto, il cattivo*) <http://www.imdb.com/title/tt0060196/?ref_=nv_sr_4>.

¹⁰ See Case C-72/15 *Rosneft* ECLI:EU:C:2017:236, Opinion of AG Wathelet, para 46.

As argued elsewhere, these provisions have made it possible for the Court, albeit within limits, to exercise judicial control with regard to certain CFSP acts. They also recalibrate its role in patrolling the borders between EU (external) competences based on the TFEU and the CFSP, while generalizing its capacity to enforce the principles underpinning the Union's legal order.¹¹

The case law that has developed since the entry into force of these provisions displays the Court's broad conception of its CFSP-related jurisdiction. Its basic understanding is encapsulated in the following formula:

'[T]he 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' (emphasis added).¹²

Articles 24(1) TEU and 275(2) TFEU are thus not interpreted as establishing a distinct Court's jurisdiction for the purpose of the CFSP. Rather, the judicial control it intends to perform in relation to that policy appears to be the same as the one it exercises generally, as envisaged in Article 19 TEU, albeit within the limits spelled out in those Articles.

This 'generalist' (so to speak) conception of the Court's jurisdiction in the area of CFSP led it to consider that its legality control over CFSP restrictive measures is not limited to annulment proceedings envisaged in Article 263(4) TFEU, but includes the possibility for it to give a preliminary ruling on their validity:

'Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made by Article 24(1) TEU

In those circumstances, provided that the Court has, under Article 24(1) TEU and the second paragraph of Article 275 TFEU, jurisdiction *ex ratione materiae* to rule on the validity of European Union acts,

¹¹ Hillion (n 2); RA Wessel, '*Lex Imperfecta*' (n 2). For an analysis of the Court's jurisdiction in relation to sanctions, see Chapter 10 in this volume.

¹² Case C-658/11 *EP v Council (Mauritius)* ECLI:EU:C:2014:2025, para 70. See also Case C-439/13P *Elitaliana* ECLI:EU:C:2015:753, para 41; Case C-455/14P *H v Council* ECLI:EU:C:2016:569, para 40.

that is, in particular, where such acts relate to restrictive measures against natural or legal persons, it would be inconsistent with the system of effective judicial protection established by the Treaties to interpret the latter provision as excluding the possibility that the courts and tribunals of Member States may refer questions to the Court on the validity of Council decisions prescribing the adoption of such measures.¹³

The Court's legality control over certain CFSP acts is therefore the same as the one it exercises over other EU acts. It is an expression of its general mandate as established in Article 19 TEU;¹⁴ it is governed by the same principles, in particular the principle of effective judicial remedies enshrined in Article 47 of the Charter of Fundamental Rights.¹⁵

The application of the general EU rules on legality control to the CFSP context illustrates that the Court considers the CFSP as firmly embedded in the EU legal order, despite its procedural specificity mentioned in Article 24(1) TEU. Principles and rules of general application would thus be guaranteed through judicial oversight even where applied to a CFSP situation. The latter circumstance does not entail judicial immunity. Three illustrations come to mind:

First, the Court has made clear that since international agreements in the area of CFSP are concluded on the basis of the general provisions of Article 218 TFEU, albeit subject to some specific arrangements, the Court would exercise judicial control to ensure compliance with the terms of that procedure:¹⁶

‘[T]he obligation imposed by Article 218(10) TFEU, under which the Parliament is to be ‘immediately and fully informed at all stages of the procedure’ for negotiating and concluding international agreements, applies to any procedure for concluding an international agreement, including agreements relating exclusively to the CFSP . . . Article 218 TFEU, in order to satisfy the requirements of clarity, consistency and rationalisation, lays down a single procedure of general application concerning the

¹³ *Rosneft* (n 10).

¹⁴ Further on this general mandate, see C Hillion, ‘Conferral, Cooperation and Balance in the Institutional Framework of the EU External Action’ in M Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart Publishing 2018).

¹⁵ cf. Cremona (n 2).

¹⁶ T Tridimas, ‘The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?’ in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order. Vol. 1: Constitutional and Public Law. External Relations* (Hart Publishing 2004) 128; G De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 190.

negotiation and conclusion of international agreements by the European Union in all the fields of its activity, including the CFSP which, unlike other fields, is not subject to any special procedure.¹⁷

The application to a CFSP situation of a TFEU-based procedure does not therefore affect the Court of Justice's jurisdiction in relation to that procedure.¹⁸ Second, and in the same vein, the Court has considered that it would have jurisdiction to control the legality of a decision awarding a public service contract in the context of an EU CSDP Mission given that the contract concerned involved an expenditure to be allocated to the EU budget, and thereby subject to the provisions of the EU Financial Regulation. Confirming the derogatory character of the terms of Articles 24(1) TEU and 275(2) TFEU, and consequently their narrow application, the Court concluded that

‘[h]aving regard to the specific circumstances of the present case, the scope of the limitation, by way of derogation, on the Court's jurisdiction, which is provided for in the final sentence of the second subparagraph of Article 24(1) TEU and in Article 275 TFEU, cannot 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.¹⁹

Third, the EU judicature has applied a similar approach in *H. v Council and Commission* – a case brought by a staff member of the EU Police Mission in Bosnia and Herzegovina (EUPM), established under the CFSP.²⁰ It thus reiterated that

‘the scope of the limitation, by way of derogation, on the Court's jurisdiction . . . cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of

¹⁷ Case C-263/14 *Parliament v Council (EU-Tanzania Transfer Agreement)* ECLI:EU:C:2016:435, para 68.

¹⁸ In the words of Peers: ‘the Court's ruling means that any CFSP measure can be litigated before it, as long as the legal arguments relate to a procedural rule falling outside the scope of the CFSP provisions of the Treaty (Title V of the TEU). For instance, it arguably means that the Court would have the power to rule on the compatibility of proposed CFSP treaties with EU law, since that jurisdiction is conferred by Article 218 TFEU and not expressly ruled out by Article 275. But such disputes might often include arguments about the substance of the measure concerned (for instance, whether it would breach the EU's human rights obligations), and it could be awkward to distinguish between procedural and substantive issues in practice.’ See: S Peers, ‘The CJEU Ensures Basic Democratic and Judicial Accountability of the EU's Foreign Policy’ (*EU Law Analysis*, 24 June 2014) <<http://eulawanalysis.blogspot.nl/2014/06/the-cjeu-ensures-basic-democratic-and.html>>.

¹⁹ *Elitaliana* (n 12), para 49.

