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ATTRIBUTION AND RESPONSIBILITY REGARDING CFSP ACTS IN LIGHT OF THE RENEGOTIATION OF THE EU'S ACCESSION TO THE ECHR

Ágoston Mohay*

Abstract: The international responsibility of international organisations and that of the sui generis European Union (EU) is one of the most debated issues of international law. At the heart of the question of international responsibility lies the attribution of conduct and responsibility. On this question, the Articles of the Responsibility of International Organizations (ARIO), a final draft of which was adopted in 2011 but not turned into an international treaty, contain a much-debated set of rules arguably based on customary international law. Attribution vis-a-vis the EU is of particular relevance in the context of the European Convention of Human Rights (ECHR), to which the EU is not yet a party but to which it is planning accession, which would allow for external human rights reviews by the European Court of Human Rights. The ECtHR does not necessarily approach international responsibility and attribution in line with the Articles on the Responsibility of International Organizations. This factor is of crucial relevance to the EU – both now and also following its possible accession to the ECHR. This question, however, needs to be nuanced with regard to the special legal nature of the Common Foreign and Security Policy (CFSP) and the acts adopted therein, as this has proven to be one of the deciding points for the negative opinion of the Court of Justice concerning the EU's accession. This paper first looks at the current state of play, then analyses the viewpoints of the EU Court of Justice reflected in its binding opinion on the original draft accession agreement of the EU to the ECHR, and subsequently examines the renegotiated draft accession agreement – prepared in 2023 – in this regard. The novelties of the renegotiated accession agreement regarding the attribution of CFSP acts are examined in detail, focusing on the reattribution concept proposed by the EU and its relation to the ARIO, highlighting a number of dogmatic problems, including the probable effect of reattribution on access to legal remedies.

Keywords: international responsibility, attribution, European Union, Common Foreign and Security Policy, European Court of Human Rights, Articles on the Responsibility of International Organizations

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1 Introduction

The responsibility of international organisations (IOs) is a complex and multi-layered question of international law. As far as States are concerned, this field of law relies on the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).² Thus, it is not, strictly speaking, codified, though the ARSIWA are generally seen as validly representing existing customary international law.³ The question of the responsibility of IOs is even more debated and unclear: the Articles on the Responsibility of International Organizations (ARIO) go far beyond the codification of existing customary law and constitute, at least in part, a progressive development of international law in this field.⁴ At the crux of the responsibility issues lie, among other things, the questions of attribution of conduct and attribution of responsibility to IOs and their Member States, including but definitely not limited to the concept of shared responsibility.⁵

The European Union (EU) is usually seen as having a *sui generis* legal nature, and the specific nature of the organisation brings with it an additional layer of questions. The EU is a supranational entity with a legal system that exhibits a constitutional character. It utilises legislative competences transferred by its Member States to adopt binding legislative acts which enjoy direct effect and primacy of application vis-à-vis national law. The relationship between the EU and its Member States is quite intensive and arguably unique. Because of this difference in relationship, attribution may follow a different formula within the EU.⁶ The Common Foreign and Security Policy of the EU (CFSP), encompassing also the Common Security and Defence Policy (CSDP), however, is an exception to many of the special rules otherwise pertaining to the EU.⁷ Unlike other

² Draft Articles on Responsibility of States for Internationally Wrongful Acts. UNGA RES 56/83 (12 December 2001) A/RES/56/83.

³ Péter Kovács, *Nemzetközi közjog* (Osiris 2016) 542.

⁴ For a brief recent overview, see Bence Kis Kelemen, Ágoston Mohay and Attila Pánovics, 'A nemzetközi szervezetek felelőssége: koncepcionális és értelmezési kérdések' in Gábor Kajtár and Pál Sonnevend (eds), *A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században: Tanulmányok Valki László tiszteletére* (ELTE Eötvös Kiadó 2021) 285-298.

⁵ According to the prominent literature, shared responsibility occurs when several actors contribute to an individual harmful outcome, which can, in fact, be any wrongdoing, and where responsibility is shared between the actors rather than being borne by a collective – or rather a collective entity. It is also important to note that in a case of shared responsibility, the individual contribution of the actors to the harmful result cannot be established separately, ie the specific conduct of separate actors cannot be directly causally linked to a specific part of the infringement. See André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' [2013] *Michigan Journal of International Law* 359, 366–368.

⁶ On the many facets of the issue of the EU's international responsibility, see, for example, Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart, 2013).

⁷ Compare, for example, Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (Hart 2019).

EU policies, the CFSP possesses an essentially intergovernmental character, where decision-making and institutional roles differ from the general rules, where measures are not imbued with direct effect or primacy of application, and where the jurisdiction of the Court of Justice is limited and thus presents a gap in judicial protection, even if the Court has been rather inventive in expanding it as far as possible.⁸ Nevertheless, especially with regard to this last element, numerous questions remain.

Understandably, CFSP acts can result in fundamental rights infringements. Although a system of fundamental rights protection is in place in the EU in the form of the Charter of Fundamental Rights and the general principles of EU law, the EU is obliged (since the Lisbon Treaty) to accede to the European Convention of Human Rights (ECHR), which would allow for external human rights reviews by the European Court of Human Rights (ECtHR). However, the way in which the ECtHR approaches international responsibility and attribution is not necessarily in line with the ARIIO, which in and of itself raises many questions.

