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**COUNCIL OF
THE EUROPEAN UNION**

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OPINION OF THE LEGAL SERVICE*

Subject : Accession of the EU to the European Convention on Human Rights
 - questions about the submission of Union CFSP acts to the jurisdiction of the
 European Court of Human Rights

I. INTRODUCTION

1. Within the framework of the Union's accession to the European Convention on Human Rights (the Convention), the submission of Union acts falling under the scope of the EU Common Foreign and Security Policy (CFSP) to the jurisdiction of the European Court of Human Rights (ECtHR) has been a matter of concern since the beginning of the discussions. At the meeting of the Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP) on 25 and 26 February 2013, the Council Legal Service was requested to give a written opinion on the interpretation to be given to the latest draft text and the consequences that Union responsibility for CFSP acts would have, notably as to the risks the ECtHR would declare the Treaties, and in particular Article 275 TFEU, incompatible with Articles 6 and 13 of the Convention.

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II. BACKGROUND

2. On 4 June 2010, the Council authorised the opening of negotiations.¹ Although it had been discussed within the Council, the authorisation Decision did not specifically address the issue of CFSP acts. The negotiating directives provided that "*the negotiations should ensure that the accession agreement creates obligations under the Convention (...) only with regard to acts and measures adopted by institutions, bodies, offices or agencies of the Union. The negotiations will ensure that the accession is without prejudice to Articles 263, paragraph 4, 275 and 276 and Article 10(1) of the Protocol 36 (...)*" (paragraph 3).

3. A draft accession agreement was circulated in June 2011 within the Council of Europe structures.² It contained a "general attribution clause" as part of a new point c. to be inserted in Article 59(2) of the Convention, drafted as follows: "*Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf (...)*". No distinction was made between CFSP or other acts adopted by EU institutions.

4. In April 2012, the Council unanimously agreed on the negotiating position to be taken by the Union for the second negotiation round which started in July 2012.³

"Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies. For the purposes of the Convention (...):

(aa) acts, measures or omissions of organs or agents of the member States of the European Union are attributable only to the latter, even if such acts, measure or omissions occur when the member States of the European Union implement the law of the European Union.

¹ Council Decision of 4 June 2010, doc. 10817/10 RESTREINT UE.

² Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE (2011)6prov.

³ See doc. 8915/12 RESTEINT UE/EU RESTRICTED, page 8. The explanatory report was clarifying that CFSP acts not attributable to the EU would be attributed to Member States. At the FREMP meeting of 10 December 2012, the French Delegation suggested to insert this clarification in the text through rewording point (bb) as follows: "*(bb) the acts and measures performed or adopted in the context of the provisions of the Treaty on European Union on common foreign and security policy of the European Union shall be attributable solely to the Member States of the European Union, unless judicial review of such acts is attributed to the courts of the Union in the Union's legal order*", but this was not presented at the last negotiation round (see DS 1845/12).

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(bb) acts and measures are not attributable to 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 by the European Court of Justice."

5. During the negotiation round held in January 2013, some non-EU parties to the Convention claimed that point (bb) of the Council position would imply a carve-out in the scope of accession to the Convention with regard to certain type of acts and measures of the Union, which was not acceptable to them. However, attributability to the Member States of implementing acts was accepted (point (aa) of the Council position), with the understanding (agreed at FREMP) that such attributability would be without prejudice to the Union's indirect responsibility as co-respondent.

6. In this context, the Secretariat of the Council of Europe (CoE) put forward, in January 2013, the following proposal (the CoE proposal), its second paragraph being designed to replace points (aa) and (bb) of the April 2012 Council position:⁴

"Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf (...)