²⁰ See more extensively: P Van Elsuwege, ‘A Court of Justice Upholding the Rule of Law in the Common Foreign and Security Policy: *H v. Council*’ (2017) 3 *CML Rev* 841; T Verellen, ‘*H v. Council*: Strengthening the Rule of Law in the Sphere of the CFSP, One Step at a Time’ (2016) 3 *European Papers* 1041.

that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions.²¹

The Court merely argued that on the basis of Article 270 TFEU, it had jurisdiction in any dispute between the Union and its servants ‘within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union’, a provision which does not exclude CFSP-related disputes.²² It also found that its jurisdiction stemmed

‘respectively, as regards the review of the legality of those acts, from Article 263 TFEU and, as regards actions for non-contractual liability, from Article 268 TFEU, read in conjunction with the second paragraph of Article 340 TFEU, taking into account Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights.’²³

Importantly, Article 2 TEU and Article 21 TEU, to which Article 23 TEU relating to the CFSP refers, were invoked to recall that the European Union is founded, in particular, on the values of equality and the rule of law.

The above-mentioned rulings confirm that the Court of Justice considers the CFSP as part and parcel of the Union’s constitutional set-up.²⁴ The CFSP does interact with other EU policies and rules, resulting in the Court’s more complex judicial involvement in CFSP-related situations than the acknowledged jurisdiction envisaged under Articles 24(1) TEU and 275(2) TFEU. Clearly, a CFSP context forms no basis for the Court to disregard general principles of EU law or rules applicable in other policy areas. As it clearly indicated in the *H* case: ‘While the decisions adopted . . . have an operational aspect falling within the CFSP, they also constitute, by their very essence, acts of staff management, just like all similar decisions adopted by the EU institutions in the exercise of their competences.’²⁵ This is nothing new. It not only brings back memories of early CFSP case law, such as *Hautala* on access to

²¹ *H* (n 12). Similarly – at least as argued by AG Jääskinen in his Opinion of 21 May 2015, in *Elitaliana* (n 12) – the EU Courts should be able to hear individuals on budgetary issues, even if a particular decision was taken by an entity established under the CFSP.

²² *ibid*, para 57. An important argument, also in the context of the present chapter, is that jurisdiction of the CJEU would prevent possible diverging case law of this Court and the domestic courts in the countries of respective staff.

²³ *ibid*, para 58.

²⁴ C Hillion (n 2); RA Wessel, ‘*Lex Imperfecta*’ (n 2). See also Chapter 1 in this volume.

²⁵ *H* (n 12), para 54.

documents,²⁶ it is also the application of a well-established case law of the Court on the scope of EU law and application of horizontal principles.²⁷

It is not the purpose of this chapter to comment further upon the Court's approach.²⁸ In the present discussion, it suffices to underline that, notwithstanding the broad articulation and exercise of the Court's jurisdiction in relation to the CFSP, gaps remain 'as EU law stands'.²⁹ As acknowledged by the Court itself in Opinion 2/13: 'certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice'.³⁰

Thus, only restrictive measures are subject to the CJEU legality control under the terms of Articles 24(1) TEU and 275(2) TFEU, and these have not been understood (as yet) in a particularly broad fashion to ensure compliance with the requirement of effective judicial protection across the CFSP field.³¹ Indeed, clarification is needed as regards the Court's possible oversight of international agreements in the area of CFSP considering that, as mentioned earlier, they are negotiated and concluded in accordance with Article 218 TFEU, in relation to which the Court exercises full jurisdiction. Also, it remains uncertain whether, following the seminal *Rosneft* ruling, other courses of action, such as the interpretative function of the preliminary ruling procedure, or the action for damages, which play a role in ascertaining effective judicial protection, are available in the context of the CFSP, at least in situations involving acts for which the CJEU has jurisdiction.³²

To be sure, the Court lacks jurisdiction in *pure* CFSP (or CSDP)³³ situations, namely when disputes arise about decision-making procedures established in the CFSP chapter. This means, for instance, that neither the Commission nor the European Parliament can commence proceedings before the Court in cases where the Council has, for example, ignored its powers

²⁶ Case C-353/99 P, *Council of the European Union v Heidi Hautala* ECLI:EU:C:2001:661.

²⁷ See e.g. P Koutrakos, 'Primary Law and Policy in EU External Relations – Moving Away from the Big Picture' (2008) 33 *EL Rev* 666.

²⁸ For various views on this case law see: Van Elsuwege (n 20); T Verellen, '*H v. Council*: Strengthening the Rule of Law in the Sphere of the CFSP, One Step at a Time' (December 2016) *European Papers – European Forum 1*; S Øby Johansen, '*H v. Council et al.* – A Minor Expansion of the CJEU's Jurisdiction over the CFSP' (October 2016) *European Papers – European Forum 1*; S Poli, 'The Common Foreign Security Policy After the Rosneft Ruling: Still Imperfect but Gradually Subject to the Rule of Law' (2017) *CML Rev* 1799.

²⁹ Opinion 2/13 (n 5), para 252.

³⁰ *ibid.*

³¹ See in this respect the Commission's views in the context of Opinion 2/13 (n 5), and the Court's analysis of the provisions of the impugned decision in *Rosneft* (n 10), paras 75ff.

³² See in this respect: Opinion of AG Wathelet in the *Rosneft* case (n 10) at footnote 36; Case T-328/14 *Jannatian v Council* ECLI:EU:T:2016:86, paras 30–31; cf. Case T-602/15 *Jenkinson v Council* ECLI:EU:T:2016:660, para 45 – under appeal, see Case C-43/17 P.

³³ For questions on contractual and non-contractual liability of the Union for CSDP operations, see Chapter 7 in this volume.

as envisaged in decision-making procedures set out in the specific CFSP chapter, if the CFSP competence is not otherwise disputed based on Article 40(1) TEU. The interpretation and implementation of the CFSP provisions (including the procedures to be followed) in these situations is left to the Council (or even to individual Member States), unless the case is framed as a violation of Article 13(2) TEU, which would arguably allow the Court's involvement.³⁴ Remembering their initial preference for 'intergovernmental' cooperation where CFSP is concerned, it may be understandable that Member States at the time of the negotiations intended to prevent a body of 'CFSP law' coming into being by way of judicial activism on the part of the Court of Justice, but it is less understandable that they were also reluctant to allow for judicial control of the *procedural* arrangements they explicitly agreed upon. That said, it is acknowledged that it may be difficult to separate procedures and content.

Despite the limits to the Court's jurisdiction, we may therefore not yet have seen the full picture. For instance, does the reference to Article 263(4) TFEU in Article 275 TFEU limit direct actions to those initiated by individuals, or can actions by the institutions or by Member States *inter se* be foreseen on the basis of a contextual interpretation by the Court? Earlier, we argued that there are good reasons to apply the principle of sincere cooperation (as currently formulated in Article 4(3) TEU) across the board, including CFSP.³⁵ Despite the current absence of concrete cases, a use of this principle by the Court to settle procedural (or even substantive) conflicts between the institutions and the Member States or the Member States *inter se*, in a CFSP context cannot be ruled out.³⁶ The recent case law taking general principles of EU law as a starting point only supports this assertion, although it remains clear that the CFSP context should be merely 'incidental', allowing the principle of sincere cooperation to be applicable.

