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EDITORIAL COMMENTS

From Opinion 2/13 to KS and KD: Confronting a legacy of constitutional tensions

Ten years ago, on the 18th of December 2014, the European Court of Justice delivered Opinion 2/13.[1] It was, and it remains, a profoundly important text. Building on previous judgments and Opinions of the Court, it synthesized a constitutional self-understanding of the European Union and its legal order. Lawyers and political actors continue to untangle and assess the features of that system, and to further the realization of EU objectives mindful of the promise as well as of the constraints of the Opinion's complicated legacy.

In particular, Opinion 2/13's conception of the autonomy of the EU legal order is still being worked out, both judicially and academically.[2] The origins of autonomy can be traced to the Court's longstanding emphasis on the *independence* of the EU legal order from both national law and international law.[3] In Opinion 2/13, the Court underlined that, "[i]n order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law".[4] Thus, "an international agreement may affect [the Court of Justice's] own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order".[5]

For the Court, that threshold was not met by the arrangements negotiated for EU accession to the European Convention on Human Rights (ECHR) at the time. On the contrary, the draft accession agreement was, in its view, "liable

1. Opinion 2/13, EU:C:2014:2454.
2. Addressing various dimensions of this question, see Klabbers and Koutrakos (Eds.), "An anatomy of autonomy: Special issue", 88 Nordic JIL (2019). Significant judgments on the autonomy of EU law since Opinion 2/13 include Case C-284/16, *Achmea*, EU:C:2018:158; Opinion 1/17 (CETA), EU:C:2019:341; and Case C-741/19, *Republic of Moldova* v. *Komstroy*, EU:C:2021:655.
3. Case 26/62, *Van Gend en Loos*, EU:C:1963:1; Case 6/64, *Costa* v. *ENEL*, EU:C:1964:66.
4. Opinion 2/13, para 174.
5. Ibid., para 183; reflecting Art. 1 of Protocol 8, which requires that "[t]he [accession agreement] provided for in Article 6(2) [TEU] shall make provision for preserving the specific characteristics of the Union and Union law".

adversely to affect the specific characteristics and the autonomy of EU law".[6] Fundamentally, the Court considered that its own autonomy, as the authoritative judicial interpreter of EU law, would be undermined in various ways were the European Court of Human Rights (ECtHR) to acquire jurisdiction to determine matters of EU law.[7] Providing an important example, the draft agreement "fail[ed] to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in Common Foreign and Security Policy (CFSP) matters in that it entrusts the judicial review of some of those acts, actions or omissions *exclusively* to a non-EU body".[8] In 2015, we commented on this aspect of Opinion 2/13 as follows:

> "The conclusion of the Court is straightforward: the draft accession agreement fails to have regard to the specific characteristics of the EU legal system relating to judicial review in CFSP matters, though this is, admittedly, a consequence of the Treaties' provisions on the restricted jurisdiction of the ECJ in these matters. The implicit consequence of this position is as simple as problematic: the EU cannot accede to the ECHR as long as the ECJ is restricted in its jurisdiction to review CFSP matters."[9]

Have significant legal developments in the intervening decade changed that assessment?

The (non-)accession legacy

At the most basic level, the Union has still not realized Article 6(2) TEU's instruction that it "*shall* accede" to the ECHR. The ongoing task of achieving that goal has been the responsibility of the "46+1" Group.[10] In 2019, the European Parliament framed the negotiation of a new agreement for EU

6. Opinion 2/13, para 183.

7. In this respect, Opinion 2/13 built on Opinion 1/91, EU:C:1991:490 and Opinion 1/09, EU:C:2011:123.

8. Opinion 2/13, para 258 (emphasis added). The jurisdiction of the Court of Justice for CFPS matters is limited by Art. 24(1) TEU and the second paragraph of Art. 275 TFEU, which are returned to in more detail below.

