ACCOUNTABILITY MECHANISMS FOR HUMAN RIGHTS VIOLATIONS BY CSDP MISSIONS: AVAILABLE AND SUFFICIENT?

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Abstract This article demonstrates that it is doubtful whether the accountability mechanisms available in connection with operative missions conducted under the EU's Common Security and Defence Policy (CSDP) provide a sufficient level of protection when human rights are violated. The assessment of the CSDP accountability mechanisms—the Court of Justice of the European Union, domestic courts of EU Member States, and other mechanisms at the international level—is conducted in light of the requirements laid down in Article 13 of the European Convention of Human Rights. The consequences of the insufficiency of these mechanisms for the EU's accession to the ECHR are also touched upon.

Keywords: accountability mechanisms, Common Foreign and Security Policy, Common Security and Defence Policy, European Convention on Human Rights, European Union, human rights.

I. INTRODUCTION[1]

Most would agree that the European Union (EU) should be held accountable if it violates the human rights of individuals. Since the early 1970s the human rights accountability of the Union has been continuously strengthened.[2] Respect for human rights and the rule of law are today among the values upon which the Union is founded,[3] and the Charter of Fundamental Rights (CFR) now forms part of primary Union law. From the point of view of substantive law, human rights appear to be well protected.

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[2] Although the original EU treaties were silent on the matter, the Court of Justice recognized that respect for human rights were a part of 'the general principles of Community law' in Case 29/69 *Stauder v City of Ulm* [1969]. See, for further details, G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 475–80.

[3] TEU art 2.

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Nevertheless, when it comes to the procedural accountability mechanisms that are available to individuals alleging a violation of their rights, there are some chinks in the protection. This is particularly the case in relation to the EU' s Common Foreign and Security Policy (CFSP), where the jurisdiction of the Court of Justice of the European Union (CJEU)[4] has traditionally been limited. In the context of targeted sanctions[5] these limitations have been both criticized by legal scholars and challenged in practice.[6] However, most of the accountability gaps identified in connection with targeted sanctions have been closed following the entry into force of the Treaty of Lisbon.[7]

The focus of this article is therefore rather on the Common Security and Defence Policy (CSDP); a sub-policy of the CFSP providing the Union with an operative capacity, drawing on civilian and military assets, that may be used for missions abroad.[8] Although human rights are among the principles that shall guide the conduct of the CSDP,[9] the accountability *mechanisms* applicable in this area are—as will be argued below—seemingly insufficient. This is despite the fact that the CSDP is a policy area that is just as susceptible to human rights violations as any other area of Union law and policy. Indeed, due to the CSDP's operative nature, the risks of violations of the most basic human rights (such as the right to life or the freedom against torture) are arguably greater than in connection with any other policy area.

The issue of the sufficiency of CFSP (and thus CSDP) accountability mechanisms was brought thoroughly into the spotlight after the Court of Justice handed down Opinion 2/13 on the EU's proposed accession to the European Convention on Human Rights (ECHR). In this Opinion the CJEU was, *inter alia*, faced with the question of whether the Draft Agreement on the Accession of the EU to the ECHR (DAA)[10] respected the specific characteristics of EU law concerning judicial review in CFSP matters.[11] To answer this question it was necessary for the Court to first identify what these 'specific characteristics' are. In doing so, it came as close as it has ever come to define the limits of its jurisdiction under the CFSP, stating that:

[4] References to the CJEU in the following also refer, where appropriate, to its predecessor, the Court of Justice of the European Communities.

[5] In EU terminology known as 'restrictive measures against natural or legal persons', see TFEU art 275(2).

[6] An overview of the case law is found in P Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 511–28.

[7] Some potential accountability gaps may nevertheless remain, eg in cases where individuals are negatively affected by general (non-targeted) sanctions. See C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 MLR 254, 283.

[8] TEU art 42(1).

[9] TEU art 23, which refers back to, *inter alia*, TEU art 21(1).

[10] Attached as Appendix I to CDDH 47+1 Ad Hoc Negotiation Group, 'Final report to the CDDH' (5 April 2013) CoE Doc 47+1(2013)008 <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf>.

[11] CJEU, Opinion 2/13 *EU Accession to the ECHR (II)* [2014] paras 249–258.

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> for the purpose of adopting a position on the present request for an Opinion, it is sufficient to declare 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.[12]

This admission proved to be critical, as the Court then moved on to find that accession would create a situation where the review of certain CFSP conduct attributable to the EU was (exclusively) entrusted to a non-EU body; the European Court of Human Rights (ECtHR).[13] This would notably be the case for those 'acts, actions or omissions […] whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights'.[14] The CJEU thus concluded that the DAA failed to have proper regard to the specific characteristics of EU law with regard to judicial review in CFSP matters—while noting that its conclusion was a 'consequence of the way in which the [CJEU's] powers are structured at present'.[15] In the eyes of the CJEU this was enough to render the DAA incompatible with the constituent treaties of the Union.[16]

In light of this rather brief and incomplete assessment of the sufficiency of CFSP accountability mechanisms in Opinion 2/13, there is a need to further explore the issue. Particularly because the current legal literature on the accountability of international organizations, and the EU in particular, has a clear bias towards substantive rules; issues such as whether international organizations (including the EU) have human rights obligations, and whether certain conduct amounting to human rights violations would be attributable to them.[17] To the extent that accountability mechanisms are discussed in the literature, it is usually done in a quite short and superficial manner.[18] No-one

[12] ibid, para 252. [13] ibid, para 255. [14] ibid, para 254. [15] ibid, para 257.

[16] ibid, para 258. The CJEU also found the DAA incompatible with the treaties on four other, independent grounds: (1) that the DAA is liable adversely to affect the specific characteristics and the autonomy of EU law, (2) that the DAA is liable to affect TFEU art 344, (3) that the DAA does not lay down arrangements for the operation of the co-respondent mechanism that enable the specific characteristics of Union law to be preserved, and (4) that the DAA does not lay down arrangements for the prior involvement of the CJEU that enable the specific characteristics of Union law to be preserved.

[17] See eg 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) Pt III; MD Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) (edited collection); R Gosalbo-Bono and S Boelaert, 'The European Union's Comprehensive Approach to Combating Piracy at Sea: Legal Aspects' in A Skordas and P Koutrakos (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart 2014), particularly 104–32; D Thym, 'Transfer Agreements for Pirates Concluded by the EU – a Case Study of the Human Rights Accountability of the Common Security and Defence Policy' in Skordas and Koutrakos ibid.

[18] Among the works cited in the previous footnote accountability mechanisms are briefly discussed in Evans and Koutrakos (n 17) 331–2; Gosalbo-Bono and Boelaert (n 17) 161–4; Thym (n 17) 179–81. In the scholarship on other international organization there is also a bias towards substantive issues, although there are some authors that write quite extensively on mechanisms. See eg J Wouters *et al.* (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) for a collection of articles exemplifying both approaches.

yet seems to have explored whether the Union's accountability mechanisms are compatible with the human right to a remedy.[19]

The present article attempts to fill this gap, by questioning the sufficiency of the accountability mechanisms applicable to a subset of CFSP activities: CSDP missions. It will be demonstrated that it is doubtful whether the accountability mechanisms available in connection with CSDP missions provide a sufficient level of protection when human rights are violated. The consequences of this for the ongoing, but temporarily derailed, process of EU accession to the ECHR, will also be touched upon.

First, section II, recalls the main features of the CFSP and its relationship with the CSDP. Second, section III, then identifies potential human rights violations that may occur in connection with two specific CSDP missions. Although the primary focus is on accountability *mechanisms*, it is necessary to briefly summarize these institutional and substantive points of the law to provide the necessary context for the main purpose of this article; the assessment of the CSDP accountability mechanisms. Third, section IV will analyse the accountability mechanisms applicable to CSDP missions, and assess whether they provide a sufficient level of accountability, as required under and CFR Article 47(1) and ECHR Article 13. Finally, section V offers an overall conclusion.

II. THE CFSP, THE CSDP AND THEIR RELATIONSHIP

In order to fully grasp the issues at hand, it is necessary to briefly recap the fundamental features of the CFSP following the 2009 Treaty of Lisbon, and its relationship with the CSDP sub-policy. A key achievement of the Lisbon treaty was the merging of the three former pillars of the EU into a single, unified international organization. In most areas, this had the effect of bringing together formerly fragmented competences, principles, legal personalities and decision-making procedures into one legal person—the European Union—with a distinctly supranational touch. Procedures were simplified, with a stronger emphasis on (qualified) majority voting.[20] All the Union's central institutions—the Commission, the Parliament, the Council, and the Court of Justice—were to play a role across the former pillars. However, despite the formal removal of the pillar structure, the institutional specificities in this area, previously known as the second pillar, were to a large extent preserved by the Lisbon treaty.[21] The CFSP is 'subject to specific rules and procedures'—as explicitly stated in TEU Article 24(1), second subparagraph.[22] This view is reinforced by the placement of the

[19] As laid down in CFR art 47(1) and ECHR art 13.