Gaps nevertheless remain in the CJEU's control of the CFSP. This is all the more problematic since the Court has not attempted to dissuade the use of CFSP instruments since the entry into force of the Lisbon Treaty. Even if the CFSP course of action entails derogatory limits to judicial oversight which should be understood narrowly, the Court does not seem to develop a case law giving preference to TFEU-based policies as a result. It has instead signalled that it is taking seriously its post-Lisbon border patrolling function (based on Article 40 TEU) involving

³⁴ On Art. 13(2) TEU, see Hillion (n 14).

³⁵ Hillion and Wessel (n 1).

³⁶ One may think of Member States concluding international agreements in areas covered by EU legislation or agreements, but perhaps even of conflicts on agreed (financial) contributions to CFSP/CSDP actions.

the preservation of the CFSP integrity,³⁷ deferring to the Treaty drafters' choice to keep the CFSP as a distinct policy framework involving specific institutional balance. The use of the CFSP procedures, and some implications in terms of limited CJEU oversight, are arguably here to stay as long as the Treaties are not modified.

Having identified recurrent gaps in the CJEU control over the CFSP, one may then have to examine possible alternative avenues to ensure effective judicial remedies, as required by both Article 47 of the Charter of Fundamental Rights and Article 19 TEU. As the Court of Justice underlined in the *H* ruling, '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'.³⁸ In Opinion 2/13, the Court, however, made clear its reluctance in accepting that an international Court, *in casu* the European Court of Human Rights (ECtHR), could have jurisdiction in relation to CFSP acts over which it could not itself exercise control. It also suggested, although implicitly, that Member States' courts did not have a role to play. The next two sections further discuss this approach.

3. 'THE BAD': INTERNATIONAL/EXTERNAL JUDICIAL CONTROL

When introduced by the 1992 Maastricht Treaty, CFSP was often seen as falling outside EU law. In fact, some early publications viewed the then newly established second pillar as international law (if the rules were considered legal at all).³⁹ While the present authors have maintained that CFSP has always been part and parcel of the EU's legal order, since the entry into force of the Lisbon Treaty it now seems even more difficult to argue otherwise.⁴⁰

³⁷ In 2012, the Court was given a first chance to develop an approach towards the function of Article 40 in Case C-130/10 *Parliament v Council* ECLI:EU:C:2012:472. The Court held that Article 215 TFEU (following a previous CFSP decision) rather than Article 75 TFEU (in the Area of Freedom, Security and Justice – AFSJ) was the correct choice, despite the limited role of the European Parliament in relation to the CFSP/Article 215 procedure. The context of peace and security proved to be decisive for the Court's conclusion. Subsequent cases include Case C-658/11 (*Mauritius*) (n 12) and Case C-263/14 (*Tanzania*) (n 17). See more extensively Chapter 1 in this volume; C Matera and RA Wessel, 'Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements – Case C-658/11, *European Parliament v. Council (Mauritius Agreement)*' (2014) *Revista de Derecho Comunitario Europeo* 1047; van Elsuwege (n 20); and C Hillion, 'Fighting Terrorism through the CFSP' in I Govaere and S Poli (eds), *EU Management of Global Emergencies* (Brill 2014).

³⁸ See the *H* case (n 12), para 41; also in *Rosneft* (n 10), para 77.

³⁹ See for an early analysis of those studies: RA Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International 1999).

⁴⁰ See for instance RA Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) 1 *European Constitutional Law Review* 117; C. Hillion, 'Tous pour un, Un pour tous! Coherence in the External Relations of the European Union' in M Cremona (ed.), *Developments in EU External Relations Law* (OUP 2008).

The question therefore arises as to whether Article 344 TFEU also applies to disputes on the basis of CFSP acts and obligations and, if so, to what extent. Article 344 TFEU provides that ‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’. This provision has continuously been used by the CJEU to claim its exclusive jurisdiction whenever the interpretation or application of EU law is at stake,⁴¹ and the Court’s case law has developed the conditions under which participation of the EU in international dispute settlement systems can be allowed.⁴² Following the present chapter’s metaphor, external judicial involvement has in effect been viewed as ‘bad’ in the eyes of the Court, despite its declared openness towards international jurisdiction.⁴³

Indeed, in Opinion 2/13, the CJEU confirmed the complexities related to the EU’s submission to external judicial scrutiny.⁴⁴ In answering the question of whether the Union could join the ECHR, the Court pointed to a number of (classic) principles and conditions inherent in the nature of EU law, which in effect encapsulate the difficulties of a combination of EU law and international dispute settlement. For the purpose of the present chapter it is relevant to point to specific paragraphs in which the Court addresses the external judicial review of CFSP measures. As stated earlier, it expressed its displeasure with the idea that the ECtHR would be able to rule on the compatibility with the ECHR of ‘certain acts, actions or omissions performed in the context of the CFSP’ which ‘fall outside the ambit of judicial review by the Court of Justice’.⁴⁵

⁴¹ See further below and for instance Opinion 1/91 ECLI:EU:C:1991:490, para 35 and Opinion 1/00 ECLI:EU:C:2002:231, paras 11–12; judgments in C-459/03 *Commission v Ireland* ECLI:EU:C:2006:345, paras 123 and 136, and *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, para 282.

⁴² See C Hillion and RA Wessel, ‘The European Union and International Dispute Settlement: Mapping Principles and Conditions’ in M Cremona, A Thies and RA Wessel (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017); as well as T Lock, *The European Court of Justice and International Courts* (OUP 2015).

⁴³ Opinion 1/76, *European Laying-up Fund for Inland Waterways* ECLI:EU:C:1977:63. Further: see Hillion and Wessel (n 42); see also: B De Witte, ‘A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union’ in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014) 33.

⁴⁴ Opinion 2/13 (n 5). See also View of AG Kokott, ECLI:EU:C:2014:2475. For an academic appraisal see, *inter alia*, A Łazowski and RA Wessel, ‘When Caveats turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR’ (2015) 16(1) *German Law Journal* 179; as well as A Łazowski and RA Wessel, ‘The European Court of Justice Blocks the EU’s Accession to the ECHR’ (CEPS Commentary, 8 January 2015) <<http://www.ceps.eu/node/9942>>.

⁴⁵ Opinion 2/13 (n 5), para 252.

The issue was also referred to by Advocate General Kokott when she argued that ‘accession to the ECHR will undoubtedly mean that the EU must respect the fundamental rights protection that stems from the ECHR – and thus also the requirement of effective legal protection in accordance with Articles 6 and 13 ECHR – in all its spheres of activity, including the CFSP’.⁴⁶ The Opinion also raised the key question of whether the legal protection in the CFSP afforded by the EU legal order could be regarded as effective legal protection for the purposes of Articles 6 and 13 ECHR.