9. Editorial Comments, "The EU's accession to the ECHR – a "NO" from the ECJ!", 52 CML Rev. (2015), 1, at 11.

10. Steering Committee for Human Rights (CDDH), the terms of reference for which empower it to "elaborate, in co-operation with representative(s) of the European Union to be appointed by the latter, a legal instrument, or instruments, setting out the modalities of accession of the European Union to the European Convention on Human Rights, including its participation in the Convention system; and, in this context, to examine any related issue" (Ad hoc terms of reference concerning accession of the EU to the Convention given to the CDDH by the Ministers' Deputies during their 1085th meeting (26 May 2010), CDDH(2010)008).

accession to the ECHR in terms of seeking "positive solutions to the objections raised by the CJEU in Opinion 2/13 of 18 December 2014", considering that:

> "its completion would introduce further safeguards protecting the fundamental rights of Union citizens and residents and provide an additional mechanism for enforcing human rights, namely the possibility of lodging a complaint with the ECtHR in relation to a violation of human rights derived from an act by an EU institution or a Member State implementing EU law, falling within the remit of the ECHR".[11]

The 46+1 Group published its proposed draft accession agreement in March 2023.[12] To address the "objections raised by the CJEU in Opinion 2/13", it had structured its discussions around four main areas or "Baskets": (1) procedures before the ECtHR specific to the EU; (2) inter-party applications and references for advisory opinions; (3) the principle of mutual trust between the EU Member States; and (4) EU acts in the area of the CFSP that are excluded from the jurisdiction of the Court of Justice.[13] After its final meeting, it was acknowledged that "the Group reached a unanimous provisional agreement on solutions to the issues arising under Baskets 1, 2 and 3".[14] However, precluding final agreement on the "whole package of accession instruments" and exemplifying the autonomy of the EU legal order, "[t]he representative of the EU informed the Group of the EU's intention to resolve the Basket 4 issues internally, and of its expectation that the Group would not be required to address this issue as part of its own work, but that resolution of this issue had not yet been achieved within the EU".[15]

The autonomy legacy

The Basket 4 challenge stems from Article 24(1) TEU, which underlines that the CFSP "is subject to specific rules and procedures", including that the Court of Justice "shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of

11. European Parliament resolution of 12 Feb. 2019 on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework (2017/2089 (INI)), para 29. See generally, Lock, "The future of EU accession to the ECHR after Opinion 2/13: Is it still possible and is it still desirable?", 11 EuConst (2015), 239.
12. 46+1(2023)35FINAL, Report to the CDHH, 30 March 2023.
13. 47+1(2020)R6, Meeting Report, 22 Oct. 2020.
14. Report to the CDHH cited *supra* note 12, para 7.
15. Ibid., para 8.

this Treaty[16] and to review the legality of certain decisions as provided for by the second paragraph of Article 275 [TFEU]".[17] These qualifications reflect issues that were potently current when the Lisbon Treaty was being drafted: against the backdrop of that Treaty's novel and detailed articulation of Union and Member State competences respectively, there was an effort to preserve some of the intergovernmental distinctiveness of foreign and security policy notwithstanding the disassembling of the Maastricht pillars, on the one hand, alongside due recognition of a growing body of direct actions challenging the imposition of financial sanctions on individuals, on the other hand.[18]

In Opinion 2/13, the Court placed "at the heart of th[e] legal structure" shaped by the essential characteristics of EU law "the fundamental rights recognized by the Charter …, respect for those rights being a condition of the lawfulness of EU acts, so that *measures incompatible with those rights are not acceptable* in the EU".[19] At the same time, the Court affirmed, with reference to *Kadi*, that "[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU".[20] That way of reasoning places EU primary law's written commitments on the protection of fundamental rights in tension with the unwritten principle of autonomy.

While the Court remarked that it had "not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters", it affirmed 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".[21]It could not countenance a situation in which the ECtHR "would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions

16. Art. 40 TEU provides that "[t]he implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter".

17. The second paragraph of Art. 275 TFEU provides that the Court "shall have jurisdiction to monitor compliance with Article 40 [TEU] and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union".