A further layer of complexity is added to the aforementioned by the planned accession of the EU to the ECHR. At the moment, the EU is not a party to this European 'benchmark' of human rights protection. However, it is not only empowered but obliged to accede to it – since the Treaty of Lisbon – by Article 6(3) TEU. The CJEU had ruled the original draft ECHR accession agreement to be incompatible with EU law (with one of the Court's objections relating to none other than jurisdiction over CFSP measures), which meant it had to be redrafted. However, the Member States of the EU remain bound by the ECHR regardless of their membership of a supranational organisation⁹ and, as parties, can be taken to court in Strasbourg – also for measures adopted or actions taken as a result of or in the context of obligations under EU law, including the CFSP. The ECtHR, however, generally does not rely on the ARSIWA (let alone the ARIIO) when determining breaches of the Convention, and even if it may do so occasionally, this is not necessarily reflected in its reasoning. This 'silence' of the Strasbourg court leaves open the question of whether it considers the ECHR's rules as *lex specialis* regarding general international responsibility or not.¹⁰

This paper analyses the concept of attribution to and responsibility of the EU for Common Foreign and Security Policy measures in the context of the European Convention on Human Rights, with particular emphasis on a comparison of how the issue is regulated in the original and redrafted accession agreements. To this end, it first briefly outlines the

⁸ See, for example, Peter Van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-filling Role of the Court of Justice' [2021] Common Market Law Review 1731-1760.

⁹ See especially the judgment of the European Court of Human Rights (ECtHR) in *Mathews v The United Kingdom* (1999) 28 EHR 361.

¹⁰ Compare Pavel Šturma, 'State Responsibility and the European Convention on Human Rights' [2020] Czech Yearbook of Public & Private International Law 3.

status quo as regards the international responsibility of the EU (Section 2) and the responsibility of the EU at the ECtHR (Section 3). It subsequently analyses how the original draft agreement on the EU's accession to the ECHR aimed to approach the issue of responsibility of CFSP acts and why the CJEU found it lacking in this regard (Section 4). Finally, relevant draft suggestions emerging from the resumed accession negotiations will be considered. The novelties of the renegotiated accession agreement regarding the attribution of CFSP acts are examined in detail, focusing on the reattribution concept proposed by the EU and its relation to the ARIO, highlighting several dogmatic problems including the probable effect of reattribution on access to justice (Section 5). Finally, concluding remarks and *de lege ferenda* suggestions will be offered (Section 6).

2 The law of international responsibility – not for the EU?

For the purposes of this paper, some of the complexities of the responsibility of the EU and its Member States will have to be, at least partly, set aside. Nevertheless, it first needs to be established if and how international responsibility norms are applicable to the EU. As mentioned above, the ARSIWA of 2001 have not been adopted as a treaty, but they are generally regarded as the codification of existing custom, which binds States. In 2002, Crawford noted that the ARSIWA would have to prove themselves in practice and that they should primarily be seen as an articulation of customary law, and for this reason, the lack of a treaty format would not impede their application.¹¹ This assessment seems to have been essentially correct, as the ARSIWA are being applied by international courts and are relied upon by States.¹² They have also been 'much cited and have acquired increasing authority'.¹³

The ARIO¹⁴ of 2011, on the other hand, received a much less consistent reception. Certain provisions of the ARIO were quoted by domestic and international courts even prior to their adoption,¹⁵ but these articles contain many provisions which are progressive developments of interna-

¹¹ James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' [2002] *American Journal of International Law* 874, 889.

¹² See *Responsibility of States for Internationally Wrongful Acts – Compilation of Decisions of International Courts, Tribunals and Other Bodies* (UNGA Report of the Secretary-General 77/74), which lists altogether no less than 786 references to the ARSIWA between 2001-2022. The ICJ notably relied on them, eg in *Bosnia and Herzegovina v Serbia and Montenegro* (2007) ICJ Rep 43, 77 2007.

¹³ As Crawford also noted, ten years after their adoption. James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 539.

¹⁴ United Nations GA Res 66/100, 9 December 2011, Responsibility of international organizations.

¹⁵ As Gerlich notes, provisions of the ARIO were quoted by domestic and international courts even prior to their adoption by the General Assembly. Olga Gerlich, 'Responsibility of International Organizations under International Law' [2013] *Folia Iuridica Universitatis Wratislaviensis* 19.

tional law rather than mere codification of existing custom.¹⁶ The ARSIWA and the ARIO, however, do share many provisions, as they are built around the same basic tenets, even if the International Law Commission (ILC) refrained from using analogies in many instances, since a deeper examination of the ARIO reveals substantial differences from their predecessor.¹⁷ The differences between States and IOs notwithstanding, the fundamental elements of international responsibility need to be essentially the same for both types of subject of international law, otherwise the coherence of the law of international responsibility will be imperilled.¹⁸

The EU, for its part, already emphasised the unique characteristics of the EU legal order in the course of the formation of the ARIO. It was highlighted by the European Commission that, unlike traditional international organisations, the EU acts and implements its international obligations to a large extent through its Member States and their authorities, and not necessarily through ‘organs’ or ‘agents’ of its own, and that the EU’s unique features include ‘important law-based foreign relations powers that have a tendency to develop over time’.¹⁹ The EU’s insistence on the uniqueness of its legal order – as something other than international law – is also strongly reflected in Opinion 2/13 of the CJEU on the accession of the EU to the ECHR.

3 The Responsibility of the EU before the ECtHR: A question of attribution?

The EU’s responsibility, of course, is also a crucial question in the law of the ECHR, as all Member States of the EU are parties to the ECHR.

¹⁶ United Nations, ‘Draft Articles on the Responsibility of International Organizations, with Commentaries [2011] Yearbook of the International Law Commission (vol 2, part 2) 46-47.

¹⁷ See, for example, Articles 7, 17 and 61 of the ARIO. Compare Christiane Ahlborn, ‘The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations – An Appraisal of the “Copy-Paste Approach” [2012] International Organisations Law Review 53. The ILC itself noted at the outset the need for ‘some’ coherence in the output of the Commission as regards international responsibility, and reaffirmed that the ARSIWA should constantly be taken into consideration as a source of inspiration while drafting the ARIO, though it did recognise that analogous solutions would not always be possible or desirable (ILC Report, Fifty-fourth Session, UN Doc A/57/10 (2002), p 232 (para 475).