*For the purposes of the Convention (...), an act, measure or omission of organs or agents of a member State of the European Union shall be attributable only to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, **including Council decisions taken under the Treaty on the European Union**; this shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with Article 3 (2), (4) (5) and (7) of this Agreement".*

⁴ See Appendix IV to the Meeting Report of the Fourth negotiation meeting, doc. 47+1(2013)R04, of 23.1.2013. The CoE Secretariat also proposed to insert a clarification in the explanatory report: *"Under EU law the acts of Member States implementing EU law and Council decisions under the TEU are attributable to Member States. For the sake of consistency, parallel rules should apply for the purposes of the Convention system. It should be recalled that the approach followed by the Court as regards the attributability of a certain action to either a Contracting Party or an international organisation under the umbrella of which that action was taken, has consistently been to have regard to the particular facts of each case, and in particular to the applicable legal basis. It is expected that the Court would follow the same approach also in respect of the EU, after its accession, including with regard to matters related to the EU common foreign and security policy. In fact, in none of the cases in which the Court has decided on the attribution of extra-territorial acts or measures by Contracting Parties operating in the framework of an international organisation (see inter alia Behrami and Saramati, para. 122; Al-Jedda, para. 76) there was a specific rule on attribution, for the purposes of the Convention, of such acts or measures to either the international organisation concerned or its members. Conversely, acts, measures and omissions of the EU institutions, bodies, offices or agencies, or of persons acting on their behalf are attributable to the EU in whichever context they occur, including with regard to matters related to the EU common foreign and security policy."* (see Appendix IV referred to in footnote 4 above). In preparation for the fifth negotiation meeting to be held in from 3 to 5 April 2013, the Chairperson proposed a slightly revised version of the two texts which does not fundamentally change the terms of the debate (see Revised chairperson's proposal on outstanding issues, doc. 47+1(2013)006, of 19.3.2013).

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III. LEGAL ANALYSIS

A. Interpretation of the Council of Europe proposal as compared to the other draft texts

7. The CoE proposal (see paragraph 6 above), read in the light of the draft explanatory report (see footnote 4), although ambiguous, would seem to mean that:

- like in the April 2012 Council negotiating position, Member States would be responsible for their own acts also when implementing EU law (including CFSP acts);
- however, contrary to the Council text, the Union would be directly responsible for CFSP acts, in accordance with the first paragraph (the general attribution clause which refers to all EU acts, therefore including also CFSP acts);⁵
- the EU would, in addition, be indirectly responsible (as co-respondent) for Union law (including CFSP acts) where its compatibility with the Convention would be called into question in an action against the Member State implementing it.⁶

8. The draft CoE text is imprecise and misleading. Adding the words shown in bold in paragraph 6 has the effect (presumably unintended) of referring not only to Council decisions under the CFSP Title of the TEU, which are the subject-matter of the ongoing debate, but also to all other (non-CFSP) decisions which the Council is enabled to adopt under the TEU.⁷ These other (non-CFSP) decisions have always been covered by the terms "Union law" or "acts of the EU institutions", without this being questioned. Therefore, if the intention is to indicate that TEU decisions are part of EU law, these added words are superfluous. Likewise, the first sentence of the draft explanatory report is equivocal. If its purpose is to state that "*Council decisions under the TEU are attributable to Member States*" as a point of EU law, it is plainly wrong (all Council decisions under the TEU, which include non-CFSP ones, may not, under EU law, be said to be attributable to Member States). If the intention is to state that responsibility for CFSP decisions lies with Member States, it should be redrafted to say explicitly that "*Council decisions under Title V of the TEU are attributable to Member States*" (or rather that Member States are to be responsible for them).

⁵ See last sentence of the explanatory report: "*acts (...) of the EU institutions (...) are attributable to the EU in whichever context they occur, including with regard to matters related to the EU [CFSP]*" (see footnote 4).

⁶ This is what is recalled in the last phrase of the CoE proposal, a principle which was not questioned in FREMP: the Union would be responsible as a co-respondent for a violation resulting "*from such an act, measure or omission, in accordance with Article 3(2), (4), (5) and (7)*". However, again, the text is ambiguous as the terms "*such an act*" refer to Member States' acts when they implement EU acts (including CFSP acts), while the idea is, presumably, to state that the EU would be indirectly responsible for the EU act which has been implemented.

⁷ Such as for instance Council decisions under Article 7(3) and (4) TEU (suspension of rights under the Treaties), Article 17(7) (adoption of the list of proposed Commissioners), Article 49 (applications for accession to the EU) or Article 50(2) (withdrawal agreement).