18. Notably, Joined Cases C–402 & 415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission*, EU:C:2008:461.

19. Opinion 2/13, para 169 (emphasis added).

20. Ibid., para 170.

21. Ibid., para 251.

performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights".[22] Because of the autonomy of the EU legal order, "jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU".[23]

At its 6th meeting, the 46+1 Group agreed that "there was a common goal by delegations which had spoken that, in order to avoid 'black holes' in the European human rights protection, the Convention system should be enabled to accommodate *all acts* in the CFSP area. The question was ultimately to find the appropriate way to get there".[24] A sense of optimism might have been gleaned from the observation that "[t]he EU stated that the case-law on this issue was not static but constantly evolving" and its pointing out, more specifically, that "[c]ase-law since 2014 had steadily widened the scope of the counter-exceptions which granted jurisdiction to the CJEU in this area and established that the exclusions from the general jurisdiction of the CJEU must be given a narrow interpretation. Additional cases which could further widen the CJEU's jurisdiction were currently pending".[25]

In the context of actions for damages against the Union for harm suffered by individuals, the Court of Justice had characterized the limitation of its jurisdiction in the CFSP as "a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed", which must, as such, be interpreted narrowly.[26] It sought, to that end, to widen its CFSP jurisdiction beyond the strict letter of Articles 24(1) TEU and 275 TFEU through incremental steps taken in subsequent case law.[27] The outcome of the

22. Ibid., para 254.
23. Ibid., para 256, referring to Opinion 1/09, paras. 78, 80 and 89.
24. Meeting Report cited *supra* note 13, para 39 (emphasis added).
25. Ibid., para 35.
26. Case C–658/11, *Parliament* v. *Council (Mauritius)*, EU:C:2014:2025, para 70.
27. As discussed in the Opinion of A.G. Ćapeta in Joined Cases C–29 & 44/22 P, *KS and KD*, EU:C:2023:901, points 53 to 69, that understanding has been applied in three groups of cases: first, cases establishing jurisdiction with respect to proceedings *other than* direct actions based on Art. 263 TFEU, the only type of proceedings referenced expressly in Art. 275 TFEU (e.g. for preliminary ruling proceedings, Case C-72/15, *Rosneft*, EU:C:2017:236); second, cases removing the claims in question outside the scope of the CFSP limitation when the facts involved EU missions (e.g. Case C–439/13 P, *Elitaliana* v. *Eulex Kosovo*, EU:C:2015:753); and third, cases establishing that international agreements adopted under the CFSP do not preclude the interpretation and application of Art. 218 TFEU (e.g. Case C-658/11, *Parliament* v. *Council (Mauritius*)).

appeal in *KS and KD* was therefore keenly awaited, since it required the Court to address the scope of judicial review in CFSP matters even more directly.[28]

The systemic legacy

KS and KD were seeking compensation from the Council, the Commission, and/or the European External Action Service because of the alleged failure of Eulex Kosovo[29] properly to investigate the torture, disappearance, and killing of members of their families in 1999. Associated breaches of their fundamental rights were therefore argued for Articles 2, 3, 6, and 13 ECHR and Articles 2, 4, and 47 CFR. After the General Court declined jurisdiction by Order, applying a narrow textual reading of Articles 24(1) TEU and 275 TFEU,[30] KS and KD appealed to the Court of Justice.

In its judgment, the Court of Justice first underlined that "the inclusion of the CFSP in the EU constitutional framework means that *the basic principles of the EU legal order also apply* in the context of that policy", which include, "in particular, respect for the rule of law and fundamental rights, values expressed in Article 2 TEU and given concrete expression to in Article 19 TEU, which require that both EU and Member State authorities be subject to judicial review".[31] But it also reconciled the jurisdictional limitation in Article 24(1) TEU with Article 47 CFR *and* Articles 6 and 13 ECHR by appealing to the lawfulness (under both EU law and – its interpretation of – ECtHR case law) of legitimate limitations on remedies and to the safeguards of conferral and institutional balance that do apply in the CFSP.[32]

Notwithstanding that finding, however, the Court decided that it did have jurisdiction to review the legality of certain CFSP acts. A "*specific analysis of each of the acts and omissions* falling within the scope of the CFSP" should first be undertaken.[33] Then, while acts and omissions that relate "directly to the definition and implementation of the *political or strategic choices* of the

28. Joined Cases C–29 & 44/22 P, *KS and KD,* EU:C:2024:725.

29. Established by Council Joint Action 2008/124/CFSP of 4 Feb. 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo (O.J. 2008, L42/92).