¹⁸ Alain Pellet, ‘International Organizations are Definitely not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations’ in Maurizio Ragazzi (ed), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (CUP 2013) 41, 44. Though to nuance the role of both the ARSIWA and ARIO, it should be added that there may be an inherent risk in relying solely on ILC articles as ‘shortcuts’ to identifying customary law. See Fernando Lusa Bordin, ‘Still Going Strong: Twenty Years of the Articles on State Responsibility’s ‘Paradoxical’ Relationship between Form and Authority’ in Federica Paddeu and Christian J Tams (eds), *The ILC Articles at 20: A Symposium* (Glasgow Centre for International Law & Security 2021) 15; and more generally Fernando Lusa Bordin, ‘Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law’ [2014] *International and Comparative Law Quarterly* 535, 548.

¹⁹ Responsibility of International Organizations: Comments and Observations Received from International Organizations (14 February 2011) UN doc A/CN.4/637, 7.

As the EU, however, is not a party to the ECHR, it is not bound by it in the sense of international law. The EU cannot become a defendant in proceedings before the ECtHR for having infringed the Convention, and the ECtHR cannot directly examine the compatibility of EU law with the ECHR.²⁰

Nevertheless, the ECtHR has consistently held that the Member States of the EU remain bound by the ECHR, regardless of their membership of a supranational organisation. It has also pointed out that the fact that when the ECHR was signed, the European States did not yet intend to create a supranational organisation did *not* preclude the application of the ECHR to the institutions of a supranational community – especially since the Member States of that community were all States Parties to the ECHR.²¹

The ECtHR has also had to decide whether it could examine acts that an EU Member State had adopted in the implementation of EU law, ie State acts rooted in EU law obligations. Without diving too deeply into the abundant details,²² by reliance on the *Cantoni*²³ and *Pouse*²⁴ judgments, the answer to the question depends on whether the EU Member State had discretionary powers in relation to the act concerned. Generally, EU Member States are bound to follow obligations flowing from EU law not only due to the principle of *pacta sunt servanda*, but also based on

²⁰ See, already in this spirit, the decision of the European Commission of Human Rights in the case *Confédération Française Démocratique du Travail v the European Communities, alternatively: their Member States a) jointly and b) severally* App no 8030/77 (10 July 1978), where an action against the European Community was declared inadmissible *ratione personae*. This also follows from Article 34 of the 1969 Vienna Convention on the Law of Treaties (ie the principle of the relative binding effect of treaties). Applicants have also attempted – unsuccessfully – to sue all EU Member States collectively before the ECtHR. See *Société Guérin Automobiles contre les 15 Etats de l'Union Européenne* App no 51717/99 (ECtHR 4 July 2000) and *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* App no 56672/00 (ECtHR 10 March 2004), where the ECtHR declared the applications inadmissible (although for different reasons), as it did in *Segi and others and Gestoras Pro-Amnistia and others v 15 States of the European Union* App nos 6422/02 and 9916/02 (ECtHR 23 May 2002) and *Emesa Sugar NV v The Netherlands* App no 62023/00 (ECtHR 13 January 2005). For a concise overview of these cases, see Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases and Materials* (OUP 2008) 420-422.

²¹ *Matthews v The United Kingdom* (n 8) para 39. In this respect, the ECtHR referred to the established principle of its case law that the Convention constituted a 'living' instrument. See, for example, George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 106-41.

²² For a compendium of relevant case law, see Council of Europe / European Court of Human Rights, 'Guide on the Case-law of the European Convention on Human Rights: European Union Law in the Court's Case-law' 2022.

²³ *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996).

²⁴ *Pouse v Austria* App no 3890/11 (ECtHR, 18 June 2013).

the principle of loyalty as embodied by Article 4(3) TEU.²⁵ They are, however, endowed with varying levels of discretion in the implementation of these obligations, depending first and foremost on the form of secondary EU legislation that is used to lay down specific obligations. In *Cantoni*, the dispute revolved around a provision of French law which was essentially identical to the text of the EC directive that the State had transposed. The ECtHR held that the textually identical nature did not exclude the French law from the scope of the ECHR, as the transposition of a directive gives the national legislator 'room to manoeuvre'. It is therefore the responsibility of the State to follow the obligations laid down in the directive in a way that at the same time remains compatible with the ECHR.²⁶ However, vis-à-vis secondary EU law, which does not provide national legislators with meaningful discretion, especially regulations, the ECtHR has held (in *Pouze*) that in such cases the Member State is simply following EU law obligations with no possibility of divergence.²⁷ This can nevertheless lead to a violation of Convention rights if the root of the infringement is indeed the EU legislative act. Theoretically, this would lead to the invocation of the responsibility of the EU itself, which, however, is not possible *de iure condito*. This is where the oft-cited *Bosphorus* formula comes into play.

In *Bosphorus*, the ECtHR construed a presumption of legality to address the contradiction that States cannot exclude themselves from the scope of the ECHR by delegating their powers to an international entity, but at the same time, the supranational organisation itself is not directly bound by the ECHR. The case concerned a measure taken by a Member State on the basis of an EU regulation implementing at the EU level a binding resolution of the UN Security Council.²⁸ According to the *Bosphorus* presumption, a State's obligation to take action arising from its membership of an international organisation is lawful as long as the organisation concerned provides for the protection of fundamental rights in a way at least equivalent to the protection guaranteed by the ECHR, both substantively and procedurally.²⁹ The presumption of an adequate and

²⁵ On the relationship of the two principles, see Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) pp 9-30 <<https://doi.org/10.1093/acprof:oso/9780199683123.003.0001>> accessed 2 December 2023.