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9. Under the explanatory report, the declared purpose of the CoE proposal is to avoid ECtHR's rulings in the sense of *Behrami*⁸ in which the impugned actions of the respondent States carried out in implementation of decisions adopted by an international organisation (in that case the UN under Chapter VII of the UN Charter) were attributed to the latter. It would indeed follow from the CoE proposal that the implementing acts by Member States would not be attributable to the Union.

B. Scope of the Union's accession to the Convention and specificity of the CFSP

10. Article 6(2) TEU establishes that the Union's accession to the Convention "*shall not affect the Union's competences as defined in the Treaties*", a requirement repeated in Article 2 of Protocol N° 8 under which such accession "*shall not affect the competences of the Union or the powers of its institutions*".⁹ Article 1 of the Protocol provides that "(...) [the accession agreement] *shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (...) - the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or to the Union as appropriate*" (emphasis added).

11. Respect for fundamental rights is a basic principle of the Union that applies to all its acts in whatever Union's competence area they are adopted or performed.¹⁰ In accordance with its Article 51, the Charter of Fundamental Rights (the Charter) applies to all Union activity with no exception.¹¹

⁸ Case *Behrami v. France, Germany and Norway*, n° 714112/01 and 78166/01, 2 May 2007, § 122, 144 and 149.

⁹ In order to comply with this requirement, the draft accession agreement states that "*nothing in the Convention (...) shall require the European Union to perform an act or adopt a measure for which it has no competence under the law of the European Union*".

¹⁰ Article 2 TEU lists the respect for human rights as one of the founding values of the Union and common to the Member States. Under Article 6(3) TEU, fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union's law.

¹¹ As the Court said, "*the duty to respect fundamental rights is imposed (...) on all the institutions and bodies of the Union*" (see point 83 of Case C-130/10, judgment of 19 July 2012, *EP v. Council* (not yet published)). See also Case C-617/10, judgment of 26 February 2013, *Åkerberg* (not yet published) where the Court stated that "*the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law*" (point 19) and that "*the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter*" (point 21). Under Article 52(3) of the Charter, which is part of primary law, the meaning and scope of the rights recognised in the Charter that are also guaranteed by the Convention are the same as those laid down in the Convention.

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12. Therefore, when acceding to the Convention, the EU should ensure that the provisions on attribution of responsibility in cases before the ECtHR to either the Union or to the Member States should be drafted in accordance with Union law, both as regards distribution of competences between the EU and its Member States, including the specificity of the CFSP, and in a manner ensuring that the result complies with the Union's obligation to respect fundamental rights and would thus not risk being declared incompatible with Articles 6 and 13 of the Convention on the right to a fair trial and to an effective remedy.

13. Article 24(1), second subparagraph, TEU summarises the different specificities of the CFSP, stating that the CFSP "*is subject to specific rules and procedures*" and recalling the specificities of CFSP acts as non-legislative acts and the limited jurisdiction of the ECJ over such acts.

1. Specificities of CFSP acts and their implementation

14. Under Title V (CFSP) of the TEU, the European Council and the Council are empowered to take a number of decisions.¹² Besides decisions of general strategic or organisational nature, international CFSP positions,¹³ and international CFSP agreements, there are mainly two types of CFSP decisions taken by the Council:

¹² The European Council may, *inter alia*, adopt decisions setting out the strategic interests and objectives of the Union on a particular subject or a specific country or region (Articles 22(1) TEU), identifying strategic interests, determining objectives and defining guidelines for the CFSP (Article 26(1) TEU) or establishing a common defence (Article 42(2) TEU). The Council may, *inter alia*, adopt decisions establishing a permanent structured cooperation (Article 46 TEU), conclude international agreements for the EU (Article 37), adopt certain financing decisions (Article 41), define the European Defence Agency rules (Article 45(2)) or appoint EU Special representatives (Article 33, see Council Decision 2013/133/CFSP of 18 March 2013 appointing the European Union Special Representative for the Sahel (OJ L 75, 19.3.2013, p. 29)).