30. Case T-771/20, *KS and KD* v. *Council and Others*, EU:T:2021:798. Where jurisdiction *can* be established in a CFSP-adjacent situation, the difference in outcome is well illustrated by the ruling in Case C-351/22, *Neves 77 Solutions SRL*, EU:C:2024:723 (delivered on the same day as the judgment in *KS and KD*).

31. Joined Cases C–29 & 44/22 P*, KS and KD*, para 68 (emphasis added). This finding builds on the connections made between the CFSP and the Union's founding values, as expressed in Art. 2 TEU, in Case C 455/14 P, *H* v. *Council and Others*, EU:C:2016:569, para 41; Case C-72/15, *Rosneft*, para 72; and Case C–134/19 P, *Bank Refah Kargaran*, EU:C:2020:793, para 35.

32. Joined Cases C–29 & 44/22 P*, KS and KD*, paras. 70–81.

33. Ibid., para 121 (emphasis added).

CFSP"[34] would remain outside the scope of the Court's jurisdiction, more functional or operational acts and omissions – such as acts of "day-to-day management forming part of the performance of [a] mission's mandate"[35] or "purely procedural rules",[36] or "aspect[s] of [a mission's] administrative management"[37] – would fall within the scope of the Court's jurisdiction and may therefore produce EU liability for the related harms suffered by individuals.

The many dimensions of this landmark judgment will be analysed in detail in this and other publications.[38] For now, the question highlighted here is how *KS and KD* fits with the systemic vision of the EU legal order elaborated in Opinion 2/13. There, an external accountability pathway was essentially blocked by the largely *unwritten* specific and essential characteristics of the EU legal order. In *KS and KD*, certain internal and, in consequence, external (following Opinion 2/13) accountability pathways were essentially blocked by the *written* Treaties. Can we somehow reconcile these written and unwritten sources of EU constitutional norms?

The jurisdiction legacy

As noted above, notwithstanding the exclusion from jurisdiction intended by Articles 24(1) TEU and 275 TFEU, the judgment of the Court of Justice in *KS and KD* establishes a jurisdiction to review certain CFSP acts for compliance with fundamental rights when the acts in question meet the criteria set out in the judgment. It is not yet clear how that "political or strategic choices" test will play out in practice. For example, there is arguably a certain friction between the statement in paragraph 86 of the judgment that "the action brought by KS and KD does not relate to individual restrictive measures" and the statement in paragraph 133 that "the absence of both that remedial action and a legally sound review of that case concern the failure to adopt individual measures relating to the particular situations of KS and KD and are not directly related to the political or strategic choices made in the context of the CFSP". Also, looking at the elements of the claim in respect of which the General Court should not, according to the Court of Justice, have declined jurisdiction (as listed in paragraph 137 of the appeal judgment), do these represent specific administrative or procedural failures in this case, or did the

34. Ibid., para 124 (emphasis added).
35. Ibid., para 127.
36. Ibid., para 130.
37. Ibid., para 131.
38. Not only the specific legal questions about the Court's jurisdiction, the system of remedies, and the nature of CFSP competence, but also the wider context of the EU's role in third States and its responsibilities to vulnerable individuals in such situations need to be examined.

Court of Justice mean to go further and institute a general procedural obligation on the EU institutions to have regard to the fundamental rights of individuals in their CFSP actions or face liability otherwise?

Further case law is therefore needed to enable better understanding of the scope of – and continuing exclusions from – judicial review of CFSP acts at EU level. Where CJEU review is indeed ruled out, national courts could play a part in cases where their jurisdiction can be successfully established.[39] Awakening the sleeping *Bosphorus* giant might provide another route to fundamental rights review by invoking the responsibility of an individual Member State for approving a CFSP act found to raise serious fundamental rights problems from the perspective of the ECtHR.[40] Piecing these jurisdictional elements together, we can see how the *Les Verts* "complete system of remedies" idea manifests by involving actors at different levels of jurisdiction.[41] Moreover, the judgment of the Court of Justice acknowledges the arguments appealing for a certain caution in some of the submissions before it, highlighting the discretion normally extended to the conduct of foreign affairs.[42]