²⁶ See, for example, Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' [2013] *Fordham International Law Journal* Volume 1114, 1137-1140; Erzsébet Szalayné Sándor, 'Unió's jog Strasbourgban – a koherens alapjogvédelem új rendje' [2011] *Scientia Iuris* 89. Although in the case at hand, the ECtHR did not find an infringement of the ECHR, it did give a strong signal, indicating the 'normative power of the EC/EU institutions' did not completely escape judicial review by the Strasbourg court (Luis I Gordillo, *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law* (Hart 2012) 134).

²⁷ *Pouze v Austria* (n 23). The case involved a dispute concerning the application of Regulation 2201/2003/EC (Brussels IIa).

²⁸ Regulation (EEC) No 990/93 (OJ 1993 L 102/14) implemented UNSC Resolution 820 (1993), which covered the seizure of vehicles wholly or mainly owned or at least controlled by Yugoslavia as part of the UN sanctions against the Federal Republic of Yugoslavia during the armed conflict in the region.

²⁹ *Bosphorus Airways v Ireland* App no 45036/98 (ECtHR 30 June 2005) paras 155-156.

comparable level of protection of fundamental rights is not final: it may be subject to review by the ECtHR in light of any substantial change. Nevertheless, where an international organisation affords a degree of fundamental rights protection comparable to that guaranteed by the ECHR, the State concerned must be presumed not to have violated the Convention in the performance of its obligations flowing from its membership of an international organisation such as the EU.³⁰ The presumption is, however, rebuttable if, in a specific case, the protection of the rights contained in the ECHR would be 'manifestly deficient' under EU law. In this case, the ECHR – as a constitutional instrument of European public order – must prevail, as opposed to the interests of the international organisation.³¹

The establishment of the *Bosphorus* presumption has at least two consequences relevant to our topic. On the one hand, it means a favourable equivalence assessment by the ECtHR for the EU, but on the other hand, it also means that ultimately the application of an EU regulation that does not give a Member State any room for discretion remains attributable to the Member State from the ECHR perspective, as the act falls within the jurisdiction of the State. According to Gaja, this should be seen as being in line with what Article 4(1) ARSIWA suggests regarding attribution:

[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'

regardless of whether the State was acting under an obligation based on international or EU law.³² However, based on the strict and non-derogable nature of certain EU legislative acts and on the 'executive federalism'³³ character of EU law, one could argue that, in fact, the Member States are acting as organs of the EU. This is what the concept of normative control posits as well.³⁴ Despite its supranational character and autonomous legal order, the Union remains dependent on the Member States and their organs as regards the implementation of the vast majority of its legal acts.³⁵

If, however, one examines, in turn, the rules of the ARIO, it is apparent that the latter instrument does not consider the Member States of

³⁰ *Bosphorus Airways v Ireland* (n 28) para 156.

³¹ On the role of the ECHR as such an instrument, see *Loizidou v Turkey* App no 15318/89 (ECtHR 18 December 1996).

³² Giorgio Gaja, 'Accession to the ECHR' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012) 190.

³³ See, for example, Robert Schütze, 'From Rome to Lisbon: 'Executive Federalism' in the (New) European Union' [2010] *Common Market Law Review* 1385.

³⁴ See Andrés Delgado Casteleiro, *The International Responsibility of the European Union: from Competence to Normative Control* (CUP 2016), especially 227-235.

³⁵ Jed Odermatt, *International Law and the European Union* (CUP 2021) 208-209.

an IO as organs of the IO. That follows *inter alia* from Article 2(c) of the ARIIO, which defines the organ of an international organisation as ‘any person or entity which has that status in accordance with the rules of the organization’ – and IOs do not define Member States as their organs, except for the EU, which has argued for recognition of the Member States as *de facto* organs of the EU *vis-à-vis* acts adopted within the exclusive competences of the EU.³⁶ Arguably, Article 64, covering the existence of *lex specialis* rules, can be seen as covering this possibility, as it mentions that ‘special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members’. Nevertheless, no *expressis verbis* mention of the aforesaid agent status of Member States is made in the article, and nor can such a rule be found in EU law.³⁷ Such rules could, however, find a place in the agreement on the accession of the EU to the ECHR in line with the logic that if a Member State organ acts on the basis of EU law but exercises discretion, the act would be attributed to the State, and where a Member State implements an EU act that leaves no room for discretion to the EU itself.³⁸

The original draft accession agreement³⁹ took a different stance. It envisaged that accession would place obligations on the EU ‘with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf’ (Article 1(3)), and that an act, measure or omission of organs of a Member State of the EU would be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under both the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU, Article 1(4)), which of course contains the rules on the CFSP. This is nuanced, however, by the inclusion of the co-respondent mechanism, allowing the EU to become a co-respondent beside a Member State. This mechanism permits the Strasbourg Court *not* to determine who the correct respondent in a given case may be or how responsibility should be shared between them – although the explanatory report seemingly foresees joint responsibility as the ‘ordinary’ case to be expected.⁴⁰ However, this is, as Naert points

³⁶ Jean d’Aspremont, ‘European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union’ (2013) SHARES Research Paper 22, 4-6.

³⁷ *ibid* 6-7, where d’Aspremont notes, referring to Ahlborn, that the wording of Article 64 and thus its scope (ie what exactly are to be regarded as the rules of the organisation) also remains problematic. Compare Christiane Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’ [2011] *International Organizations Law Review*, 397.

³⁸ Gaja (n 31) 190.

³⁹ Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, ‘Final Report to the CDDH’ (10 June 2013) CoE Doc 47+1(2013)008 rev2.