The Commission’s view on this point is noteworthy. In the words of AG Kokott:

‘It proposes that [Article 275 TFEU] be understood as meaning that the Court of Justice of the EU not only has jurisdiction over actions for annulment brought by individuals against restrictive measures, but it may in addition deal with actions for damages and reply to requests for preliminary rulings from national courts or tribunals in the sphere of the CFSP. It also advocates handling the options for the legal protection of individuals in the CFSP in such a way as to cover not only acts, within the meaning of the first paragraph of Article 263 TFEU, which produce binding legal effects, but also mere ‘material acts’ (*Realakte*), that is to say, acts without legal effects.’⁴⁷

While the Commission may be complimented for the daring view that in certain circumstances the extended jurisdiction of the Court flows from the post-Lisbon EU legal order,⁴⁸ Advocate General Kokott was not convinced. Indeed, and perhaps even more interestingly, she argued:

‘the very wide interpretation of the jurisdiction of the Courts of the EU which it proposes is just not necessary for the purpose of ensuring effective legal protection for individuals in the CFSP. This is because – the entirely accurate – assertion that neither the Member States nor the EU institutions can avoid a review of the question whether the measures adopted by them are in conformity with the Treaties as the basic constitutional charter does not necessarily always have to lead to the conclusion that the Courts of the EU have jurisdiction.’⁴⁹

As will be discussed in the following section, the reason would be that ‘national courts or tribunals have, and will retain, jurisdiction’.⁵⁰

⁴⁶ AG View (n 44), para 83.

⁴⁷ *ibid*, para 86.

⁴⁸ C. Hillion, ‘A Powerless Court?’ (n 2) and RA Wessel ‘Resisting Legal Facts’ (n 2).

⁴⁹ AG View (n 44), para 95.

⁵⁰ *ibid*, para 96.

Despite this option, the question remains – as acknowledged by Advocate General Kokott – of whether effective legal protection in relation to the CFSP can be provided by the EU’s multilevel system itself. And it is this situation that forms the source of the Court’s worries as it would perhaps give room to a ‘non-EU body’ to exercise powers that were consciously left out of the EU Treaties for the CJEU itself. In Opinion 2/13, the Court also aimed to prevent other courts from considering possible human rights violations. It is doubtful whether this claim can be made. The choice by the EU Treaty drafters at the time to maintain a special position for many CFSP norms as far as their judicial review is concerned does not imply that possible human rights violations in relation to CFSP actions should in general be exempt from judicial scrutiny. Arguably, the reason for the special arrangement was rather to prevent judicial activism in this area of EU competence. These days, the gap in the judicial control over CFSP – which, as we have seen, is recognized by the Court itself – leads to examining the extent to which courts outside the EU can have a role in the judicial scrutiny of CFSP.

Given the link between CFSP and other external EU action, CFSP matters could in theory be subject to dispute resolution before several different tribunals.⁵¹ However, we will focus first on the European Court of Human Rights, second on the International Court of Justice and third on the national courts of third states.

With regard to a possible role for the ECtHR, we have seen that Opinion 2/13 does not exclude it. In fact, this was one of the reasons for the CJEU to advise against the Accession Agreement. In the words of the Court of Justice, the ECtHR could rule on the compatibility with the ECHR of ‘certain acts, actions or omissions performed in the context of the CFSP’.⁵² Obviously – as the EU is not (yet) a party to the ECHR – these could only be actions by the Member States. It is also clear that the ECtHR will only examine compatibility with the ECHR and cannot function as a tribunal to supervise or enforce the implementation of CFSP obligations as such. In that sense, the role of the Strasbourg Court in judicial control over CFSP is limited, although it may be confronted with questions on the interpretation and application of EU law.

In the context of the present analysis, the current role of the ECtHR is thus circumscribed to possible violations of the Convention by states in the implementation of CFSP, including CSDP. While this role of the Strasbourg Court is similar to that exercised in other policy areas

⁵¹ For example, EU maritime operations such as EUNAVFOR Somalia/Atalanta, could trigger questions related to the law of the sea which could end up before the International Tribunal for the Law of the Sea (ITLOS).

⁵² Opinion 2/13 (n 5), para 7.

of the EU, an important difference lies in the fact that the Court's case law has traditionally taken the possibilities for judicial scrutiny by the EU into account when dealing with possible violations of the Convention by Member States related to an implementation of EU decisions. The well-known *Bosphorus* and *Matthews* case law serves as the basis for this line of thinking,⁵³ and the judicial protection offered by the EU has generally been seen as providing an adequate alternative. On the basis of this 'arrangement' it has been argued that 'conflicts have been rare, but the threat was ever present'.⁵⁴ Obviously, this threat is less evident when the CJEU itself cannot offer the full review of CFSP measures.

In general, there are no reasons to question the authority of the ECtHR to assess acts or conduct of EU Member States in relation to external action of the European Union. As long as the Union is not a party to the ECHR, it will obviously not be able to breach it, even though the Union's missions and other external actions are based on EU decisions.⁵⁵ According to the *Behrami* and *Saramati* case law, the Union could nevertheless be responsible for these violations when their authors are acting on behalf of the Union and are under its control; which in turn has consequences for the responsibilities for its Member States (i.e. the parties to the ECHR).⁵⁶ In recent years, the rules governing the attribution of wrongful acts committed in the context of peace support operations have been the subject of intense discussion, in particular since the Strasbourg case law mentioned above. Although this debate has demonstrated that academic opinion insists on a high level of factual control for holding states and international organizations responsible for the conduct of peace operations,⁵⁷ it has stopped short of addressing the underlying question of whether factual control is the only relevant ground of

⁵³ *Matthews v United Kingdom* (1999) 28 EHRR 361; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1.

⁵⁴ See JP Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) *CML Rev* 995, 1001.

⁵⁵ The question of international responsibility of the EU for CFSP actions is still under debate. We would point to the fact that CFSP, like other Union policies, is based on EU decision, pointing towards the responsibility of the EU as such. See Chapter 7 in this volume as well as A Sari and RA Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' in B Van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013). For others: 'it would be difficult to argue that an action committed by a Member State when complying with a CFSP measure is to be understood as having been committed by the EU by virtue of its normative control'; see A Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (CUP 2016).

⁵⁶ *Behrami v France* and *Saramati v France, Germany and Norway* (2007) 45 EHRR SE10. See also Jacqué (n 54) and A Sari, 'Autonomy, Attribution and Accountability: Reflections on the *Behrami* Case' in ND White and R Collins (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011).

⁵⁷ See, for instance, K Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control Test"' (2008) 19 *European Journal of International Law* 509.

attribution in this context. In general, states usually transfer only limited powers of operational control over their forces to international organizations, and retain supreme authority, known as full command, for themselves.⁵⁸ The armed forces of a state thus never lose their institutional status as state organs during their secondment to an international organization and could thus remain responsible even if their actions take place in the context of a military operation initiated by an international organization.