[20] P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010) 43.

[21] J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 66–7; Craig (n 20) 27.

[22] See also Craig (n 20) 380.

provisions concerning the CFSP in the EU treaties. While nearly all treaty provisions concerning the Union's external action are found in Part V of the TFEU, the provisions concerning the CFSP are found in Title V of the TEU.

The distinguishing feature of the CFSP is that it remains a markedly intergovernmental part of an increasingly supranational Union.[23] Decisions are taken unanimously, unless otherwise stated.[24] The number of EU institutions involved in CFSP activities is also limited. The CFSP is to be 'defined and implemented' by the Council, while the role of the Parliament, the Commission and the Court of Justice is severely restricted.[25] This distinguishes the CFSP from virtually all other areas of EU law. Nevertheless, the special position of the CFSP can hardly be seen as surprising, as it reflects the traditional distinction between 'high' and 'low' politics.

Although the decision-making procedure is intergovernmental in nature, decisions adopted under the CFSP heading are still regarded as decisions of the Union.[26] While the adoption of CFSP decisions requires unanimity among the Member States, once adopted 'their purpose is to restrict the freedom Member States traditionally enjoy in their external relations'.[27] Thus, when the Council adopts decisions under the CFSP defining the position of the Union in relation to a particular matter of foreign policy, its Member States must ensure that their national policies conform to the position taken.[28] They must also uphold the Union's positions when they participate in (other) international organizations and international conferences.[29] Decisions on operational actions commit EU Member States to the positions they thereby adopt.[30] The Member States are also generally required to 'support the Union's external and security policy actively and unreservedly'.[31]

The *CSDP* is an 'integral part' of the CFSP.[32] The relationship between the two may best be described as that between a general framework (the CFSP) and a specific area of activities within that framework (the CSDP). The operative actions and defence capabilities that make up the CSDP are established and carried out on the basis of CFSP instruments and rules.[33] This includes the decisions concerning CSDP missions taken under TEU Article 25(b)(i) and (iii).

What defines the CSDP missions is that they involve the use of civilian and military assets, usually abroad. They range from simple training missions to

[23] As also noted in Opinion 2/13 *EU Accession to the ECHR (II)* [2014], View of AG Kokott para 101.
[24] TEU art 31(1).
[25] TEU arts 24(1) and 36; PJ Kuijper *et al., The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (OUP 2013) 856; Craig (n 20) 411–13. But see CJEU, Case C-658/11 *Parliament v Council* [2014], where the CJEU arguably extends the role of the parliament in a CFSP-related context.
[26] TEU art 25(b).
[27] RA Wessel and L den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Accountability Gap?' in Evans and Koutrakos (n 17) 344.
[28] TEU art 29.
[29] TEU art 34(1).
[30] TEU art 28.
[31] TFEU art 24(3).
[32] TEU art 42(1).
[33] P Koutrakos, *The EU Common Security and Defense Policy* (OUP 2013) 35.

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more complex missions that may even be given executive, legislative and judicial tasks. Some missions are authorized to use physical force. How a mission is designed depends on its type and objectives. The mission types and objectives specifically mentioned in the TEU include humanitarian assistance, rescue operations, military advice and assistance, disarmament operations, conflict prevention and peacekeeping (including so-called 'peace-making'), and post-conflict stabilization.[34]

III. POTENTIAL HUMAN RIGHTS VIOLATIONS IN CONNECTION WITH CSDP MISSIONS

When human rights are violated, there is a duty to provide accountability mechanisms—this is the essence of ECHR Article 13. The question at hand is thus whether CSDP missions, and thus the Union, are capable of violating human rights. To some, the idea that international organizations may be human rights violators seem backwards. There is a certain a normative bias in favour of international organizations.[35] They are often perceived as inherently good; as promoters of human rights, and thus incapable of violating human rights. However, this perception is sometimes mistaken—as will be illustrated in the following when it comes to CSDP missions.[36]

The CSDP missions launched by the Union thus far may be divided into two broad categories. First, the Union has launched several civilian missions.[37] The objectives of these range from assisting and training members of the police and military forces of foreign States, to broader civilian missions engaged in (post-conflict) State-building. The varying mandates of these missions are reflected in their varying scale. Civilian missions range from simple, small-scale operations comprised of a handful of expert advisers to full-scale territorial administration[38] missions that may potentially assume complete legislative, judicial, and executive power over a geographical area.[39] Second, there are missions which are of a military nature. These also come in different shapes

[34] TEU art 43(1).

[35] MN Barnett and M Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004), particularly at ix and 23.

[36] Scholars have increasingly challenged the normative bias towards international organizations in recent years. See among others: A Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 Global Governance 131; S Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish Publishing 2001); F Mégret and F Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 HRQ 314; G Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (CUP 2011).

[37] For an overview of the civilian missions launched so far, see Koutrakos (n 33) 133–82.

[38] On the concept of territorial administration by international organizations, see eg R Wilde, *International Territorial Administration* (OUP 2008) ch 1; C Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (CUP 2008), particularly at 43–9.

[39] The overwhelming majority of missions are, admittedly, small-scale, see Koutrakos (n 33) 181–2. EULEX Kosovo is the exception, with its large-scale and broad mandate (see section III.A below).

and forms.[40] Some are overtly military missions tasked with peacekeeping and peace enforcement. Other military missions engage in conduct that more closely resembles policing or coast guard activities.

CSDP missions within both categories are capable of causing human rights violations, but the risk of violations varies between the categories, and between missions. One important factor explaining these variations in risk is the extent of which the missions make use of force. Military missions are normally expected to use force, either offensively or in self-defence, while civilian missions rarely use force.[41] Another relevant factor is the issue of applicable law. While human rights law is generally applicable across both categories, military missions tasked with peacekeeping and peace enforcement may also involve the law of armed conflict. Whether the law of armed conflict is applicable to CSDP peacekeeping/peace enforcement missions cannot be answered in the abstract, but depends on an individual assessment of each situation. This assessment is both complex and difficult, and ultimately depends on the factual conduct of the EU forces on the ground.[42]

To illustrate this the following sections consider some potential human rights violations that may occur in connection with two missions; the civilian EULEX Kosovo and the military NAVFOR Somalia—Operation Atalanta (hereinafter: NAVFOR Atalanta). A survey of potential human rights violations in connection with specific CSDP missions will, almost as a matter of necessity, be speculative. Since there are few cases to draw on, I will limit myself to provide some very brief, hypothetical indications of the kind of human rights violations that could occur in the context of the two missions, and show how such violations would be attributable (also to) the Union. The aim is, in other words, not to exhaustively catalogue all potential human rights violations—which would likely be impossible. Rather, it is intended to provide some context for the analysis and assessment of the accountability *mechanisms* applicable to CSDP missions, which is the focus of this article. Moreover, the responsibility of the Union—including the attribution of conduct in CSDP missions—has been extensively discussed elsewhere.[43]

[40] For an overview of the military missions launched so far, see ibid 101–32.

[41] Civilian missions will usually only use force in self-defence, to protect the security of the mission. However, some comprehensive civilian missions wielding executive power over a territory are empowered to use force to ensure public security. An example of the latter is the use of tear gas by EULEX in order to disperse demonstrators at a construction site, documented in Secretary General of the UN, 'Report on the United Nations Interim Administration Mission in Kosovo' (UN Doc S/2009/300, 10 June 2009) paras 12–14.

[42] For a discussion of the general applicability of the law of armed conflict to CSDP missions, and the difficulties of assessing this in the context of individual missions, see: Naert, *International Law Aspects of the EU's Security and Defence Policy* (n 17) 463–506; F Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement' (2011) K.U. Leuven, Institute for International Law Working Paper No 151 at 17 <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp151e.pdf>.