⁴⁰ Christina Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’ [2013] *The Modern Law Review* 266-267.

out, far from evident from the text of Article 1 of the agreement as outlined above. In fact, Naert makes an effective argument detailing how, for instance, in the context of a CSDP operation, the operations themselves:

are established by the Council of the EU; are governed by EU legal instruments, including international agreements, and EU-approved operational planning documents and rules of engagement; and are conducted by Headquarters and forces/personnel under the command and control of the EU Operation Commander who acts under the political control and strategic direction of the PSC, and ultimately under the responsibility of the Council and of the High Representative. Under international law, it is likely that these combined elements amount to a degree of (effective) control by the Union entailing – at least in principle – the attribution of the acts of an operation and its personnel (not of a private nature) to the Union.⁴¹

4 CFSP acts in the original draft accession agreement and Opinion 2/13

The draft accession agreement also did not foresee special rules for the EU's responsibility for CFSP measures. On the contrary, it envisaged that acts and measures of the EU and/or its Member States under the CFSP, including Member State implementation of EU CFSP decisions taken under the TEU would fall within the jurisdiction of the ECtHR.⁴² Such a solution would close the fundamental rights review gap that currently exists as regards the CFSP and the CSDP.⁴³ Thus, from a purely fundamental rights standpoint, it should be commended. However, from the point of view of precise regulation of attribution of responsibility, the question may be seen in a different light, taking into account *inter alia* the variety of actors potentially involved in CFSP or CSDP operations, ranging from the Council (ie representatives of Member State governments deciding – in this case – unanimously), to military forces of various Member States involved in a mission, even possibly entailing the use of NATO assets.⁴⁴

In any case, in its Opinion 2/13, the Court of Justice ruled against this broad determination of the ECtHR's jurisdiction. In its argumentation, the Court of Justice started from the fact that under EU law it has

⁴¹ Frederik Naert, 'European Union Common Security and Defence Policy Operations' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 700.

⁴² Maria José Rangel de Mesquita, 'Judicial Review of Common Foreign and Security Policy by the ECtHR and the (Re)negotiation of the Accession of the EU to the ECHR' [2021] *Maastricht Journal of European and Comparative Law* 362-363

⁴³ Compare Joyce De Coninck, 'Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication?' [2023] *German Law Journal* 342-363.

⁴⁴ Naert ascertains no less than ten different scenarios resulting in possibly different combinations of (partly shared) responsibility. Naert (n 37) 676-678.

very limited competence in CFSP matters, as it may only monitor compliance with Article 40 TEU and, per Article 275 TFEU, review the legality of restrictive measures against private persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty, thus resulting in certain acts adopted in the context of the CFSP falling outside the ambit of judicial review by the Court of Justice.⁴⁵ Almost ominously, the Court added, however, that it has ‘not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions’.⁴⁶ As will be demonstrated in Section 5, such opportunities have since presented themselves.

As outlined above, the draft accession agreement would have empowered the ECtHR to rule on the compatibility with the ECHR of such acts, actions or omissions performed in the context of the CFSP, without the Court of Justice having jurisdiction – and according to the Court, jurisdiction to carry out a judicial review of acts, actions or omissions of the EU cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.⁴⁷ The draft agreement thus failed to have regard to the specific characteristics of EU law as regards the system of the CFSP, and was therefore held to be incompatible with EU primary law.⁴⁸

5 The resumed accession negotiations and the CFSP conundrum

As Opinion 2/13 was delivered under Article 218 TFEU, it is binding on the EU, leaving only two solutions that would allow the accession to go forward: amending the EU treaties themselves or drawing up a new accession agreement – and as the first option was definitely not on the agenda, the second one was pursued, though that is not to say that this latter path was necessarily a much easier one. Following Opinion 2/13, the Member States sitting in the Council agreed that a period of reflection was necessary while also reaffirming their commitment to accession.⁴⁹ It was the task of the Commission to analyse the obstacles as laid out by Opinion 2/13. The analyses were, in turn, discussed by the Council Working Party on Fundamental Rights, Citizens’ Rights and Free Movement of Persons (FREMP), which further requested the Commission to

⁴⁵ Court of Justice of the European Union, Opinion 2/13 ECLI:EU:C:2014:2454, paras 249-252.

⁴⁶ *ibid.*, para 251.

⁴⁷ The Court pointed in this regard to Opinion 1/09, EU:C:2011:123, paras 78, 80 and 89. The Court of Justice also later relied heavily on this argumentation (and Opinion 2/13) in Case C-284/16 *Achmea* ECLI:EU:C:2018:158 (especially para 57) in the context of intra-EU bilateral investment treaties.

⁴⁸ Opinion 2/13 (n 44) para 258.

⁴⁹ Council of the European Union: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of play (14963/17) 3.

prepare proposals on how to rework the accession agreement.⁵⁰ The Commission and the Council of Europe (CoE) have both reiterated that the intention to make the EU's accession to the ECHR possible was unchanged. Following an informal meeting in June 2020,⁵¹ accession negotiations were formally resumed in September 2020.⁵²

The issues raised by Opinion 2/13 were arranged into 'baskets' of negotiation, with the CFSP-related questions representing Basket 4. In its initial position paper presented at the outset of the restarted negotiations, the EU emphasised that 'a solution needs to be found, which allows for reflecting the EU internal distribution of competences for remedial action in the allocation of responsibility for the EU acts at issue for the purpose of the ECHR system'.⁵³ In a later non-paper, the EU drew attention to the fact that in the meantime the Court of Justice had in fact 'had the opportunity' to reflect on the limitation of its jurisdiction in the CFSP, and found that the limitation itself needed to be interpreted narrowly.⁵⁴ The EU pointed to the judgments in *Rosneft*,⁵⁵ *Bank Refah Kargaran*,⁵⁶ *Elitaliana Spa*⁵⁷ and *H v Council*,⁵⁸ which, succinctly put, affirmed the Court of Justice's position that, in the CFSP, the general rule was, in fact, not the limited nature of the Court's competence. On the contrary, the Court starts from the premise that it has general competence of judicial review under Article 19 TEU. Its limited jurisdiction vis-à-vis the CFSP is merely the exception to the general rule – a logic entirely the opposite of what a textual interpretation would suggest.⁵⁹ The Court of Justice has so far already made it clear that it interprets its competence regarding the CFSP as including not only the annulment procedure but also preliminary rulings as to the validity (*Rosneft*) of acts, as well as actions for damages

⁵⁰ See Council of the European Union (n 48) 3 and General Secretariat of the Council: Outcome of the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) 14639/18, 10 December 2018, 1.