¹³ See for instance in the field of disarmament and non-proliferation, Council Decision 2010/212/CFSP of 29 March 2010 relating to the position of the European Union for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (based on Article 29 TEU, OJ L 90, 10.4.2010, p. 8) or Council Decision 2012/166/CFSP of 23 March 2012 in support of activities of the Organisation for the Prohibition of Chemical Weapons (OPCW) in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction (based on Article 26(2) TEU, OJ L 87, 24.3.2012, p. 49).

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- a) decisions on restrictive measures, based on Article 29 TEU, such as for instance measures against Syria,¹⁴ by which the Council imposes restrictions on exports and imports, on financing of certain enterprises, on infrastructure projects, on financial support for trade, in the transport sector, visa bans and freezing of assets. Parts of such decisions are then implemented through a Council Regulation adopted under Article 215 TFEU;¹⁵
- b) decisions relating to crisis management operations, based on Articles 42(4) and 43(2) TEU, such as military operations like Operation Atalanta against piracy off the Somali coast¹⁶ or civilian operations like "EUCAP SAHEL" (capacity building in security matters),¹⁷ which *inter alia* set out the mission and the mandate, and determine the chain of command.
15. The TEU sets up a specific mechanism for the implementation of CFSP decisions which, particularly for crisis management operations, very much lies on Member States:¹⁸
- CFSP decisions imposing restrictive measures are implemented and applied by Member States in accordance with their own rules and means (such as restrictions on financial support for trade or visa bans). In addition, a major part of those measures are implemented through EU Regulations under Article 215 TFEU (directly applicable in Member States);
 - CFSP decisions establishing military and/or civilian operations rely for their implementation and execution on capabilities made available by Member States. These capabilities keep a statutory link with their respective national authorities. CFSP decisions that involve the use of the capabilities of Member States and of Union's resources (i.e. operation with a civilian component), include provisions ensuring that the Member State or the EU institution having seconded a member of their staff is responsible for answering any claims linked to the secondment, from or concerning the staff member and is responsible for bringing any action against the seconded person.¹⁹ In addition, a mechanism for compensating damages caused to third parties during an operation is usually provided for in the Status of Forces or Mission Agreement (SOFA or SOMA) concluded with the host country, which is without prejudice to possible actions brought to the courts of Member States.

¹⁴ See Council Decision 2012/739/CFSP of 29 November 2012 concerning restrictive measures against Syria and repealing Decisions 2011/782/CFSP (OJ L 330, 30.11.2012, p. 21).

¹⁵ See Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (OJ L 16, 19.1.2012, p. 1).

¹⁶ See Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (OJ L 301, 12.11.2008, p. 33).

¹⁷ Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger) (OJ L 187, 17.7.2012, p. 48).

¹⁸ See notably Article 29 TEU: "Member States shall ensure that their national policies conform to the Union positions" and Article 42(3) TEU: "Member States shall make civilian and military capabilities available to the Union for the implementation of the [CFSP], to contribute to the objectives defined by the Council (...)" (emphasis added).

¹⁹ See e.g. Article 7(2) of the EUCAP SAHEL Decision (footnote 17 above): "The Member State, Union institution, or the EEAS respectively, shall be responsible for answering any claims linked to the secondment from or concerning the member of staff seconded, and for bringing any action against that person".

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The political control and strategic direction of such operations is exercised by the Political and Security Committee "*under the responsibility of the Council and of the High Representative*" (second paragraph of Article 38 TEU) and the operation commander is appointed by the Council (a person put at the disposal by a Member State, for military operations, and an EEAS agent, for civilian operations).

2. *Limited ECJ jurisdiction and other remedies*

16. Another specificity of CFSP is the less extensive system of legal remedies available. The first paragraph of Article 275 TFEU states that the ECJ "*shall not have jurisdiction with respect to the provisions relating to [CFSP] nor with respect to acts adopted on the basis of those provisions*".