However, within the EU context, responsibility questions seem more complex. As a distinct chapter in this volume is specifically devoted to the responsibility and liability for CSDP operations,⁵⁹ we will limit ourselves to a few general observations with regard to the possible role of external courts. The legal status of the missions and their staff is regulated in Status of Forces Agreements (SOFAs) or Status of Mission Agreements (SOMAs). The absence of an extensive practice⁶⁰ makes it difficult to present concrete examples, especially since, as stated by Heliskoski ‘virtually all claims lodged under SOFAs and SOMAs in the context of CSDP operations are sorted out by means of amicable settlement’. First of all, civilian missions now have an accepted distinct legal capacity, albeit under EU law only.⁶¹ In general, it has been argued that if it can be established that EU military missions constitute ‘subsidiary organs’ of the EU, a rebuttable presumption may be said to exist in favour of attributing their wrongful conduct to the Union, rather than to the contributing states.⁶² Since all legal acts relating to the launch, conduct and termination of EU military operations are adopted by the Council of the EU,⁶³ the latter is the only EU institution capable, in principle, of establishing military operations as its subsidiary organs (compare the arguments used in the *H* case mentioned above). The decision-making procedures or voting rules (unanimity) do not affect the nature of

⁵⁸ See, for instance, B Cathcart, ‘Command and Control in Military Operations’ in T Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010). See also S Johansen, *The Accountability Mechanisms of International Organisations – A Framework and Three Case-Studies* (Oslo University 2017) esp. 143–201.

⁵⁹ Chapter 7 in this volume.

⁶⁰ See F Naert, ‘Shared Responsibility in the Framework of the EU’s CSDP Operations’ in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law*, Vol. III (CUP 2017) 3689.

⁶¹ These missions are now endowed with a legal personality under EU law, including ‘the capacity to . . . be a party to legal proceedings, as required in order to implement [the] Joint Action [concerned]’. See, for instance, Art. 15 *bis* of Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L 340/73, as amended by Council Decision 2014/349/CFSP [2014] OJ L 174/42. See further Chapter 7 in this volume.

⁶² Sari and Wessel (n 55). See also Heliskoski (Chapter 7 in this volume): ‘a presumption that responsibility under public international law for the conduct of CSDP operation or missions is borne by the EU in its own right rather than by the Member States’.

⁶³ cf. F Naert, ‘Legal Aspects of EU Military Operations’ (2011) *Journal of International Peacekeeping* 218; P Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013).

the Council Decision.⁶⁴ This seriously limits the possibilities for the ECtHR to scrutinize CFSP/CSDP actions by EU Member States to situations in which Member States would not act on behalf of the Union, but would, for instance, go beyond their mandate. More generally, Naert has pointed to a number of complexities in the application of human rights law to CSDP operations: ‘the extraterritorial application of the European Convention on Human Rights, the question of derogation in times of emergencies and its applicability to peace operations, the relationship between human rights and international humanitarian law and the impact of UN Security Council mandates on human rights’.⁶⁵ Again, these factors limit the possibilities of seeing the ECtHR as being able to fill possible gaps in the judicial control of CFSP/CSDP.

This brings us to the question of whether other international courts could play a role in dealing with CFSP questions. Given the subject matter, the International Court of Justice (ICJ) could be an obvious candidate. In the course of the development of the CFSP, this option has occasionally been mentioned, but also rejected. As held by Denza in 2002:

‘Although reference is sometimes made to the possibility to adjudication of disputes between Member States by the International Court of Justice, this is clearly not a realistic option for most disputes given the time scale required for the ICJ to reach a decision. The actual use by Member States of the ICJ to adjudicate on the intergovernmental provisions of the TEU would, moreover, certainly undermine the role of the ECJ as a constitutional guarantor of the legal order of the European Union – in particular the requirement of unity and consistency.’⁶⁶

Leaving aside the reference to ‘intergovernmental provisions’ in the context of the EU in this respect, the second part of the argument indeed makes sense. It is important to recall that in this context Article 344 TFEU also seems to exclude the possibility for Member States to settle potential CFSP disputes before the ICJ, despite the restrictive role of the CJEU as mentioned in Article 275 TFEU. As was made clear in Opinion 2/13, the prohibition on submitting a dispute to another court is not dependent on the CJEU itself having jurisdiction in that particular field.⁶⁷

This leaves us with the question of whether third states may initiate proceeding before the International Court and sue EU Member States in cases of, for instance, disagreements related

⁶⁴ This is not to say that Member State liability is always excluded. For a detailed analysis, see Chapter 7 in this volume.

⁶⁵ Naert (n 63) 237.

⁶⁶ E Denza, *The Intergovernmental Pillars of the European Union* (OUP 2002) 322.

⁶⁷ See also Lock (n 42) 88.

to international agreements concluded in the area of CFSP or CSDP. While, as we have seen, the exclusivity of the Court's jurisdiction would usually prevent EU Member States from settling disputes involving the interpretation of EU law elsewhere, it is more difficult to find legal arguments to prevent third states from initiating international legal proceedings. As the EU as such has no standing before the ICJ, these actions could only involve the Member States.⁶⁸ So far, however, international agreements in the area of CFSP/CSDP have been concluded by the EU alone. Again, the fact that the Council decides on the basis of unanimity does not change the nature of the Decision adopting the agreement. This would only be the case if the Decision were not taken by the Council as such, but by Member States' representatives acting 'in the framework of the Council'.⁶⁹ Perhaps ironically, mixity is not used in this area and hence Member States do not bear individual responsibilities under international law, but only through Union law. This is not to say that CFSP issues may, theoretically, not come up in ICJ proceedings.⁷⁰ Again one may think of situations in which EU Member States have allegedly violated international law in the margins of activities which fall within the framework of an EU operation. The facts of the case will be decisive in establishing their international responsibilities. One may also think of political decisions on, for instance, individual sanctions which could come into conflict with existing obligations under international diplomatic law. While for EU Member States this could lead to conflicting obligations under EU (CFSP) law and international law, nothing seems to stand in the way of third states using available ICJ

⁶⁸ cf. the cases before the ICJ of Serbia and Montenegro (then composite republics of one single state) against eight NATO member states (Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the United Kingdom), asking the ICJ to hold each of the respondent states responsible for international law violations stemming from the NATO bombing campaign against Yugoslavia in March–April 1999. Here also, Serbia and Montenegro chose to sue a number of Member States irrespective of the fact that the actions were based on a NATO decision and also coordinated by NATO. As, according to the ICJ, Serbia and Montenegro, lacked standing, the Court did not have a chance to consider the merits of the case. The cases can be accessed through the website of the ICJ: <http://www.icj-cij.org>.

⁶⁹ We are not aware of existing examples of CFSP Decisions taken in the framework of the Council. Yet, a recent external relations example is the Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, annexed to the European Council Conclusions on Ukraine of 15 December 2016.

⁷⁰ In general, EU law has not played a role in disputes before the ICJ. Only a very indirect reference to EU law may perhaps be found in the ICJ judgment on the *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, where the CJEU's view on commercial policy as presented in its Opinion 1/76 was accepted by the ICJ. See more extensively RA Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) *Oxford Yearbook of European Law* 533. While there are indeed no practical examples at this moment, the *Gabcíkovo-Nagymaros (Hungary v Slovakia)* case, for instance, revealed that international rules may collide with EU obligations.

procedures to hold other states responsible, even when these other states happen to be EU members. So far, however, practice has not provided any concrete examples.