[43] See eg F Naert, 'The International Responsibility of the Union in the Context of Its CSDP Operations' in MD Evans and P Koutrakos (eds), *The International Responsibility of the*

A. A Civilian Mission Example: EULEX Kosovo

EULEX Kosovo is a large-scale example of a CSDP civilian mission.[44] With a current annual budget of EUR 90 million, and over 800 international staff, it is the largest civilian CSDP mission ever launched.[45] Its central aim is to assist and support the Kosovo authorities in the rule of law area—with a particular focus on the judiciary.[46] EULEX Kosovo is primarily supposed to monitor, provide advice and mentor local authorities, but the mission may also wield significant judicial, executive, and legislative powers if necessary.[47] Examples of this include the power to secure the rule of law 'through reversing or annulling operational decisions taken by the competent Kosovo authorities'.[48]

When EULEX Kosovo makes use of its extensive competences, it is quite possible that ECHR violations could occur. For example, if the power to annul decisions of Kosovo authorities is exercised, EULEX is engaging in a form of judicial review of those decisions—with the risk of violating the fair trial guarantees laid down in ECHR Article 6 and CFR Article 47 in the process. Another human rights sensitive part of the mission is the EULEX Police. They operate 'in the areas of financial and economic crime, organized crime, war crimes, terrorism, high-level corruption, and inter-ethnic crimes, but also crowd and riot control'.[49] Both in the conduct of crowd and riot control, and in the conduct of investigations—which the EULEX Police may, exceptionally, initiate and carry out on their own—there are risks of human rights violations.

Any human rights violations in the above-mentioned scenarios would, as a general rule, be attributable to EULEX Kosovo (and thus the Union). EULEX staff performing conduct as described above are either contracted or, alternatively, seconded from a State or an international organization. 'The conduct of contracted staff who are institutionally, and thus *de iure* integrated into the [Union], is necessarily attributed to the [Union].'[50] The conduct of seconded staff may only be attributed to the Union if it, through the EULEX mission, exercises sufficient command and control over them. The latter is of particular relevance for EULEX police. According to Spernbauer,

European Union: European and International Perspectives (Hart 2013); Wessel and den Hertog (n 27); 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* (OUP 2013); M Spernbauer, *EU Peacebuilding in Kosovo and Afghanistan: Legality and Accountability* (Brill 2014) 320–49.

[44] For further details on EULEX Kosovo, see: Naert, *International Law Aspects of the EU's Security and Defence Policy* (n 17) 164–73; Koutrakos (n 33) 168–77; Spernbauer (n 43).

[45] European External Action Service, 'Factsheet: EULEX Kosovo' (October 2014) <http://eeas.europa.eu/csdp/missions-and-operations/eulex-kosovo/pdf/factsheet_eulex_kosovo_en.pdf>.

[46] Art 3 of Council Joint Action 2008/124/CFSP [2008] OJ L42/92.

[47] ibid art 3(a) i.f.; Spernbauer (n 43) 200.

[48] Art 3(b) of Council Joint Action 2008/124/CFSP [2008] OJ L42/92. See also art 17 of the Law on EULEX jurisdiction, approved by the Assembly of Kosovo on 13 March 2008 (in force 15 June 2008) No 2008/03-L-053 <http://www.kuvendikosoves.org/common/docs/ligjet/03-L-053%20a.pdf>.

[49] Spernbauer (n 43) 327.

[50] ibid 321, with further references.

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> EULEX executive police operates independently from the [Kosovo Police] and its command structures are an EULEX-only chain of operational control, from the head of Mission to the individual police officer. This results in a *prima facie* attribution of any unlawful conduct by a police officer to the European Union, instead of to Kosovo or the contributing state.[51]

B. A Military Mission Example: NAVFOR Atalanta

NAVFOR Atalanta is a military CSDP mission launched in 2008, tasked with deterring, preventing and repressing acts of piracy off the Somali coast.[52] Its mandate includes tasks such as keeping watch over the relevant areas, taking the necessary measures to protect vessels (including the use of force), as well as arresting, detaining and transferring captured pirates to States with jurisdiction to prosecute them.[53] To this end 20 EU Member States and 2 non-EU Member States contribute military assets and personnel. At any given time approximately 4–7 warships and 2–4 maritime patrol and reconnaissance aircraft participate in the mission.[54]

NAVFOR Atalanta is a prime example of a military mission with a mandate closer to policing or coast-guarding than to peacekeeping or peace enforcement. The same can be said of its legal basis under (general) international law. Although UN Security Council resolution 1816 provided the political impetus necessary for establishing the mission, its legal basis is found elsewhere:

> on the one hand, in the law of the sea as regards actions undertaken on the high seas and, on the other, in the prior consent of the [Transitional Federal Government of Somalia] for the action undertaken within Somalia's territorial jurisdiction.[55]

The legal basis of NAVFOR Atalanta has been analysed in great detail by Papastavridis.[56] It will not be discussed further here—except to point out that, since NAVFOR Atalanta operates outside the context of an armed conflict, international humanitarian law does not apply. Instead, the potential for human rights violations in connection with the mission will be examined. Three scenarios seem particularly relevant.

[51] ibid 328.

[52] For an overview of NAVFOR Atalanta, see Naert, *International Law Aspects of the EU's Security and Defence Policy* (n 17) 179–91; Koutrakos (n 33) 120–4; ; Gosalbo-Bono and Boelaert (n 17) 87–134. For a detailed analysis, with a particular emphasis on responsibility, see E Papastavridis, 'EUNAVFOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters?' (2015) 64 ICLQ 533.

[53] Council Joint Action 2008/851/CFSP [2008] OJ L301/33 arts 2 and 12.

[54] European External Action Service, 'Factsheet: NAVFOR Operation Atalanta' (23 November 2014) <http://www.eeas.europa.eu/csdp/missions-and-operations/eu-navfor-somalia/pdf/factsheet_eunavfor_en.pdf>.

[55] Papastavridis (n 52) 542.

[56] ibid, particularly at 536–50.

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First, the human right to life may plausibly be violated in connection with a boarding and search of a (suspected) pirate vessel.[57] Warships conducting the boarding are in principle allowed to use force, albeit subject to the rules governing law enforcement at sea.[58] It is not unthinkable that force may be used in a manner that does not respect the strict requirements of necessity and proportionality that applies in this context. However, 'as the operational control rests with the Member State rather than with the EU Force Commander', it appears as if potential violations would not be attributable to the Union.[59] Still, the Union might incur responsibility on the basis of its complicity (indirect responsibility). The concept of complicity has been recognized by the ILC in its Draft Articles on the Responsibility of International Organizations when they contribute to the violation by another State or international organization through aid, assistance, coercion, or direction and control.[60] The provisions on aid and assistance seem to be particularly relevant, although their exact scope is uncertain.[61] This uncertainty reflects the lack of judicial fora for cases alleging the responsibility of international organizations for human rights violations. Still, there are instances where the responsibility of international organizations has been touched upon by international courts, because the issue was incidental to a case against a State. The famous ECtHR case of *Behrami and Saramati* is a good example of this.[62] In that case the attribution of the allegedly human rights violating conduct to the international organization (the UN) was essentially presupposed. The question for the ECtHR was essentially limited to whether the Member States that had contributed the troops that performed the conduct in question were (also) responsible.[63]

Second, detention of pirates aboard a ship that is under the command of NAVFOR Atalanta would trigger the human right to liberty, as laid down in ECHR Article 5 and the corresponding CFR Article 6.[64] Other provisions are also applicable, for example ECHR Article 3 and CFR Article 4, which prohibit degrading treatment or punishment. But, since it is the Commanding Officer of

[57] The right to life is laid down in ECHR art 2 and CFR art 2.

[58] Papastavridis (n 52) 547.

[59] ibid 560.

[60] ILC Draft Articles on the Responsibility of International Organizations (30 May 2011) UN Doc A/CN.4/L.778, arts 14–19.

[61] See also Papastavridis (n 52) 558–60.

[62] ECtHR, *Behrami and Behrami v France, and Saramati v France, Germany and Norway* [GC] (dec), no 71412/01 & 78166/01 (2007).

[63] The case has been vehemently criticized by scholars, see eg M Milanović and T Papić, 'As Bad as It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law' (2009) 58 ICLQ 267; KM Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test' (2008) 19 EJIL 509. The criticism does not, however, seem to be directed towards the implicit finding of responsibility on the part of the UN. Rather, the gist of the criticism seems to be that the ECtHR did not consider that the respondent States could *also* be responsible, alongside the UN (multiple/dual attribution or complicity).

[64] See ECtHR, *Rigopoulos v Spain*, no 37388/97 (1999); ECtHR, *Medveyev and others v France* [GC], no 3394/03 (2010). See also Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, 19–20.

the vessel that decides whether to detain suspected pirates for the purpose of prosecuting them or to release them, breaches of human rights in connection with detention aboard would probably be attributed to the Member State to which the vessel belongs.[65] The Union might nevertheless be held responsible for complicity, as explained just above.