Nevertheless, it is untenable that a mature system of law can continue to excuse itself from liability claims, even if only to a limited extent, where the human rights of individuals are breached by its own actors. How does it align with the assurances given in Opinion 2/13 that internal scrutiny of EU actions for compliance with human rights will be sufficient since, according to the principle of autonomy, it is also necessary? How does it reflect the genesis of the direct protection afforded to individuals by the EU Treaties in *Van Gend en Loos*? How does it accord with the insistence in *Les Verts* that since the Union is "based on the rule of law ... neither its Member States nor its institutions can avoid a review of ... whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty",[43] to which we can also now add, the Charter of Fundamental Rights? How, in short, can the CFSP jurisdictional limitation be reconciled with the fact that "the CFSP is, under the Lisbon Treaty, subject to the same basic constitutional principles" as other

39. See e.g. the argument of the Commission outlined in para 98 of Opinion 2/13. See, before *KS and KD,* Spaventa, "Remedying constitutional heresies: The Charter, damages and jurisdiction in the Common Foreign and Security Policy" in Armstrong, Scott and Thies (Eds.), *EU External Relations and the Power of Law: Liber Amicorum in Honour of Marise Cremona* (Hart Publishing, 2024), p. 47. A.G. Ćapeta addresses this question at points 134–144 of her Opinion in Joined Cases C–29 & 44/22 P, *KS and KD*.

40. ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland* 42, Appl. No. 4503/98, judgment of 30 June 2005.

41. Case 294/83, *Les Verts* v. *Parliament*, EU:C:1986:166, para 23.

42. See in particular, Joined Cases C–29 & 44/22 P, *KS and KD*, paras. 105–110.

43. Case 294/83, *Les Verts*, para 23.

EU policy fields?[44] Does it mean that the importance increasingly attributed to the founding values of the Union in Article 2 TEU applies only somewhat selectively?[45]

Reconciling competing legacies?

Primary responsibility for constructing the Treaties lies with the Member States: here, they must take responsibility not only for crafting the CFSP jurisdictional exclusion in the first place (and at the same time as legal effects were conferred on the Charter of Fundamental Rights), but also for sustaining it to this day. Adjusting the standard of judicial review to the relevant policy context is a normal part of the law: for example, what are essentially more political than legal judgements benefit from a stricter threshold in terms of breaching the principle of proportionality. In other words, courts commonly differentiate between types of acts that fall within their jurisdiction when they undertake judicial review. Exclusion by *category* of policy sphere is simply not required.[46]

However, the CFSP question also reflects critical tensions built into Opinion 2/13 itself, and therefore by the Court itself. These tensions are most obvious in the self-referential accountability mechanisms that an autonomy-driven system will inevitably incline toward. Opinion 2/13 put different premises of constitutionalism in tension with each other because elements of the EU's written and unwritten primary laws do not sit comfortably with each other. More specifically for present purposes, there is a direct tension between the EU legal order's written commitments to the protection of fundamental rights, which call for an openness to external

44. Opinion in Joined Cases C–29 & 44/22 P, *KS and KD*, point 83. See generally, Van Elsuwege and Gremmelprez, "Protecting the rule of law in the EU legal order: A constitutional role for the Court of Justice", 16 EuConst (2020), 8.

45. Cf. Opinion in Joined Cases C–29 & 44/22 P, *KS and KD,* points 78–79, reflecting, *inter alia*, that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which . . . are an integral part of the very identity of the European Union as a common legal order" (Case C-156/21, *Hungary* v. *Parliament and Council*, EU:C:2022:97, para 232).

46. Framing the Art. 24(1) TEU jurisdictional in a way that acknowledges the legitimacy of "prevent[ing] the EU Courts from intervening in political and strategic decisions in the area of the CFSP" yet insists that "Article 24(1) TEU and Article 275 TFEU must . . . be interpreted as not preventing the EU Courts from policing such constitutional limits by hearing actions for damages brought by individuals for alleged breaches of fundamental rights by CFSP measures", see Opinion in Joined Cases C–29 & 44/22 P, *KS and KD*, points 121–124.

standards and scrutiny,[47] and the dilution, even closing down, of that openness through the understanding of autonomy that Opinion 2/13 entrenched.