Apart from the ICJ, other international courts could be confronted with questions related to CFSP. One example could be the International Criminal Court in the event of a violation by nationals of EU Member States of the rules on genocide, crimes against humanity and war crimes during the operations of CSDP missions. At present, all EU Member States are States Parties to the Rome Statute. It is also important to remember that the EU and its Member States accept that if EU-led forces become a party to an armed conflict, international humanitarian law will apply to them fully.⁷¹ Specific situations could furthermore lead to proceedings before specialized tribunals, such as the International Tribunal for the Law of the Sea (ITLOS), whenever law of the sea disputes arose during or as a result of a CSDP mission. Obviously, however, these disputes could not relate to interpretation of EU law, but merely of – in this case – the rules on the law of the sea.

Finally, could one envisage CFSP disputes being brought to and settled by national courts of third states, for instance states where the EU is active through military missions? Again, it is important to underline the obvious: not just because of Article 344 TFEU, but also because of jurisdictional problems, it would not be possible for Member States *inter se* to have their disputes settled by those courts. However, there is no reason in principle why local or national courts would not have the competence to deal with disputes between third states or local actors and Member States, for instance in relation to the responsibility for wrongful acts committed by CFSP missions or alleged violations of domestic or even international law. In the case of CSDP missions, the SOFAs would generally mention ‘respect’ for local law, although the view is usually taken that ‘respect’ does not mean ‘comply with’ and therefore imposes lower standards.⁷² Moreover, the application of domestic law would generally be ruled out in the provisions in the agreement dealing with the privileges and immunities of the EU mission.⁷³ While it is not unusual in international law to confer diplomatic privileges and immunities on foreign military and civilian personnel, it has been noted that in the case of EU missions the privileges and immunities are much more extensive and are not only conferred on the higher-

⁷¹ F Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010) 463–540.

⁷² F Naert, ‘Legal Aspects of EU Military Operations’ (n 63) 240.

⁷³ See on these agreements P Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013) 198–202; Naert (n 63); A Sari, ‘Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice’ (2008) *European Journal of International Law* 67.

ranking staff.⁷⁴ The EU Model SOFA and SOMA⁷⁵ grant EU missions' personnel immunity from the criminal jurisdiction of the host state 'under all circumstances'.⁷⁶ At the same time, the sending states retain 'all the criminal jurisdiction and disciplinary powers conferred on them by the law of the Sending State'.⁷⁷ Furthermore, the missions' personnel are exempted from the civil and administrative jurisdiction of the host state 'in respect of words spoken or written and all acts performed by them in the exercise of their official functions'.⁷⁸ A role for domestic courts in third states cannot be fully excluded in cases related to so-called ordinary activities, such as driving for private reasons or contracting on the local market. With regard to lawsuits in third countries, practice offers a variety of situations, including the following: traffic incidents involving EU Delegations' staff (where in each case the EU examines whether or not to lift immunity for the purpose of local proceedings); criminal proceedings against an international contracted staff member of an EU mission, where the local authorities imprison the person in question, in clear violation of the relevant provisions of the Status of Mission Agreement (but where the host country reminded the EU that the SOMA also calls for mission staff to respect local laws and where the staff member could only be released after some diplomatic effort); and disputes about whether an employment contract with local personnel was concluded by the Head of Delegation in his private or official capacity.⁷⁹

Overall, however, the role of international courts and courts of third countries in relation to CFSP seems to be limited by the CJEU's wide interpretation of Article 344 TFEU (as in the case of the ECtHR), the lack of standing of the EU (the ICJ) or the quite extensive rules on EU immunities (courts in third states). The *H* case also revealed that the proceedings initiated by Ms H before Italian courts gave the CJEU no reason to reconsider the division of judicial tasks.⁸⁰ This brings us to the question of what role, if any, Member States' courts could then play in relation to the CFSP.

⁷⁴ Sari (n 73) 78–79; also Naert (n 63) 250, calling the situation 'unusual'.

⁷⁵ See Draft Model Agreement on the status of the European Union-led forces between the European Union and a Host State, Council of the European Union (SOFA), 20 July 2007, Doc. 11894/07; and Draft Model Agreement on the Status of the European Union Civilian Crisis Management Mission in a Host State (SOMA), Council of the European Union, 15 December 2008, Doc. 17141/08.

⁷⁶ Art. 6(3) EU Model SOFA; Art. 6(3) EU Model SOMA.

⁷⁷ Art. 8 EU Model SOFA; Art. 8 EU Model SOMA.

⁷⁸ Art. 6(4) EU Model SOFA; Art. 6(4) EU Model SOMA.

⁷⁹ Informal note issued by the European Commission in March 2010 (available online at <www.coe.int/t/dlapil/cahdi/Source/state_immunities/EU%20Immunities.pdf>. See more extensively on these examples: RA Wessel, 'Immunities of the European Union' (2014) *International Organizations Law Review* 395.

⁸⁰ *H* (n 12), para 19.

4. ‘THE UGLY’: MEMBER STATES’ COURTS

As is well established, Member States’ systems of remedies are integrated in the EU judicial system. Indeed, according to Article 19 TEU, Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.⁸¹ Yet, in the eyes of the Court of Justice, it would be difficult (or perhaps ‘ugly’) to allow domestic courts to play a leading role in EU law without at least a harmonizing role for the Court itself. As mentioned in *Rosneft*:

‘The Court must reject the argument that it falls to national courts and tribunals alone to ensure effective judicial protection if the Court has no jurisdiction to give preliminary rulings on the validity of decisions in the field of the CFSP that prescribe the adoption of restrictive measures against natural or legal persons.’⁸²

The Court of Justice has further spelled out the role that national courts are to play in ensuring that in the interpretation and application of the Treaties, the law is observed. Thus, in its Opinion on the *Unified Patent Court*,⁸³ it held:

‘As is evident from Article 19(1) TEU, the guardians of [the] legal order and the judicial system of the European Union are the Court of Justice *and the courts and tribunals of the Member States*

It should also be observed that the Member States are obliged, by reason, *inter alia*, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, *it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual’s rights under that law.*

The national court, in collaboration with the Court of Justice, fulfils *a duty entrusted to them both* of ensuring that in the interpretation and application of the Treaties the law is observed (emphases added).’

Based on this general statement, it is arguable that as co-‘guardians of [the] legal order and the judicial system of the European Union’, Member States’ courts and tribunals should be called

⁸¹ This section builds on Hillion (n 1).

⁸² See *Rosneft* (n 10), para 77.