A third potential scenario is one where a ship participating in NAVFOR Atalanta hands over a captured pirate to a State in violation of the principle of *non-refoulement*—which is inherent in ECHR Article 3 and CFR Article 4.[66] Such transfers are facilitated by Transfer Agreements between the EU and States in region that are willing and able to prosecute suspected pirates.[67] Those agreements are drafted with the CFP and the ECHR in mind, and provide for extensive diplomatic assurances and safeguards to protect the rights of suspected pirates that are transferred.[68] However, there are some doubts whether all the transfer agreements are fully compatible with the CFR and the ECHR.[69]

Allegations of transfer in violation of the principle of non-refoulement have already been litigated before German courts in the *MV Courier* case.[70] That case concerned a violation of the *non-refoulement* principle by German forces taking part in NAVFOR Atalanta that handed over a suspected pirate to Kenya for prosecution.[71] The Cologne Administrative concluded that the German State had violated the principle of *non-refoulement* enshrined in ECHR Article 3, leaving the question of the Union's responsibility open.[72] The Tribunal took great care in emphasizing that, while the German forces were generally under the authority of NAVFOR Atalanta, the German government had intervened by giving specific orders concerning the transfer of the suspected pirate.[73] Papastavridis has criticized the judgment, stating that 'the transfer in question was made under the authority of the EU pursuant to the relevant agreement with Kenya'.[74] Thus,

> from the moment the German Commanding Officer under the instructions of the German Government decided to delegate the responsibility for [the suspected pirate] to the EU Operation Commander, Germany was acting as an organ or agent of the Union; it follows that if the wrongful conduct in question is the ultimate decision to transfer or release the suspected pirates, it is the EU and

[65] See Papastavridis (n 52) 561–2.
[66] Confirmed by the ECtHR in *Soering v UK* [PC], no 14038/88 (1989).
[67] See generally Thym (n 17). [68] ibid 174–6.
[69] ibid 176–7; MD Evans and S Galani, 'Piracy and the Development of International Law' in Skordas and Koutrakos (n 17) 354; D Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 ICLQ 141, 160–8.
[70] *MV Courier*, Cologne Administrative Tribunal judgment 25 K 4280/09 (2011). The case has been appealed by the German government, and the appeal is pending before Upper Administrative Court Münster. For an explanation of why the case was litigated before German, and not Union courts, see section IV below.
[71] *MV Courier*, Cologne Administrative Tribunal judgment 25 K 4280/09 (2011).
[72] ibid, para 55. [73] ibid, paras 55–56. [74] Papastavridis (n 52) 566.

> not Germany that should be held responsible. Even though it was the German authorities that initially decided not to prosecute and to send the suspected pirates to Kenya, the legal basis was the EU–Kenya [transfer] agreement and thus the EU had the final decision-making authority.[75]

Again the issue of attribution is difficult. Yet, the *MV Courier* case, while finding Germany responsible, does not exclude Union responsibility. Dual attribution may be an option. And, even if the unlawful conduct must be attributed solely to Germany, the Union may still be held responsible for complicity.

C. The Cross-Cutting Issue of Extraterritoriality

A common feature of CSDP missions is that they take place outside the territory of (the Member States of) the Union. This fact alone does not preclude that violations of the CFR and the ECHR might occur. The CFR applies whenever the institutions, bodies and agencies of the Union exercise their powers.[76] According to Moreno-Lax and Costello, this has the effect that

> if those institutions, bodies, offices and agencies act outside the territory of EU Member States, *the extraterritoriality of the action is immaterial to the question of the Charter's applicability*. […] The Charter seems to reflect a general understanding that EU fundamental rights obligations simply track EU activities, whether they take place within or without territorial boundaries.[77]

In other words, the key question is 'not whether the Charter applies territoriality or extraterritorially, but whether a particular situation falls to be governed by EU law or not'.[78]

The ECHR, on the other hand, applies 'to everyone within [the] jurisdiction' of a party.[79] The case law in this area is somewhat erratic,[80] but still clearly confirms that conduct of the parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of ECHR Article 1.[81] Such extraterritorial application of the ECHR is reserved for 'exceptional cases', while jurisdiction is 'presumed to be

[75] ibid (footnotes omitted).

[76] CFR art 51(1).

[77] C Costello and V Moreno-Lax, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in S Peers *et al.* (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1662 (emphasis added).

[78] ibid 1682.

[79] See ECHR art 1. Similar clauses are found in many other human rights treaties, albeit with some slight variations, see M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 11–13, with further references. The wording of ECHR art 1, and similar clauses in other conventions, is quite State-centric. Therefore, several modifications to ECHR art 1 were envisaged in the recently rejected DAA. Firstly, the word 'State' would have been understood as applying *mutatis mutandis* to the Union post-accession, see DAA art 1(6) i.f. Secondly, the Union's territory would, according to DAA art 1(6), be defined as 'the territories of the member States of the European Union to which the TEU and the TFEU apply'.

[80] As aptly demonstrated in Milanović (n 79).

[81] See eg ECtHR, *Al-Skeini v UK* [GC], no 55721/07 (2011).

exercised normally' throughout the territory of a party.[82] Recent case law from the ECtHR on what counts as an exceptional exercise of jurisdiction within the meaning of Article 1 of the Convention provides us with two alternative tests—both of which may be relevant to CSDP missions.[83] First, if the Union through agents acting under the command of a CSDP mission 'exercises control and authority over an individual'—for example by detaining him or her—the Union would be under the obligation to the ECHR rights 'that are relevant to the situation of that individual'.[84] Second, the ECHR would also apply if the Union, as a consequence of military action or by invitation, 'exercises effective control of an area' outside its territory.[85] The application of these tests requires a detailed case-by-case analysis. Such an assessment of each individual scenario outlined above falls outside the scope of this article. It suffices to note that several of the scenarios discussed above were based on cases where a State acting outside its territory was found to have the necessary 'jurisdiction' within the meaning of ECHR Article 1.

IV. CSDP ACCOUNTABILITY MECHANISMS: AVAILABLE AND SUFFICIENT?

Having demonstrated that CSDP missions may cause human rights violations that the Union could be held responsible for, I will now turn to assessing the accountability mechanisms available to victims of such violations. The particular legal standard that will be relied upon in this regard is that laid down in ECHR Article 13. The reason for using the ECHR as the yardstick for an assessment of the accountability mechanisms applicable to a category of Union conduct—instead of relying on, for example, the CFR—is threefold.

First, the availability of sufficient accountability mechanisms in the context of the CFSP (and thus the CSDP) may be crucial for the accession of the Union to the ECHR. This is because it seems that the very fact that the accountability mechanisms applicable to the CFSP are insufficient under the standard laid down in ECHR Article 13 precludes EU accession to the ECHR. That is at least the position of Advocate General Kokott. In her View[86] concerning Opinion 2/13 she questioned whether

> the EU, by its accession to the ECHR as envisaged in the draft agreement, be assuming international obligations with respect to legal protection in the CFSP

[82] ECtHR, *Al-Skeini v UK* [GC], no 55721/07 (2011) para 131.

[83] M Milanović, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 EJIL 121, 127–31; T Lock, 'End of an Epic? The Draft Agreement on the EU's Accession to the ECHR' (2012) 31 Yearbook of European Law 162, 189.

[84] ECtHR, *Al-Skeini v UK* [GC], no 55721/07 (2011) para 137.

[85] ECtHR, *Al-Skeini v UK* [GC], no 55721/07 (2011) para 138.

[86] Although entitled 'the view of Advocate General Kokott', it is no different from an opinion by an Advocate General, which is the common term. The change in terminology was likely made to avoid any confusion arising from the fact that, since the case was brought under TFEU art 218 (11), the decision of the CJEU was styled as an opinion, and not a judgment.