⁵¹ Virtual Informal Meeting of the CDDH Ad Hoc Negotiation Group ('47+1') on the Accession of the European Union to the European Convention on Human Rights – Meeting Report, 22 June 2020 (47+1(2020)rinf).

⁵² The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission. Réf DC 123(2020).

⁵³ European Union Position paper for the negotiations on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms, 47+1(2020)01, 5 March 2020, 5.

⁵⁴ *ibid* 2.

⁵⁵ Case C-72/15 *Rosneft* ECLI:EU:C:2017:236.

⁵⁶ Case C-134/19 P *Bank Refah Kargaran* ECLI:EU:C:2020:793.

⁵⁷ Case C-439/13 P *Elitaliana Spa* ECLI:EU:C:2015:753.

⁵⁸ Case C- 455/14 P *H v Council* ECLI:EU:C:2016:569.

⁵⁹ Ramses A Wessel, 'Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality', presented at the workshop Contemporary Challenges to EU Legality, European University Institute, Florence, 5 February 2019, 6-7.

(*Bank Refah Kargaran*),⁶⁰ and has introduced a ‘centre of gravity’ test for measures that could potentially be considered as falling either within or outside the CFSP (*H v Council*). In doing so, the Court has aimed to narrow the gap in judicial review by interpreting its own powers rather broadly – yet a gap nevertheless remains.⁶¹

In the course of the resumed negotiations, the EU has proposed a solution to sidestep the jurisdictional clash (or challenge to the autonomy of the EU legal order, if you will) perceived by the CJEU and, at the same time, close the justiciability gap in the CFSP. This solution would entail introducing a rule of *retribution* applicable to CFSP acts. According to the solution proposed in March 2021, the EU will be enabled to allocate responsibility for a CFSP act of the EU to one or more Member State in case the act is excluded from CJEU jurisdiction.⁶² This would mean, in practice, that acts that the EU could not be held responsible for either by the CJEU or the ECtHR would, in turn, be reattributed to one or more EU Member State. In essence, the concept would not follow the classical logic of attribution (linked to conduct) but would rather shift responsibility to an actor that would otherwise not be responsible – all in order to fill the justiciability gap. In this sense, it can be seen as a ‘legal fiction’ to override any other method of attribution.⁶³

In the context of the ARIIO, the concept of the attribution of responsibility (not the attribution of *conduct*) relates to a situation where an internationally wrongful act is committed collectively by an IO and one or

⁶⁰ Interestingly, Advocate General Kokott argued in her view on the EU’s accession to the ECHR that actions for damages are not covered by the limited jurisdiction of the Court of Justice in the CFSP, speaking against a ‘very wide’ interpretation of the relevant provisions of primary law. Opinion 2/13, View of AG Kokott ECLI:EU:C:2014:2475 para. 94. This is also noted by Naert (n 40) 692.

⁶¹ Jasper Krommendijk, ‘EU Accession to the ECHR: Completing the Complete System of EU Remedies?’ [2023] SSRN 3-4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4418811> accessed 2 May 2023.

⁶² CDDH 47+1 Ad Hoc Negotiation Group on the Accession of the European Union to the European Convention on Human Rights, ‘Report of the Ninth Negotiation Meeting’ (25 March 2021) CoE Doc 47+1(2021)R9, 3.

⁶³ Krommendijk (n 60) 17. In a way, the solution may lend itself to comparison with that of the EU’s situation in the United Nations Convention on the Law of the Sea (UNCLOS, 1982), which is one of the EU’s many mixed agreements, where both the EU and its Member States are parties. Based on ITLOS Advisory Opinion in Case No 21 (Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, 2 April 2015), the International Tribunal for the Law of the Sea at least seems to approach attribution of responsibility in the EU context based on competence rather than the attribution of conduct of agents or organs. In Case No 21, the central issue concerned the question of who was entitled to submit observations on behalf of the EU. On this latter point, see Esa Paasivirta, ‘The European Union and the United Nations Convention on the Law of the Sea’ [2015] *Fordham International Law Journal* 1059-1061. Notably, this issue has also resulted in an intra-EU dispute between the Council and the Commission (C73/14 *Council v Commission* ECLI:EU:C:2015:663), with the Court ruling in favour of the Commission. For an analysis, see Soledad R Sánchez-Tabernero, ‘Swimming in a Sea of Courts: The EU’s Representation before International Tribunals’ [2016] *European Papers* 751-758.

more State.⁶⁴ The attribution of responsibility does not necessarily result in *multiple* responsibility, however.⁶⁵ A reattribution clause per se would not be foreign to the logic of the ARIIO. It would, however, definitely mean overriding the general logic of attribution in a certain way. The EU has not made it clear how or on what basis the EU would reattribute responsibility to certain Member States in the situation described above. With such a clause, the EU aims to *remove* attribution entirely from both the logic of the ARIIO and that of the ECtHR's jurisprudence and decide on attribution internally instead. While the solution would make the situation of applicants easier, the dogmatic background of the concept remains unclear, at least in the absence of official documents on its details. The sensitive nature of the CFSP-related issue is demonstrated by the fact that from among numerous working documents presented to the CDDH Ad Hoc Negotiation Group on accession, the one containing 'Proposals by the European Union on the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union' was one of the very few restricted ones.⁶⁶