⁸³ Opinion 1/09 *Unified Patent Court* ECLI:EU:C:2011:123.

upon to ensure compliance with provisions of EU law in the context of the CFSP where the CJEU itself does not have jurisdiction. Nothing in the Treaties suggests that the restrictions applicable to Court of Justice's powers, based on Articles 24(1) TEU and 275(1) TFEU, concern in any way the jurisdiction of Member States' courts. On the contrary, Article 274 TFEU stipulates: 'Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.' In this sense, Advocate General Kokott underlined in her View in the Opinion procedure 2/13, that 'this follows from the principle of conferral, according to which competences not conferred upon the EU in the Treaties remain with the Member States'.⁸⁴

The restricted jurisdiction of the Court of Justice per Articles 24(1) TEU and 275(2) TFEU should thus involve the commensurate involvement of Member States' judiciaries precisely to offset the Court's inability to ensure that the law is observed in the interpretation and application of some aspects of the CFSP. Article 19 TEU indeed points to this complementary role, inspired by the Court of Justice's case law,⁸⁵ when requiring Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', to avoid 'a lacuna . . . in the legal protection system',⁸⁶ and thus to fulfil the requirement of Article 47 of the EU Charter of Fundamental Rights (CFR).⁸⁷ Given that the Court of Justice itself cannot provide legal protection, the notion of *sufficiency* entails that it is for the Member States to provide effective remedies.

Advocate General Kokott discussed the role of national judiciaries extensively in her *ECHR* Opinion.⁸⁸ The Court, by contrast, did not. In mentioning that 'accession would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU *exclusively* to a non-EU body' (emphasis added),⁸⁹ it suggested instead, albeit obliquely, that Member States' courts are not able to review the legality of CFSP acts, even those that fall outside its

⁸⁴ See View of AG Kokott (n 44), esp. para 96. For an academic appraisal see, *inter alia*, Łazowski and Wessel (n 44).

⁸⁵ See e.g. Case C-583/11 *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:62; Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:462.

⁸⁶ View of AG Kokott (n 44), para 85.

⁸⁷ Art. 47 CFR stipulates: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

⁸⁸ View of AG Kokott (n 44), esp. paras 96–103.

⁸⁹ See Opinion 2/13 (n 5), para 255. It reiterated that point in the following paragraph.

jurisdiction. For the Court of Justice, its exclusion from certain aspects of the CFSP sphere is seemingly tantamount to an exclusion of the whole EU judicial system, including Member States' courts as EU courts, despite the express provision of Article 274 TFEU, the unequivocal language of Opinion 1/09, and the obligations enshrined in Article 19 TEU.

Admittedly, allowing Member States' courts to review the legality of certain EU acts would undoubtedly complicate the functioning of the EU legal order. This is a well-known concern for the Court of Justice, which was forcefully expressed in its *Foto-Frost* judgment in which it concluded that

‘those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze* [1981] ECR 1191, the main purpose of the powers accorded to the Court by Article [267 TFEU] is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the community legal order and detract from the fundamental requirement of legal certainty. The same conclusion is dictated by consideration of the necessary coherence of the system of judicial protection established by the Treaty. In that regard it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the community institutions

Since Article [263] gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.’⁹⁰

The invalidation of CFSP acts by Member States' courts would have implications comparable to those evoked in *Foto-Frost* as regards the unity of the EU legal order and legal certainty. This could indeed explain the Court's implicit position on Member States' courts in Opinion 2/13.

⁹⁰ Case C-314/85 *Foto Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452. For a recent reiteration of the doctrine it contains, see e.g. Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650, and *Rosneft* (n 10).

That said, how could the *Foto-Frost* solution operate in a situation where the Court of Justice has no jurisdiction? How can it guarantee the unity of the EU legal order, and particularly the uniformity of application of CFSP rules, if the Court cannot review those rules in the first place? Arguably, ‘the necessary coherence of the system of judicial protection established by the Treaty’ requires that if the Court does not have the ‘jurisdiction to declare void’ certain CFSP acts, it cannot claim the power to declare such acts invalid, and *a fortiori* that such power be reserved to it. The application of the *Foto-Frost* doctrine presupposes the CJEU’s jurisdiction. Thus, Advocate General Kokott considered:

‘ [I]n the context of the CFSP, the Court of Justice cannot claim its otherwise recognised monopoly on reviews of the legality of the activities of EU institutions, bodies, offices and agencies. The settled case-law of the Court, stemming from the judgment in *Foto-Frost*, cannot, therefore, in my view, be applied to the CFSP. Unlike in supranational areas of EU law, there is no general principle in the CFSP that only the Courts of the EU may review acts of the EU institutions as to their legality.’⁹¹

Admittedly, the *Foto-Frost* doctrine does apply to certain CFSP-related situations. Member States’ courts are thus precluded from invalidating CFSP acts that fall under the Court of Justice’s jurisdiction. The Court made that point clear in the *Rosneft* judgment:

‘The necessary coherence of the system of judicial protection requires, in accordance with settled case-law, that when the validity of acts of the European Union institutions is raised before a national court or tribunal, the power to declare such acts invalid should be reserved to the Court under Article 267 TFEU (see, to that effect, judgments of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 17, and of 6 October 2015, *Schrems*, C362/14, EU:C:2015:650, paragraph 62). *The same conclusion is imperative with respect to decisions in the field of the CFSP where the Treaties confer on the Court jurisdiction to review their legality* (emphasis added).’⁹²

The tenets of the *Foto-Frost* jurisprudence, applied to the CFSP context, are therefore strongly reaffirmed – the judgment indeed spells them out almost in full. But this application is envisaged only where it itself has jurisdiction. One may thus infer from the above dictum that

⁹¹ View of AG Kokott (n 44), para 100.

⁹² See *Rosneft* (n 10), para 78.

for CFSP-related cases falling outside the scope of Article 275(2) TFEU, by contrast, Member States' courts are able to exercise what remains their judicial power.

To be sure, Member States' judiciaries can always invalidate unlawful national measures taken in the context of a CFSP act.⁹³ EU principles and rules, including the CFR, are then of relevance given that the Member State would be acting within the scope of EU law within the meaning of Article 51(1) CFR. But beyond the national implementation measures, Member States' courts, *qua* EU courts, are arguably the only EU judiciary able to control the validity of CFSP acts as such, though possibly with the Court of Justice's aid.

In particular, the Court may assist the national judge's review of a CFSP act, or its national implementation, through the preliminary ruling procedure. In particular, it may provide an *interpretation* of any EU law, such as a provision of the Charter or a provision on the EU institutions' essential role enshrined in Title III TEU, which would be relevant for deciding on the case at hand.⁹⁴ After all, the limits enshrined in Article 275(2) TFEU cannot entail restrictions on the Court's jurisdiction in relation to other (that is, non-CFSP) domains of EU law without potentially breaching the rule of Article 40(1) TEU, while negating the exceptional nature of the judicial arrangements of Article 275 TFEU, and their consequent narrow interpretation.⁹⁵

In sum, there are legal elements to support Member State courts' involvement, as EU courts, in exercising complementary judicial control over the CFSP, where and as long as the Court of

⁹³ The High Administrative Court of Nordrhein Westfalen was asked to rule on the alleged responsibility of Germany for the transfer of suspected Somali pirates to Kenya, carried out in the framework of the EUNAVFOR Atalanta mission (Oberverwaltungsgericht NRW, 4 A 2948/11, 18 September 2014). For an insightful analysis of this case see: E Sommario, 'Attribution of Conduct in the Framework of CSDP Missions: Reflections on a Recent Judgment by the Higher Administrative Court of Nordrhein Westfalen' in S Poli (ed.), *Protecting Human Rights in the European Union's External Relations* (CLEER paper 2016/5).