Taking blunt issue with the "narrow and formalistic reasoning" of the General Court,[48] Advocate General Ćapeta's Opinion in *KS and KD* did not ignore the existence of Article 24(1) TEU yet also aimed to accommodate the wider norms that shape the EU legal order – the principles of *law*, which go beyond those of EU law and include principles of international law.[49] She recalled Advocate General Mancini's frank advocacy in *Les Verts* of going beyond the wording of the Treaty when the judicial protection of individuals is at stake.[50] But she sought a solution that was, in her view, derivable from *interpretation* of the Treaty. Thus, since the rule of law is "expressed today" by Article 2 TEU,[51] she presented the fundamental dilemma raised by *KS and KD* in this way:

> "[T]he rule of law not only empowers the EU Courts to ensure that other EU institutions and bodies abide by the law, but also binds the EU Courts themselves to follow the law. The question one may therefore ask is: what does fidelity to the law require from the Court? Should it strictly abide by the wording of the Treaties which limit its jurisdiction in the CFSP, or should it give preference to EU constitutional principles and establish the jurisdiction necessary to protect fundamental rights, even if this is not expressly provided for by the wording of the Treaties?"[52]

However, Advocate General Ćapeta had herself proceeded from the premise that the case at hand was "[o]utside of the context of restrictive measures" per the second paragraph of Article 275 TFEU,[53] erecting some obstacles for her efforts to deliver a solution entirely *inside* the wording of all relevant Treaty

47. For wider discussion of this point, see de Búrca and Kilpatrick, "Resisting external accountability: The European Union and human rights" in Armstrong, Scott and Thies, op. cit. *supra* note 39, p. 137.

48. Opinion in Joined Cases C–29 & 44/22 P, *KS and KD*, point 90.

49. We reflected on these obligations in Editorial Comments, "Taking international law seriously?", 61 CML Rev. (2024), 1181. We note, too, the judgment of the Court since then in Joined Cases C–779 & 799/21 P, *Front Polisario II*, EU:C:2024:835.

50. Ibid., point 96, citing A.G. Mancini's view that "the obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission" (Opinion in Case 294/83, *Les Verts,* EU:C:1985:483, point 7).

51. Opinion in Joined Cases C–29 & 44/22 P, *KS and KD*, point 80.

52. Ibid., points 94-95.

53. Thus, not falling within the jurisdiction established in Case C–134/19 P, *Bank Refah Kargaran*. Opinion in Joined Cases C–29 & 44/22 P, *KS and KD*, point 49. See also, Order of the General Court in Case T-771/20, *KS and KD*, paras. 38–40.

provisions. She concluded that "Article 24(1) TEU and Article 275 TFEU should be interpreted as not limiting the jurisdiction of the EU Courts to hear an action for damages brought by individuals based on an alleged breach of fundamental rights by any type of CFSP measure",[54] though her rationale for that conclusion is not easily readable-into those written provisions even if it is, more generally, compelling.[55]

In Opinion 2/13, the Commission had offered, alternatively, a broad reading of the concept of a "restrictive measure" within the meaning of Article 275, arguing that:

> "… where CFSP acts are performed by EU institutions, a distinction should be made between acts that have binding legal effects and those that do not. Acts that have binding legal effects are, in so far as they are capable of violating fundamental rights, 'restrictive measures' within the meaning of the second paragraph of Article 275 TFEU and could, therefore, be the subject of an action for annulment before the EU judicature. By contrast, acts that do not produce such effects could not by their nature be the subject of an action for annulment or of a reference for a preliminary ruling. The only remedy available within the EU against such acts would be an action for damages pursuant to Article 340 TFEU, since such an action is not, in the Commission's submission, excluded by the first paragraph of Article 275 TFEU."[56]

In that understanding, "all acts and measures on the part of the EU . . . in the area of the CFSP, in respect of which a person may claim to be a victim of a violation of the rights set forth in the ECHR, [would] have an effective remedy before the EU judicature or the courts of the Member States".[57] In *KS and KD*, the Commission – supported by several Member State governments – argued similarly that "the present case concerns alleged violations of human rights,