> which its institutions — namely the Court of Justice of the EU — lack the necessary powers to fulfil?[87]

To this she answered:

> Should the Court of Justice determine the latter to be the case, *not only would the EU be prevented from acceding to the ECHR* but, within the EU, a lacuna would emerge in the legal protection system which would be highly problematic even now, not least in the light of the homogeneity requirement laid down in the first sentence of Article 52(3) of the Charter of Fundamental Rights.[88]

The solution to this potential conundrum was, according to AG Kokott, to realize that also other bodies than the CJEU may provide legal protection:

> Effective legal protection for individuals, as required by Articles 6 and 13 ECHR, can also be safeguarded without the Court of Justice having jurisdiction to give preliminary rulings or a monopoly on ruling on validity.
>
> […] in matters relating to the CFSP, effective legal protection for individuals is afforded partly by the Courts of the EU (second paragraph of Article 275 TFEU) and *partly by national courts and tribunals* (second subparagraph of Article 19(1) TEU and Article 274 TFEU).[89]

The issue dealt with by Advocate General Kokott in these passages is one of two issues raised in Opinion 2/13 where legal protection under the CFSP is of relevance. It may be labelled the 'competence issue'. The second issue, which may be labelled as the 'specific characteristics' issue, is whether the DAA respects the specific characteristics of EU law as regards judicial review in CFSP matters.[90] As alluded to in the Introduction, it is in connection with the 'specific characteristics' issue that the CJEU found the DAA incompatible with the constituent treaties.[91] The Court did not even raise the 'competence issue'. The importance of this fact is debatable, however, since the two issues are very closely related. That the CJEU does not explicitly deal with the 'competence issue' may just indicate that it considers it redundant or unnecessary. Besides, the CJEU's conclusion of incompatibility under the 'specific characteristics' issue was based on an argument that could have fit under either issue. Namely that accession to the ECHR under the terms of the DAA

> would effectively entrust the judicial review of [CFSP] 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.[92]

[87] Opinion 2/13 *EU Accession to the ECHR (II)* [2014], View of AG Kokott, para 85.
[88] Opinion 2/13 *EU Accession to the ECHR (II)* [2014], View of AG Kokott, para 85 (emphasis added).
[89] Opinion 2/13 *EU Accession to the ECHR (II)* [2014], View of AG Kokott, paras 102–103 (emphasis added).
[90] General Advocate Kokott deals with the latter issue in paras 185–195 of her View. The CJEU deals with it in Opinion 2/13 *EU Accession to the ECHR (II)* [2014] paras 249–258.
[91] See CJEU, Opinion 2/13 *EU Accession to the ECHR (II)* [2014] paras 249–258.
[92] CJEU, Opinion 2/13 *EU Accession to the ECHR (II)* [2014] para 255.

What makes this argument fit both issues particularly snugly is that it turns on the definition of an EU/non-EU body. The CJEU is not alone in being an EU body capable of conducting judicial review. In Opinion 1/09, the CJEU held that also the domestic courts of the EU Member States also form part of the 'judicial system' of the Union.[93] Interestingly, this part of Opinion 1/09 is referred to Opinion 2/13, in the paragraph immediately after that which was just cited.[94] One can then reasonably conclude that the concept of EU bodies includes (also) the domestic courts of its Member States. An important effect of this conclusion is that the CJEU's concept of EU bodies in Opinion 2/13 refers to the same bodies as those Advocate General Kokott identified as providers of effective legal protection within the CFSP; the CJEU *and* domestic courts of the EU Member States.[95] Consequently, the CJEU and Advocate General Kokott may be seen as agreeing on the starting point: unless the accountability mechanisms applicable to the CFSP offer sufficient legal protection for individuals, as defined in particular by ECHR Article 13, the Union is precluded from acceding to the ECHR.[96]

Second, if the Union does accede to the Convention, the question whether the accountability mechanisms applicable to CSDP missions are sufficient will gain new importance. Post-accession, the Union will be under an international obligation to respect the provisions of the ECHR, including Article 13.[97] Victims of a human rights violation for which the Union is responsible will then be able to bring the issue of incompatibility with ECHR Article 13 before the ECtHR, after exhausting any available remedies within the EU legal system.[98]

Third, an inquiry into ECHR Article 13 will be of relevance to the interpretation of the CFR. The CFR incorporates the substantive provisions

[93] CJEU, Opinion 1/09 *Creation of a unified patent litigation system* [2011] para 66, with further elaboration in paras 78–89. See also TEU art 19(1).

[94] See CJEU, Opinion 2/13 *EU Accession to the ECHR (II)* [2014] para 256 i.f.

[95] Opinion 2/13 *EU Accession to the ECHR (II)* [2014], View of AG Kokott, para 102–103 (quoted above).

[96] The CJEU and General Advocate Kokott seemingly diverge, though, on the question of whether the CFSP accountability mechanisms offer sufficient legal protection. Kokott finds that the CJEU does not provide sufficient protection alone, but argues that this is offset by the role of the domestic courts of EU Member States under TEU Art 19(1) second subparagraph and TFEU art 274. See Opinion 2/13 *EU Accession to the ECHR (II)* [2014], View of AG Kokott, paras 101–102 in particular. The CJEU is less explicit on the matter, but may arguably be read as concluding that no EU body—a category including both the CJEU and domestic courts—provide sufficient legal protection. See Opinion 2/13 *EU Accession to the ECHR (II)* [2014], in particular paras 251–257.

[97] The present wording of ECHR art 13 is not easily applied to an international organization like the Union, since it requires an effective remedy before a 'national authority'. However, DAA art 1(5) second hyphen provides that this term should be understood as applying *mutatis mutandis* 'to the internal legal order of the European Union as a non-State party to the Convention and to its institutions, bodies, offices or agencies'. Although the DAA was rejected in Opinion 2/13, any future accession agreement will certainly have a similar provision.

[98] ECHR art 35(1), as it would be authoritatively interpreted by DAA art 1(5) second hyphen or its equivalent. See also the comments made in the previous footnote.

of the ECHR, expands the scope of some of the rights, and adds certain additional rights. As 'the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR',[99] an assessment in light of ECHR Article 13 would be equally applicable in the context of the Charter. Furthermore, CFR Article 47(1) 'is based on Article 13 of the ECHR'.[100] This right to a remedy is, however, slightly more extensive under the Charter, since it 'guarantees the right to an effective remedy *before a court*'.[101] Apart from that modification, ECHR Article 13 forms the 'floor' or minimum level of protection under CFR Article 47(1).[102] An assessment of CSDP accountability mechanisms using ECHR Article 13 as a yardstick may thus be of interest even if we ignore the prospect of EU accession to the Convention.

The next section will briefly outline the main features of ECHR Article 13 before assessing the potential CSDP accountability mechanisms.

A. The Yardstick for Assessing the CSDP Accountability Mechanisms

ECHR Article 13 requires the parties to establish 'effective' accountability mechanisms when a Convention right is (allegedly) violated. The parties are afforded a certain margin of appreciation as to what kind of accountability mechanisms to establish, provided that their effectiveness is sufficient.[103] Nevertheless, certain minimum requirements exist. One of these is access. Individuals must have direct access to the mechanism in question for it to be considered 'effective' under Article 13.[104] But access is not enough. The mechanism must also be able to prevent a violation or stop a continuing violation, or afford a remedy to those individuals which rights have been violated. As summarized by the ECtHR in *McFarlane v Ireland*, an effective accountability mechanism must be 'available to the applicant in theory and in

[99] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, 33. The Explanations, which are technically a part of the Charter's *travaux préparatoires*, 'shall be given due regard' when interpreting the Charter's provisions, see CFR art 52(7) and JP Jacqué, 'The Explanations Relating to the Charter of Fundamental Rights of the European Union' in S Peers *et al.* (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014). See also CFR art 53.

[100] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, 29. To the extent that the provisions correspond, the meaning and scope of CFR art 47(1) shall be the same as that laid down in ECHR art 13. This does not prevent Union law or the Charter from providing more extensive protection. See CFR art 52(3).

[101] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, 29 (emphasis added).

[102] See also CFR art 52(3), according to which rights in the CFR that correspond to rights guaranteed by the ECHR 'shall be the same as those laid down in the said Convention'.

[103] ECtHR, *Öneryildiz v Turkey* [GC], no 48939/99 (2004) para 146; JF Kjølbro, *Den Europæiske Menneskerettighedskonvention – for praktikere* (3rd edn, DJØF Forlag 2010) 876.

[104] See eg ECtHR, *McFarlane v Ireland* [GC], no 31333/06 (2010) para 114; ECtHR, *Riener v Bulgaria*, no 46343/99 (2006) para 138.

practice, that is to say, [be] accessible, capable of providing redress and [offer] reasonable prospects of success'.[105] However, it must be underlined that ECHR Article 13 'does not go so far as to guarantee a remedy allowing a [Party]'s laws as such to be challenged […] on the ground of being contrary to the Convention'.[106]

With regard to the design of accountability mechanisms, it is clear from ECtHR case law that they can, but must not necessary be, judicial.[107] For example, an administrative complaint procedure may be sufficient, provided that the body examining the complaint is independent from the organ that allegedly violated the applicant's rights, if it fulfils certain requirements of effectiveness. In order to be considered effective, an accountability mechanism must be independent and impartial, able to take binding decisions as to whether an applicant's rights have been violated, address the substance of Convention-based complaints, and provide an appropriate remedy.[108]

Since the CFR incorporates the ECHR into Union law at a constitutional level, one would expect the ECJ to be capable of fulfilling all these minimum requirements. However, there are severe limitations upon the ECJ's jurisdiction that may make it unavailable as a remedy in the context of the CFSP. As will be shown below, in section IV.B, the ECJ lacks jurisdiction over most of the potential situations of ECHR violations identified above. Given this conclusion, it is necessary to examine whether the lack of access to the ECJ is offset by the special position that the domestic courts of EU Member States enjoy under the CFSP (section IV.C), or by other accountability mechanisms (section IV.D).