⁹⁴ AG Wahl considered in the *H* Case that when the CJEU does not have jurisdiction it is for the national courts 'to examine the lawfulness of the contested decisions and rule on the related claim for damages' (para 89). In doing so, they may have to ask preliminary questions: '90. . . it cannot be excluded that the competent national courts may have doubts as to the extent of their review of the contested decisions as well as on the possible consequences of that review. 91. Should that be the case, I would remind those courts that they are at liberty – and they may sometimes be obliged – to submit a request for a preliminary ruling to the Court under Article 267 TFEU. In that connection, the Court may still be able to assist those courts in deciding the case before them, while remaining within the boundaries established by Articles 24(1) TEU and 275 TFEU. It occurs to me that such requests for a preliminary ruling ought to be welcomed . . . '.

⁹⁵ As mentioned above, the Court of Justice considered 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*' (emphasis added); see at para 70 of its *Mauritius* judgment.

Justice is not allowed to exercise it itself.⁹⁶ That this approach involves complications for the functioning of the legal order cannot in itself disqualify the only judicial protection against CFSP acts that is available under EU law as it stands. The contrary would amount to a denial of legal protection which would be equally problematic for the EU legal order, based as it is on the rule of law.⁹⁷

Indeed, the implications of a decentralized judicial control of the CFSP might be less damaging for the EU legal order than a judicial review by national courts limited to the domestic implementation measures. While in the latter case, national courts would be adjudicating by reference to national and EU law, in the former situation, they would review the legality of the CFSP measure on the basis of EU law only, including the CFR, thus acting in the interest of the Union and in line with their duty of cooperation. In other words, the shared power of national courts in exercising judicial review of CFSP acts may contribute to securing the primacy of EU norms, including the Charter, in situations where the Court does not have jurisdiction.⁹⁸

5. CONCLUSION

While Article 24(1) TEU refers to ‘specific rules and procedures’ for the CFSP, it is equally clear that, in the absence of such specific rules and procedures, the general rules apply. If anything, the case law of the Court referred to above consistently underlined this. References to CFSP provisions in Articles 24(1) TEU and 275 TFEU are indeed meant to limit the Court’s jurisdiction to acts that are not of a ‘pure’ CFSP nature (based on Title V, Chapter 2 TEU).⁹⁹ Indeed, as Cremona puts it, ‘this allows the Court – while granting the CFSP full scope as a policy field – to ensure that “CFSP exceptionalism” with respect to its own jurisdiction does not creep beyond its proper bounds’.¹⁰⁰ While one may discuss what these ‘proper bounds’ are, it is at least clear that the Court’s general jurisdiction is not limited by the fact that a certain act was adopted in the context of the CFSP.

⁹⁶ For a possible role of domestic courts in settling questions of liability for CSDP operations, see Chapter 7 in this volume.

⁹⁷ See Article 2 TEU, and e.g. *Schrems* (n 90), para 60.

⁹⁸ In this respect, see Case C-399/11 *Melloni v Ministero Fiscal* ECLI:EU:C:2013:107.

⁹⁹ cf. the Opinion of AG Wathelet in the *Rosneft* case (n 10), paras 42–46. The question whether ‘pure’ CFSP sanctions (e.g. arms embargoes) would be covered by the ‘restrictive measures’ mentioned in Art. 275 remains unanswered, but given the Court’s restrictive approach to the exceptions and the importance attached to EU principles (such as equality and access to court), we would see no reasons to exclude sanctions with a mere CFSP legal basis from the Court’s jurisdiction.

¹⁰⁰ Cremona (n 2).

Yet it is widely acknowledged that, despite the Court's clear jurisdiction in relation to CFSP-related issues, it cannot yet provide 'full review'. If so, there is a systemic gap in the EU system of judicial remedies, as seemingly recognized by the Court itself. How could one then fill this gap? One option is simply to grant the Court full judicial oversight over the CFSP and thus suppress the current derogatory provisions of Articles 24(1) TEU and 275 TFEU.¹⁰¹

The Court may, in the meantime, have to elaborate on its current CFSP-related case law, premised on the narrow interpretation of the derogations enshrined in the above-mentioned Articles, in an attempt to meet, as far as possible, the standards of Article 47 CFR without circumventing the limits set out by the Treaty drafters. The hope in Luxembourg may indeed be that, in the medium term, the Masters of the Treaties realize that the Court of Justice is trustworthy in the CFSP context, the integrity of which it scrupulously protects, in that it is capable of exercising judicial control over the EU foreign policy without overshadowing the authority of the political protagonists.

A droit constant, the Court of Justice may have to accept that in the current system, an additional role for external or other EU judiciatures must be acknowledged. In that respect, Opinion 2/13 was not very helpful for those waiting for the possibility of the ECtHR stepping in and filling the gaps. As we have argued elsewhere,¹⁰² the criteria to allow external courts to deal with EU (including CFSP) law are hard to meet: they comprise, *inter alia*, the prevention of an adverse effect on the autonomy of the EU legal order; respect for the allocation of powers between the EU and its Member States; and the absence of jurisdiction to interpret EU law. At the same time, other international courts or national courts in third states may de facto be confronted with CFSP-related questions and it may be difficult for EU Member States to draw on their EU membership card to escape international obligations where situations have not been regulated otherwise.

While a substantial role for 'outside' courts may indeed be difficult considering the terms of Article 344 TFEU, the contrary seems to hold true for the domestic courts in the EU Member States. On the basis of Article 19 TEU, they do have a role to play. To quote the Court once more: 'As is evident from Article 19(1) TEU, the guardians of [the] legal order and the judicial system of the European Union are the Court of Justice *and the courts and tribunals of the Member States*.'¹⁰³ The *Rosneft* case confirmed that the CFSP is not excluded from this general

¹⁰¹ See in this respect, the intervention of President of the CJEU Lenaerts at the ICON-S Conference 2016, Day 3, Plenary Session 3: 'Judicial Interview and Dialogue': https://www.youtube.com/watch?v=_VrjbtE9Yfg.

¹⁰² Hillion and Wessel (n 42).

¹⁰³ Opinion 1/09 (n 83), para 66 (emphasis added).

role of the national courts. Thus, full access to court is ensured as regards CFSP acts, in line with requirements of the rule of law.

Judicial control over the CFSP may thus take place at different levels and we would maintain that, as the law stands, the role of the national courts is not so much 'ugly' as, in certain situations, necessary. In addition, to ensure full review of CFSP measures, it can only be hoped that the Court will not consider all external review as 'bad' and at least allow for other courts (the ECtHR in particular) to fill the gaps, thus giving preference to effective judicial review over autonomy in situations where its own jurisdiction is limited.