54. Opinion in Joined Cases C–29 & 44/22 P, *KS and KD*, point 154.

55. Ibid., point 155 ("Such an interpretation follows from the constitutional principles of the EU legal order, principally the rule of law, which includes the right to effective judicial protection, and the principle requiring respect for fundamental rights in all EU policies. The constitutional role of the EU Courts that follows from those principles can be limited only exceptionally. That is why Article 24(1) TEU and the first paragraph of Article 275 TFEU must be interpreted narrowly. Such an interpretation, even if it is narrow, cannot run counter to the purpose of the jurisdictional limitation embedded in the Treaties. If that purpose is to protect political choices in the CFSP from interference of the EU Courts, such a purpose cannot justify an interpretation which includes actions for damages caused by alleged breaches of fundamental rights in that jurisdictional limitation. That is so because the breach of fundamental rights cannot be a political choice in the European Union, and the EU Courts must have jurisdiction to ensure that CFSP decisions do not cross 'red lines' imposed by fundamental rights").

56. Opinion 2/13, para 99.

57. Ibid., para 100.

and that the CFSP is merely the context in which such violations occurred. Thus, the Court is faced with what is essentially "a human rights damages claim" arising under EU law in relation to a CFSP measure".[58]

The Commission's approach maintains an admittedly artificial distinction between reviewing a CFSP act per se and reviewing a CFSP act only as regards its compliance with human rights. But it does offer a way to draw from the language of Title V TEU when the adverse effects of CFSP measures are felt by individuals – when their fundamental rights are *restricted*.[59] It institutes a vital safeguard to counterbalance the extensive yet unhelpfully vague competences of the EU under the CFSP.[60] It accords, too, with the explicit reference to general principles *of law* found in Article 340 TFEU. It is not, however, the solution that the Court of Justice endorsed, in either Opinion 2/13[61] or in *KS and KD*.[62]

Excessively wide interpretation of Treaty provisions is problematic, and caution about the jurisdiction of the Court in the CFSP sphere is well taken in a general sense.[63] But let us recall that the second paragraph of Article 275 TFEU refers only to "decisions providing for restrictive measures against

58. As summarized by A.G. Ćapeta in her Opinion in Joined Cases C–29 & 44/22 P, *KS and KD*, point 106. Though a wide understanding of "restrictive measures" per Art. 275 TFEU was not, as noted above, the central premise of her own reasoning, she did acknowledge the potential of the Commission's perspective, observing in point 131 of the Opinion that "[t]he reference to actions for annulment in respect of restrictive measures against natural and legal persons seems relatively narrow. It can, however, be understood in a broader sense as requiring that the jurisdiction of the EU Courts cannot be limited in respect of the legality review of CFSP measures which restrict the rights of individuals."

59. See, even before significant developments in the case law of the Court summarized in note 27 *supra*, Hillion, "A powerless court? The European Court of Justice and the EU common foreign and security policy" in Cremona and Thies (Eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, 2014), p. 47.

60. In Title V TEU, there is no equivalent to Art. 75 TFEU, which sets out in a detailed way the competence to impose sanctions in connection with the areas specified by Art. 67 TFEU. Instead, the provision normally used for restrictive measures under the CFSP is Art. 29 TEU, which provides only that "[t]he Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions".

61. "Notwithstanding the Commission's systematic interpretation of those provisions in its request for an Opinion – with which some of the Member States that submitted observations to the Court have taken issue – essentially seeking to define the scope of the Court's judicial review in this area as being sufficiently broad to encompass any situation that could be covered by an application to the ECtHR, it must be noted that the Court 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" (Opinion 2/13, para 251).