B. The CJEU's (Lacking) Jurisdiction over CSDP Missions

The principal rule regarding the CJEU's jurisdiction over the CFSP policy area, including CSDP missions, is quite clear: it simply does not have jurisdiction. This is explicitly stated in not only one, but two almost identically worded provisions of the Union's constituent treaties: TEU Article 24(1) *in fine* and TFEU Article 275(1). Quoting from the latter: 'The Court of Justice of the European Union *shall have no jurisdiction* with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.'[109]

[105] ECtHR, *McFarlane v Ireland* [GC], no 31333/06 (2010) para 114.
[106] ECtHR, *James v UK* [PC], no 8793/79 (1986) para 85.
[107] ECtHR, *Chalal v UK* [GC], no 22414/93 (1996) para 152.
[108] See eg ECtHR, *Riener v Bulgaria*, no 46343/99 (2006) para 138. See also C Grabenwarter, *European Convention on Human Rights: Commentary* (Beck Verlag 2014) 333–4; Kjølbro (n 103) 876–9.
[109] Emphasis added. In three recent cases the CJEU has been eroding the edges of this carve-out. First, in case C-439/13 P *Elitaliana SpA v EULEX Kosovo* [2015], conduct related to public procurement for a civilian CSDP mission was attributed to the Commission—thus paving the way for CJEU jurisdiction—because the budgetary and financial matters of such civilian

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From this main rule there are two exceptions:

> the Court shall have jurisdiction to *monitor compliance with Article 40 of* [*the TEU*] and to rule on proceedings brought in accordance with the conditions laid down in the fourth paragraph of [TFEU Article 263], *reviewing the legality of decisions providing for restrictive measures against natural or legal persons* adopted by the Council on the basis of [the CFSP].[110]

The first exception concerns cases where the legality of a CFSP act is challenged for encroaching upon the other (non-CFSP) areas of the Union's competences, which is prohibited by TEU Article 40.[111] As this exception only allows for legality challenges on the grounds of there being a wrongful or insufficient legal basis under Union law, it cannot serve as an avenue for individuals seeking remedy against Union acts under CSDP missions, and thus it will not be discussed further here.

The second exception relates to so-called targeted sanctions—in EU terminology known as 'restrictive measures against natural or legal persons'.[112] These sanctions regimes are set up through a Council decision under TEU Article 29. A sanctions decision will, firstly, contain a list of the restrictive measures that are to be applied, usually the freezing of financial assets and travel bans, and secondly, a list of natural and legal persons that are to be the targets of the sanctions will usually be annexed to the decision.[113] By virtue of the second exception embodied in TFEU Article 275(2) the CJEU is granted jurisdiction to review the legality of such decisions—both in relation to the rules laid down in the TEU and TFEU, and perhaps more importantly, the Charter of Fundamental Rights. Although this exception was introduced in 2009 through the Lisbon Treaty, the internal market regulations implementing these targeted sanctions regimes already

missions are dealt with by the Head of Mission 'under the supervision and authority of the Commission' (para 58). Second, in case C-263/14 *Parliament v Council (Tanzania Transfer Agreement)* [2016], the CJEU confirmed that it had jurisdiction to review the compliance with TFEU art 218(10) of a treaty that fell 'predominantly within the scope of the CFSP' (para 55). This was because TFEU art 218(10) applied to all treaties that the EU is to become party to, 'including those exclusive to the CFSP' (para 68). The common strand in these two cases is that a non-CFSP area of Union law is involved, thus pulling the case into the CJEU's field of jurisdiction. In contrast, claims brought by private individuals alleging that the conduct of a CSDP mission resulted in a human rights violation—which are the type of claims this article is about—do not involve such non-CFSP Union law. In the third and most recent case, C-455/14 P *H v Council et al.* [2016], the CJEU asserted jurisdiction over a labour dispute involving a civilian CSDP mission and a person seconded to the mission from a Member State. Again the CJEU nibbled at the margins of the carve-out, this time to ensure that staff seconded to the mission from, respectively, Member States and the EU institutions were given equal access to court for labour disputes—a rationale that seems limited to that particular situation.

[110] TFEU art 275(2) (emphasis added). The same exceptions are also laid down in TEU art 24(1) i.f.

[111] Kuijper *et al.* (n 25) 863.

[112] TFEU art 275(2) i.f.

[113] See for example Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya [2011] OJ L58/53.

have a long history of being contested on human rights grounds.[114] CSDP missions cannot be equated with targeted sanctions. However, it might be possible to read the 'restrictive measures' exception broadly, as covering more than just targeted sanctions. Or, perhaps there exists further, unwritten exceptions that may provide the CJEU with jurisdiction.

The rather unambiguous wording of the exception has led most scholars to understand it literally, as limited to targeted sanctions.[115] There are also indications that the drafters of TFEU Article 215(2) intended the 'restrictive measures' exception to be understood narrowly. In this respect it is of particular interest to read what Jean-Claude Piris, the former head of the Legal Service of the EU Council and the Legal Adviser to the intergovernmental conference which negotiated the treaty of Lisbon, writes about these issues in his 2010 book on the Lisbon treaty. Since he was deeply involved in the drafting of the Lisbon treaty (and every major EU amendment treaty since 1992), his account provides a unique insight into what the drafters intended with these provisions. He also seems to support a narrow reading of the 'restrictive measures' exception:

> [TFEU Article 275(2)] confers jurisdiction on the EU Court of Justice to review 'the legality of decisions providing for restrictive measures against natural or legal persons' – *that is, in the context of action against terrorism and against country-specific sanctions regimes*.[116]

The Commission nevertheless, in its submissions to the CJEU in connection with Opinion 2/13, asserted that the CJEU's jurisdiction over CSDP conduct was not as narrow as traditionally held. The argument put forward to support this assertion was rather complex. Firstly, the Commission argued that when a Member State acts on the basis of a provision of a Council decision adopted under TEU Article 28(1), the Council decision itself constitutes a 'restrictive measure' if such acts could violate fundamental rights.[117] Secondly, it was argued that CFSP acts performed by EU institutions producing legal effects would, in so far such acts are capable of violating fundamental rights, constitute a 'restrictive measure'. As for those acts that did not produce legal effects the Commission argued, thirdly, that the available remedy would be an action for damages under TFEU Articles 340

[114] This is because CFSP decisions on sanctions against individuals that provided for the freezing of financial assets had (and still have) to be implemented through internal market regulations. The legal basis for such implementing regulations was rather complex pre-Lisbon, but has now been codified in TFEU art 215. Since these regulations are not CFSP measures, the CJEU found that it had jurisdiction to review them even prior to 2009. For further details, see Eeckhout (n 6) 506–23 and the cases cited therein.

[115] See *inter alia:* Spernbauer (n 43) 361–2; Gosalbo-Bono and Boelaert (n 17) 161; Kuijper *et al.* (n 25) 862–3; Eckes (n 7) 281; Piris (n 21) 263.

[116] ibid (emphasis added).

[117] CJEU, Opinion 2/13 *EU Accession to the ECHR (II)* [2014] para 98. In support of this part of its argument the Commission cited Case C-355/04 P *Segi and Others v Council* [2007], a case where the CJEU had indicated that it would interpret any restrictions upon its jurisdiction narrowly.

cf. 268, and that such an action would not be precluded by TFEU Article 275(1). Taken together, this would have the effect of defining the scope of the CJEU's jurisdiction under TFEU Article 275(2) 'as being sufficiently broad to encompass any situation that would be covered by an application to the ECtHR'.[118] The Commission's progressive reading of TFEU Articles 275(1) and (2) was vehemently opposed by the majority of EU Member States and the Council.[119] Advocate General Kokott was also sceptical.[120]

The CJEU was not convinced by the Commission's argument for an expansive interpretation of TFEU Article 275(2). In Opinion 2/13 the CJEU held that, although it did not need to adopt an exhaustive position on the matter, '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'.[121] According to the Court this 'is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone'.[122] The CJEU also confirmed that it might indeed lack jurisdiction in relation to certain human rights violations in connection with the CFSP.[123]

Human rights violations by CSDP missions seem to fall squarely within the category of violations over which the CJEU would lack jurisdiction. First, the Council decisions establishing such missions are not in themselves restrictive—it is their actual implementation that may cause human rights violations.[124] It is therefore difficult to construe the human rights violating conduct of CSDP missions as 'restrictive measures' which would bring such cases within the ambit of the CJEU's jurisdiction.