At its 18th meeting held in March 2023, the Negotiation Group reached a unanimous provisional agreement on solutions to the issues raised by Opinion 2/13 – save for the CFSP issue.⁶⁷ According to the Group, the solutions proposed as regards 'Baskets 1, 2 and 3' were in line with the general principles that the Group had agreed, ie preserving the equal rights of individuals and the rights of applicants under the ECHR, as well as maintaining the equality of all contracting parties (be they States or the EU), and preserving as far as possible the control mechanism of the ECHR and its application to the EU in the same way as to all other parties.⁶⁸ At the same meeting, the EU informed the Group of its resolve to address the CFSP conundrum internally and 'of its expectation that

⁶⁴ As rightly pointed out by Boon (Kristen E Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' [2014] *Melbourne Journal of International Law* 12-13), the attribution of responsibility, as distinguished from attribution of conduct, rests primarily on concepts developed by Roberto Ago as ILC Special Rapporteur (see, for example, 'First Report on State Responsibility' [1969] II Yearbook of the International Law Commission 125, UN Doc A/CN.4/217; 'Second Report on State Responsibility' [1970] II Yearbook of the International Law Commission 177, UN Doc A/CN.4/223).

⁶⁵ Compare Stian Øby Johansen, 'Dual Attribution of Conduct to both an International Organisation and a Member State' [2019] *Oslo Law Review* 182-183 and 192-193, who considers the terminology of 'attribution of responsibility' confusing and imprecise as such, stating that attribution in international law should always be tied to conduct, and thus suggests using the term shared and/or derived responsibility. Furthermore, he argues that dual attribution of conduct may or may not result in simultaneous attribution to a State and an IO, and thus they should not be regarded as being synonymous.

⁶⁶ See, for example, CDDH 46+1 Ad Hoc Negotiation Group on the Accession of the European Union to the European Convention on Human Rights, 'Report on the 13th Negotiation Meeting (13 May 2022), CoE Doc 46+1 (2022) R13.

⁶⁷ 46+1 CDDH Ad Hoc Negotiation Group ('46+1') on the Accession of the European Union to the European Convention on Human Rights, 'Report to the CDDH' (30 March 2023) CoE Doc 46+1(2023)35 FINAL.

⁶⁸ *ibid.*

the Group would not be required to address this issue as part of its own work'. The Group rightly noted that it would nonetheless be necessary for all parties to the accession negotiations to be appropriately informed about the way in which the EU was looking to resolve Basket 4 as a precondition to any possible final agreement by all parties on the EU's accession; the EU undertook to keep the CDDH appropriately informed.⁶⁹

Otherwise, the general attribution rules enshrined in Article 1(3)-(4) remain unaltered in the new draft agreement. The comments provided by the Negotiation Group make it clear that paragraph (4) applies to CFPS acts as well;⁷⁰ the actual text of the draft agreement foregoes any express mention of this policy field. Pergantis and Johansen note that the (original, but thus also the revised) agreement starts from the idea that attribution of responsibility should primarily depend on the act and/or the provision at the origin of the breach and not on any additional concept of normative control such as the allocation and nature of competence or the existence or lack of discretion, allowing the ECtHR to decide on a factual basis to whom conduct should be attributed.⁷¹ This could be the case for attribution of conduct but not necessarily for the proper attribution of *responsibility*.⁷²

6 Concluding remarks

This paper has shown that conceptualising, regulating and interpreting attribution and responsibility for CFSP acts at the ECtHR is a complicated exercise. *De lege lata*, there are no specific rules pertaining to this issue in either legal order, and, based on the outcome of the renegotiation process, there seems to be little chance of such rules being codified *de lege ferenda* in the revised accession agreement either. Interestingly, during the negotiations on the original draft accession agreement, the EU *did* propose and advocate a special attribution rule pertaining to the CFSP. This proposal would have added to what is now Article 1(4), stating that:

acts or measures shall be attributable only to the member States of the European Union where they have been performed or adopted in the context of the provisions of the Treaty on European Union on the common foreign and security policy of the European Union, except in cases where attributability to the European Union on the basis of European Union law has been established within the legal order of

⁶⁹ *ibid.*

⁷⁰ *ibid.* 16.

⁷¹ Vassilis Pergantis and Stian Øby Johansen, 'The EU Accession to the ECHR and the Responsibility Question. Between a Rock and a Hard Place?' in Christine Kaddous, Yuliya Kaspiarovich, Nicolas Levrat and Rasmus A Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart 2022) 237.

⁷² Compare in this context James D Fry, 'Attribution of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014) 106.

the European Union.⁷³

This proposal, however, was firmly rejected by the non-EU parties to the negotiations and was not only simply dropped, but the reference to the TFEU and TEU was added, conveying the idea that no difference exists between violations arising from whichever EU policy – not even the CFSP.⁷⁴

The concept of normative control has been suggested to potentially act as a special rule of attribution in EU-Member State relations.⁷⁵ Of course, the CFSP has a special situation from this point of view as well, as some of the elements of the EU's perceived normative control are missing from the CFSP, including notably the full jurisdiction of an internal judicial organ⁷⁶ – then again, the Court of Justice is slowly but surely expanding its jurisdictional reach in this policy, so arguments for a normative control-based attribution in the CFSP could perhaps be made. The concept itself is, however, missing from both the original and the revised accession agreement. The attribution rules in the revised agreement remain unchanged, relying on singular attribution coupled with the co-respondent mechanism; an attribution of *responsibility* is not foreseen or supported in this scheme.⁷⁷

Yet the co-respondent mechanism is not a true attribution rule, as it depends on the willingness of the EU or its Member States to enter into the proceeding in question willingly, and of their own accord, and this cannot be taken for granted.⁷⁸ The EU did signal in a draft declaration that it would request to become a co-respondent in every case where the conditions are fulfilled, yet this undertaking does not change the nature of the clause as a 'self-judged' rule.⁷⁹

The Union's resolve that it will decide internally on CFSP attribution brings to mind the Court of Justice's statements made in Opinion 1/17 on the Comprehensive Economic and Trade Agreement between Canada, the EU and its Member States, where it emphasised that in the CETA dispute resolution system, the competence to decide the 'correct' respondent (ie whether it should be the EU or a Member State) rests with the EU. This was stressed explicitly by the Court as setting the CETA apart from the draft accession agreement to the ECHR.⁸⁰

⁷³ See CDDH 47+1 Ad Hoc Negotiation Group, 'Report of the Third Negotiation Meeting' (11 March 2012) CoE Doc 47+1(2012)R03, as noted by Pergantis and Johansen (n 70) 238.