62. Joined Cases C–29 & 44/22 P, *KS and KD*, paras. 85–92.

63. E.g. Poli, "The right to effective judicial protection with respect to acts imposing restrictive measures and its transformative force for the common foreign and security policy", 59 CML Rev. (2022), 1045.

natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V [TEU]" – open-ended language that is, as such, open to interpretation by the Court of Justice. Aspects of the Court's reasoning in *KS and KD* have resonance with its defence of the *Plaumann* case law in *UPA*. There, the Court pushed the problem back to the Member States, pointing out that:

> "[w]hile it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force".[64]

That may be true in terms of changing the Article 263 TFEU standing test altogether. But it is also true that determining the meaning of that provision's "direct and individual concern" language is a task that *does* attach to the Court.[65]

The specific and essential characteristics of the EU and of its legal order should generate a system of law that is ethical as much as it is existential, coherent across its complicated layers of written and unwritten legal sources. Agreeing with Advocate General Ćapeta, while "the requirement of effective judicial protection cannot on its own lead to the modification of the Treaties by the EU Courts . . . that does not prevent the EU Courts from interpreting the Treaties in conformity with the principle of effective judicial protection. [T]he EU Courts are even obliged to do so."[66] The protection of the individual from the adverse effects of EU law has sometimes been achieved through invocation of unwritten EU primary law while, in other situations, written EU primary law provides the guarantees. Ultimately, "respect for human rights is a condition of the lawfulness of [Union] acts and . . . measures incompatible with respect for human rights are not acceptable in the [Union]".[67]

So, yes, the CFSP-driven ECHR accession challenges *should* be resolved by the Member States: to enable accession, but more than this, to close the EU legal order's constitutional gap that their actions have created. Whatever their intentions more than a decade ago,[68] how the EU engages with the world

64. Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462, para 45.

65. Of course, wider developments beyond the EU may yet play a role on standing before the Court; see Eeckhout, "From Strasbourg to Luxembourg? The *KlimaSeniorinnen* judgment and EU remedies", available at <verfassungsblog.de/from-strasbourg-to-luxembourg/>.

66. Opinion in Joined Cases C–29 & 44/22 P, *KS and KD,* points 99–100.

67. Joined Cases C–402 & 415/05 P, *Kadi,* para 284.

68. As we noted in 2015, "the authors of the Lisbon Treaty did not see any contradiction between the limited jurisdiction of the ECJ on the one hand (Art. 40 TEU, Art. 275(1) TFEU) and the recognition of jurisdiction of the ECtHR in CFSP matters on the other.51 Or, to put it in other terms: the Member States (as authors of the Lisbon Treaty) seem to follow a notion of the

around it exposes the weaknesses of the jurisdictional limitation in Article 24(1) TEU. However, would you want to open an EU Treaty amendment process just now, even one confined to addressing a single issue?[69]

The uncertain legacy

In *KS and KD,* Advocate General Ćapeta argued that the CJEU should have jurisdiction "to hear an action for damages brought by individuals based on an alleged breach of fundamental rights by any type of CFSP measure".[70] In this way, she sought to overcome the autonomy objection to the ongoing and unfinished project of EU accession to the ECHR by providing the CJEU with an opportunity to have the critical first say in such cases.[71] The approach proposed by the Commission would have rendered the path to ECHR accession clearer still.

The Court of Justice tried to close the CFSP jurisdictional gap in a different way by confining that gap to what are essentially "political" decisions, which might reflect how the ECtHR curtails its own jurisdiction.[72] And the Court might yet find a way to restate its test in a clearer way, disentangled from the specific facts of and the contested measure in *KS and KD*. However, its efforts, at the same time, to justify the EU legal order's CFSP jurisdictional limitation *at the level of principle* – and in ECHR as much as CFR terms – already spark an uneasy feeling about Opinion 2/13 "2.0".

'specific characteristics' of Union law set forth in Protocol No. 8 EU that deviates from that espoused by the ECJ" (Editorial Comments, op. cit. *supra* note 9, 13).

69. The simplified revision procedure could not be used since Art. 48(6) TEU confines its application to "proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union" and Art. 48(7) TEU relates only to adjusting the decision-making processes with respect to Title V TEU.

70. Opinion in Joined Cases C–29 & 44/22 P, *KS and KD*, point 154.

71. See generally on ECHR accession, ibid., points 145–153.

72. See further, Sarmiento and Iglesias, "KS and Neves 77: Paving the way to the EU's accession to the ECHR", *EU Law Live* (12 Sept. 2024), available at <eulawlive.com/insight-ks-and-neves-77-paving-the-way-to-the-eus-accession-to-the-echr/>.