Second, even if some conduct of CSDP missions could be classified as 'restrictive measures', TFEU Article 275(2) refers *only* to actions for annulment under TFEU Article 263 as the applicable cause of action. For victims of human rights violations committed by CSDP missions an action for annulment would rarely provide an appropriate remedy. As the examples mentioned above in section III illustrate, there are often no formal, annullable decisions in play when CSDP missions violate human rights. Instead, what is usually at stake

> is not so much the review of the legality of CFSP acts as such, or of administrative decisions taken in relation to staff management. It is rather compensation for material and immaterial damages inflicted upon it in the context of the implementation of such acts.[125]

[118] CJEU, Opinion 2/13 *EU Accession to the ECHR (II)* [2014] para 251.
[119] CJEU, Opinion 2/13 *EU Accession to the ECHR (II)* [2014], in particular para 131.
[120] Opinion 2/13 *EU Accession to the ECHR (II)* [2014], View of AG Kokott, paras 88–102.
[121] CJEU, Opinion 2/13 *EU Accession to the ECHR (II)* [2014] para 252.
[122] ibid, para 253.
[123] See, by implication, ibid, para 254.
[124] See also Spernbauer (n 43) 361.
[125] ibid.

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Such outcomes would only be possible if the cases are litigated as actions for damages under TFEU Articles 268 and 340. However, an action for damages 'constitutes an independent, autonomous cause of action which neither requires a previous action for annulment, nor can it be 'annexed' to an action for annulment'.[126] The clear wording of TFEU Article 275(2), which refers exclusively to actions for annulment, thus seems to exclude actions for damages in the context of the CFSP. As clear as the wording is, the argument that TFEU Article 275(2) should be interpreted narrowly, since it constitutes a derogation from the rule of general jurisdiction under TEU Article 19,[127] should be of little relevance. The clear wording also seems to preclude any resort to the technique of consistent interpretation using CFR Article 47(1) as an argument for expanding the CJEU's jurisdiction. TFEU Article 275(2) was drafted by the EU Member States in full cognizance of the fact that lacking CJEU jurisdiction in the CFSP area would entail a lack of judicial protection for those arguing that their rights are violated—eg in connection with CSDP missions.

The conclusion must therefore be that the CJEU lacks the jurisdiction to adjudicate cases concerning alleged human rights violations caused by CSDP missions. Except, perhaps, in the exceptional case where the alleged human rights violation flows from a formal decision by a CSDP mission that fulfils the requirement of being a 'restrictive measure'.[128] Against this background it seems that individuals lack access to the CJEU in many of the potential cases of human rights violations identified above in section III. In light of the standard identified in section IV.A above, this means that the CJEU must be regarded as an insufficient accountability mechanism.

C. Can Domestic Courts of the EU Member States Serve as Effective CSDP Accountability Mechanisms?

Another place to look for alternative accountability mechanisms is within the domestic court system of the Union's Member States. As the issue at hand is the Union's own responsibility—not that of a troop-contributing or otherwise cooperating Member State—there are several obstacles that may come in the way of effective accountability.

1. The (non-)obstacle of jurisdictional immunity

For most international organizations a search for accountability mechanisms in the domestic legal systems of its Member States would end rather quickly,

[126] ibid (footnote omitted). [127] CJEU, Case C-658/11 *Parliament v Council* [2014] para 70.
[128] Concurring: Naert, 'Responsibility of the EU Regarding Its CFSP Operations' (n 43) 330–1; Spernbauer (n 43) 359–61; Gosalbo-Bono and Boelaert (n 17) 163; Papastavridis (n 52) 540. *Contra*: 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: Constitutional Challenges* (Hart 2014) 51–4.

because international organizations normally enjoy jurisdictional immunity.[129] Interestingly, however, the Union is a rare example of an organization whose constituent treaties explicitly allows for suits against it in domestic courts, subject to certain conditions.[130] TFEU Article 274 provides:

> 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.

As we can see, the criterion for domestic courts of the EU Member States having jurisdiction in a particular case is that CJEU jurisdiction is lacking. As shown just above, in section IV.B, this requirement is fulfilled in connection with CSDP missions, and TFEU Article 274 should in principle apply.[131] Jurisdictional immunity will hence not prevent individuals from bringing claims before domestic courts in connection with CSDP missions—even if claims are brought against the Union itself. The fundamental requirement of access to accountability mechanisms is thereby satisfied. But, as will be demonstrated in the following sections, other obstacles may prevent domestic courts from acting as sufficient accountability mechanisms in the CFSP context.

2. *The potential obstacle of Foto-Frost: Lack of annulment powers*

An obstacle may be found in the CJEU's *Foto-Frost* judgment, where it held that the domestic courts of EU Member States 'do not have the power to declare acts of the [Union] institutions invalid'.[132] The only exception are interim measures ordering the suspension of a domestic act or administrative measure implementing a Union act—providing that a preliminary reference has been made to the CJEU.[133] For those CFSP decisions over which CJEU jurisdiction is lacking, the *Foto-Frost* doctrine therefore seems to prevent domestic courts from stepping into the CJEU's shoes.

Yet, there is some uncertainty as to whether *Foto-Frost* applies to the CFSP at all. Some writers propose that *Foto-Frost* should be deemed inapplicable to the CFSP, since it is premised on the possibility of making a reference to the CJEU.[134] Others argue that because the CFSP is now integrated into Union law, rather than being a separate 'pillar', the regular Union law rules on the competences of domestic courts must apply (including *Foto-Frost*).[135] The

[129] HG Schermers and NM Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) 1031.

[130] RA Wessel, 'Immunities of the European Union' (2014) 10 International Organizations Law Review 395, 401. [131] Similarly ibid 405–406. [132] CJEU, Case 314/85 *Foto-Frost* [1987] para 15.

[133] ibid, para 19 and Case C-465/93 *Atlanta Fruchthandelsgesellschaft* [1995] paras 19–30.

[134] eg Craig, who finds this solution to be 'preferable', see (n 20) 435.

[135] A Hinarejos, 'Judicial Control of CFSP in the Constitution: A Cherry Worth Picking?' (2006) 25 Yearbook of European Law 363. Similarly: Naert, 'Responsibility of the EU Regarding Its CFSP Operations' (n 43) 331. See also Opinion 2/13 *EU Accession to the ECHR (II)* [2014], View of AG Kokott, para 100.

latter seems most convincing owing to the fact that *Foto-Frost* was 'not exclusively concerned with the uniformity of EC law, it was also concerned with its supremacy'.[136] A divergent practice between domestic courts as to the validity of CSDP acts could greatly undermine them. Thus, '[e]xpressly ruling out a *Foto-Frost* style rule […] would solve the problem of access to a court, but would do so by undermining the supremacy of Union law.'[137]

Assuming that *Foto-Frost* does apply, the question is then to what extent domestic courts are nevertheless allowed to act as CFSP accountability mechanisms under EU law. One potential avenue would be to avoid the questions of validity and annulment completely, focusing instead on whether the ECHR has been breached and, if necessary, award damages.[138] This might be sufficient, especially considering the fact that human rights violations by CSDP missions will rarely be the result of formal and annullable decisions.[139]

However, in the rare instance that a CSDP mission violates the human rights of an individual through a formal decision, such an approach by a domestic court may be regarded as an unlawful circumvention of *Foto-Frost*, at least if the domestic court awards damages because a CFSP decision in itself violated the ECHR. This is because the CFR, which is part of primary EU law, adopts the ECHR as the minimum level of protection (the 'floor').[140] Any judgment declaring that a CFSP decision is in breach of the ECHR would in other words be an (implicit) determination of its invalidity.[141]

Still, for the vast majority of cases of relevance here, where the violation does not flow from a formal CFSP decision, *Foto-Frost* would be no obstacle to suits in domestic court. Domestic courts could therefore potentially play a role in establishing that the ECHR has been breached, and award damages where appropriate. So far domestic courts seem to fill the accountability gap at the Union level.