⁷⁴ *ibid* 239.

⁷⁵ See notably Delgado Casteleiro (n 33) and Cristina Contartese, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and its Member States' [2019] *International Organizations Law Review* 339.

⁷⁶ Delgado Casteleiro (n 33) 233.

⁷⁷ Pergantis and Johansen (n 70) 240.

⁷⁸ This was also noted in the view of AG Kokott on Opinion 2/13, para 216.

⁷⁹ Pergantis and Johansen (n 70) 240. Compare also Opinion 2/13, paras 218-222.

⁸⁰ Court of Justice of the European Union, Opinion 1/17 ECLI:EU:C:2019:341 para 132, with reference to Article 8.21 of the CETA.

This may be beneficial from the perspective of the EU and the autonomy of its legal order, though empowering the ECtHR to decide would arguably be more consistent⁸¹ with Article 1 Paragraph 1(b) of the relevant protocol annexed to the TEU and TFEU, which requires that the accession agreement include the 'mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'.⁸² Furthermore, internalising the (re)attribution issue could have detrimental effects for applicants as well, as it could complicate and/or draw out access to justice. Pergantis and Johansen rightly question whether this represents an ideal solution in light of the right to effective judicial review, enshrined inter alia in the EU Charter for Fundamental Rights.⁸³ It would also definitely mean that the EU would not be on an equal footing with other contracting parties,⁸⁴ and would partly weaken the external judicial review provided by the ECtHR, as it would ultimately *not* have the power to decide on whom to attribute responsibility to.⁸⁵ The details of how the decision on reattribution would be taken are not known at this point, although this raises a number of additional questions. From the perspective of the judicial remedies available to individuals, one of the most significant ones would be whether internalised attribution can be subjected to 'internal' judicial review by the CJEU. According to the CJEU, the Treaties aim to establish a complete system of judicial remedies.⁸⁶ However, the jurisdiction of the CJEU in the CFSP remains limited even if one takes the relevant jurisprudence – outlined in brief in Section 5 – into account. Thus, if the reattribution decision itself is taken on a CFSP legal basis (which can be assumed), the right to an effective remedy could see another setback, especially as such a decision would fall neither within the scope of Articles 24(1) and 40 TEU nor Article 275

⁸¹ Gaja (n 31) 346.

⁸² Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

⁸³ Pergantis and Johansen (n 70) 247.

⁸⁴ Yet this was one of the stated principles of the elaboration of the original draft accession agreement (see Steering Committee for Human Rights: Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights, CDDH(2011)009, 16). This principle is also the strongest argument against maintaining the *Bosphorus* presumption post-accession. See: Leonard FM Besselink, 'Should the European Union Ratify the ECHR?' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 310-312. Even without *Bosphorus*, many see the EU's position as envisaged by the original draft accession agreement as privileged (see, for example, Fislík Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Springer 2015) 99-100). The same can be said regarding the revised agreement.

⁸⁵ Pergantis and Johansen (n 70) 248.

⁸⁶ Compare the CJEU's decades-spanning case law starting with the landmark *Les Verts* case (Case 294/83 *Les Verts* ECLI:EU:C:1986:166).

TFEU.⁸⁷ This would affect not only individuals, of course, but Member States as well, should they strive to contest the reattribution.

In any case, the current practice of the ECtHR reveals an attempt at a balancing act. On the one hand, the Strasbourg court will not ascertain the responsibility of a Member State simply on the basis of its membership of an international (supranational) organisation alone, but at the same time it will seek to avoid a situation where a Member State of such an organisation could escape its ECHR obligations by transferring certain powers to the organisation – an understandable approach since the primary concern of the ECtHR is to ensure that individuals have access to judicial remedy in the ECHR system regarding any act of the EU.⁸⁸ This approach will not change even if the EU accedes to the ECHR. From the point of view of the individual seeking access to justice, the doctrinal soundness of attribution is of less concern (the primary consideration being access to justice),⁸⁹ but as we have seen above, the newly proposed internal reattribution system is not irrelevant from the point of view of individual applicants either, possibly affecting access to (an effective) judicial remedy.

From the Union's point of view, the attribution of CFSP acts can logically be considered as an internal public law issue of constitutional relevance. This is partly due to the autonomy of the Union's legal order. However, it is far from certain whether a reattribution of responsibility within the Union, to the exclusion of the ECtHR, is the most appropriate solution or even whether it will be acceptable to non-EU members of the Council of Europe⁹⁰ – or even to the EU Member States themselves. The accession of the EU to the ECHR would nevertheless be of great importance for the protection of individual human rights, regardless of these uncertainties.



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⁸⁷ For an excellent general conceptual analysis of the CJEU's jurisdiction in the CFSP, see Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' [2018] *International & Comparative Law Quarterly* 1. Compare also, focusing specifically on CSDP missions, De Coninck (n 42) 351-352.

⁸⁸ Odermatt (n 34) 223 and 226.

⁸⁹ Naert (n 40) 699; De Coninck (42) 361.

⁹⁰ Critical comments have already been made by some States. Krommendijk (n 60) 17.