3. *The obstacle of enforcement*

Domestic courts finding the Union responsible for a violation of the ECHR in connection with a CSDP mission will nonetheless have a hard time turning that responsibility into reality. Unless the Union voluntarily complies with the

[136] B Davies, 'Segi and the Future of Judicial Rights Protection in the Third Pillar of the EU' (2008) 14 European Public Law 311, 318.

[137] ibid, albeit with reference to the former third pillar, today known as the Area of Freedom, Security and Justice.

[138] Naert, 'Responsibility of the EU Regarding Its CFSP Operations' (n 43) 331 asserts that this is possible, although without discussion.

[139] See section IV.B above.

[140] See in particular arts 52(3) and 53 of the Charter.

[141] This line of argument also finds support in an *a contrario* reading of the CJEU's reasoning in Case 314/85 *Foto-Frost* [1987] para 14, where the power of domestic courts to uphold Union acts without making a preliminary reference is recognized, because this does not entail 'calling into question the existence of the [Union] measure'.

judgment, domestic courts lack powers of enforcement vis-à-vis the Union. This is because, although the Union under TFEU Article 274 may lack *jurisdictional* immunity, there is no similar exception for immunity against enforcement. According to TEU/TFEU Protocol No 7 on the privileges and immunities of the Union (TEU/TFEU Protocol No 7) Article 1, the Union's property and assets are excempt from 'any administrative or legal measure of constraint without the authorisation of the Court of Justice'. Given the CJEU's lack of jurisdiction on the merits of the cases under discussion, it cannot have the power to authorize enforcement of domestic judgments in the same area.[142] Acknowledging such a power would be tantamount to the CJEU outsourcing the areas where it lacks jurisdiction to domestic courts, thus circumventing the restrictions put on the Court in the EU's constitutive treaties. It must not be forgotten that TFEU Article 275 sweepingly declares that the CJEU 'shall have no jurisdiction' over the CFSP.

This raises the question of whether enforcement is really necessary for domestic courts to be regarded as adequate CSDP accountability mechanisms. In comparison, judgments of domestic courts sometimes cannot be enforced against their own States either. In the domestic setting they are a branch of government, tasked by the constitution of that State to check the other branches, and their judgments are legally binding (*res judicata*). At the very least, therefore, such binding force must be required in order to fulfil the requirements of ECHR Article 13. Unless the judgment of the domestic court is considered binding, it can hardly prevent a human rights violation, stop a continuing violation, or afford a remedy to those individuals whose rights have been violated. The weak position of domestic courts, outside the internal legal system of the Union, supports this argument. Unless the judgments of domestic courts have sufficient 'bite', they cannot realistically prevent a violation, stop a continuing violation, or afford an appropriate remedy to those individuals whose rights have been violated.

It is doubtful whether a judgment of a domestic court can be considered binding on the Union (*res judicata*)—at least if the CJEU does not authorize enforcement under Article 1 of TEU/TFEU Protocol No 7. To construe an unenforceable judgment of a domestic court of an EU Member State as legally binding on the Union seems strenuous. Unless enforcement is authorized by the CJEU, which it seems to lack jurisdiction to do, it thus seems as if the domestic courts of EU Member States provide an insufficient level of accountability in CSDP cases. However, given the lack of practice of domestic courts under TFEU Article 274 in these cases, and the subsequent lack of knowledge concerning its effectiveness as an accountability mechanism, this conclusion is uncertain.

[142] Similarly: Naert, 'Responsibility of the EU Regarding Its CFSP Operations' (n 43) 332.

D. Other Potential Accountability Mechanisms at the International Level

In addition to the CJEU and domestic courts, there are other mechanisms tasked with ensuring the accountability of the EU institutions. A prime example is the European Ombudsman, which may receive complaints from individuals concerning all kinds of 'maladministration' in the activities of the Union's organs—the only exception being the CJEU when acting in its judicial role.[143] However, despite broad jurisdiction and individual access, the European Ombudsman lacks the power to issue binding decisions. It therefore does not live up to the standards identified above, in section IV.A. The same can be said for the Committee of Inquiry established by the European Parliament.

With regard to CSDP missions, status agreements entered into between the Union and the host State may establish applicable accountability mechanisms. There are two types of such agreements: Status of Forces Agreements (SOFAs) for military missions and Status of Mission Agreements (SOMAs) for civilian missions. Since model texts have been drawn up for both types,[144] the individual agreements made with each host State are materially similar. Both model texts have an identically worded article on claims for death, injury, damage and loss against the Union and its personnel.[145]

However, also the claims procedure in the EU SOFAs/SOMAs seems to be tainted by insufficiency. Three aspects in particular deserve mention. First, the responsibility of the Union is excluded for damage or loss of property that is 'related to operational necessities' or 'caused by activities in connection with civil disturbances or protection of [the CSDP mission]'.[146] Claims based on violations of the ECHR could be covered by this relatively broad waiver. Second, resort to binding arbitration is limited to claims exceeding EUR 40 000.[147] Other claims are left to be resolved through diplomatic means, ie through negotiations. This filtering mechanism deprives those with ECHR claims of a low monetary value from having recourse to an accountability mechanism. Third, there is an inherent limitation in the fact that SOFAs/SOMAs are concluded with individual host States *ad hoc*. It is possible that human rights violations could occur outside the spatial scope of a SOFA/SOMA, eg in international waters, as is the case with the NAVFOR Atalanta mission. Taken together it seems as if the dispute resolution provisions in the Union's SOFAs/SOMAs are insufficient accountability mechanisms.

[143] TFEU art 228(1).

[144] EU model SOFA (18 May 2005) Council Doc 8720/05; EU model SOMA (27 June 2005) Council Doc 10564/05.

[145] EU model SOFA art 15; EU model SOMA art 16.

[146] EU model SOFA art 15(1); EU model SOMA art 16(1).

[147] EU model SOFA art 15(4); EU model SOMA art 16(4). Some Union SOFA/SOMA agreements stipulate different, usually higher amounts. See eg Agreement between the European Union and the Republic of Djibouti on the status of the European Union-led forces in the Republic of Djibouti (adopted 9 January 2009) [2009] OJ L33/43 art 16(4), where the amount is set to EUR 80,000.

Each CSDP mission may, moreover, have accountability mechanisms that are specific to it. One example is the above-mentioned EULEX Kosovo, which has established a Human Rights Review Panel. It is tasked with reviewing complains from individuals claiming to be the victim of human rights violations by EULEX Kosovo.[148] Its mandate is, however, limited to examining whether a human rights violation occurred, and to making recommendations for remedial action (which cannot consist of financial recommendations) to the Head of Mission.[149] In other words, the Human Rights Review Panel suffers from the same weaknesses of enforcement as the European Ombudsman. Thus, it too seems to be an insufficient accountability mechanism.

V. CONCLUSION

From the above one may draw three conclusions, the first two of which are quite clear-cut, while the last is slightly less certain:

1. CSDP missions may cause human rights violations.
2. These human rights violations may be attributed to the Union.
3. The Union accountability mechanisms applicable to CSDP missions seem to be insufficient.

Not only are each of the separate accountability mechanisms surveyed insufficient in light of ECHR Article 13. Their deficits also overlap, so that even if they are considered together the end result is that the overall system of CSDP accountability mechanisms is insufficient. In turn, this has the ironic consequence of blocking EU accession to the ECHR—a development that would have resulted in (subsidiary) legal protection for individuals at the ECtHR in cases where the CSDP accountability mechanisms are unavailable or insufficient.

This begs the question whether there is a convenient way to remedy the deficiencies identified. At first glance it seems as if some of them might be fixed without amending the constituent treaties of the Union. For example, the claims-handling clauses in the Union's model SOFA/SOMA agreements could be amended so that at least some restrictions upon the jurisdictions of those accountability mechanisms are removed. However, the Union's legal autonomy and the CJEU's monopoly on interpreting Union law, as laid down in TFEU Article 344, does impose some limits as to how far the Union can go in setting up accountability mechanisms outside its own court structure.[150] Resort to the inherent power that all international organizations have to establish

[148] Spernbauer (n 43) 369.
[149] ibid 370.
[150] See CJEU, Opinion 2/13 *EU Accession to the ECHR (II)* [2014] and SØ Johansen, 'The Reinterpretation of TFEU Art 344 in Opinion 2/13 and Its Potential Consequences' (2015) 16 German Law Journal 169.

accountability mechanisms,[151] as a tool for completely circumventing the CJEU's limited CFSP jurisdiction, is, in other words, precluded. Amending the constituent treaties of the Union therefore seems to be the most realistic option, although it might be difficult in practice.

[151] K Wellens, *Remedies against International Organisations* (CUP 2002) 259, with further references.

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