However, the second paragraph of Article 275 TFEU gives the ECJ jurisdiction to review²⁰ the "*legality of [CFSP Council] decisions providing for restrictive measures against natural or legal persons*". No other action is expressly mentioned,²¹ save for cases where the ECJ would be called to "*monitor compliance with Article 40 [TEU]*" (i.e. the mutual "non-affectation" clause between CFSP and the rest of the Treaties).

17. Therefore, CFSP decisions on restrictive measures are submitted to a full control of legality by the ECJ and where such decisions are implemented through a regulation based on Article 215 TFEU, as is customary, the full range of legal actions provided for in the Treaties may be brought to the ECJ against such measures, including actions for damages. Only those parts of the CFSP decisions which are not implemented through regulations would presumably escape the possibility of actions for damages in the ECJ (see the question below in paragraph 21).

²⁰ In accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU on actions for annulment brought by natural or legal persons.

²¹ I.e. neither actions for annulment brought by others (Member States, European Parliament, Commission) than persons, nor preliminary rulings, nor the other types of actions, such as infringement actions, actions for failure to act, pleas of illegality or actions for damages.

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18. With regard to CFSP decisions on crisis management operations, as seen above, most of their implementation lies on Member States' resources and capabilities, to which their judicial system applies. However, CFSP decisions as such and their implementation by Union bodies may not be brought to the ECJ (neither on legality, nor on damages). As to actions of Union agents executing such decisions, the latter generally include a provision stating that the Union institution is responsible for the staff it has seconded (see footnote 19). The dispute between the Union and its agent would fall within the ECJ jurisdiction (Article 270 TFEU), but it is unclear whether an action for damages could be brought to the ECJ against the Union under Articles 268 and 340 TFEU. In addition, mechanisms for damage compensation in the host State are provided for in SOFAs and SOMAs (see paragraph 15).

19. There are therefore cases where no judicial review of Union acts by the ECJ – nor by the courts of Member States – would be permissible under Union law. However, the fact that there would be no ECJ jurisdiction does not mean that there would be no remedies or relief at all. The ECJ has already examined a similar situation and has indicated avenues and solutions. In the Case *Segi*,²² which concerned the situation of limited remedies in the ex-Title VI of the TEU (i.e. ex-third pillar (JHA) area), the claimant, who was asking for compensation for damage, alleged a disregard of the right to effective judicial protection.

The Court noted that "*it is true that (...) the treaties have established a system of legal remedies in which (...) the jurisdiction of the Court is less extensive under Title VI of the [ex-TUE] than it is under the EC Treaty (...). It is even less extensive under Title V [i.e. CFSP]*" (point 50). It noted in the same point that "*a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties could be envisaged*" but that it was "*for the Member States, should the case arise, to reform the system currently in force*", by amending the Treaties.²³

²² Case C-355/04 P, *Segi*, judgment of 27 February 2007, ECR 2007 p. I-1657.

²³ Which Member States did, through the Lisbon Treaty, by giving full powers to the ECJ, as from 1 December 2014, on JHA matters and, with regard to CFSP, by conferring to the ECJ in Article 275 TFEU the jurisdiction to review the legality of restrictive measures against natural or legal persons.

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It however added that the claimant could not validly argue that it was deprived of all judicial protection since the institutions were subject to a review of the conformity of their acts with applicable law (point 51 of the judgment).

The ECJ interpreted widely its powers under ex-Article 35(1) TEU to give preliminary rulings in JHA. Although ex-Article 35 expressly mentioned only "framework decision" and "decisions", the ECJ interpreted it to cover also "*all measures (...) intended to produce legal effects in relation to third parties*" (point 53 of the judgment),²⁴ thus leaving out, however, common positions.

The ECJ also stated that "*it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered*" (point 56 of the judgment).²⁵

Of course this description including all the steps taken by the Member States before and after the adoption of a Union act leaves out the adoption of the act itself, for which it would go against the very principles of Union law for the courts of a Member State to declare it illegal, thus endangering the unity of the law of the Union.

²⁴ See point 53: "(...) *Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly. The right to make a reference to the Court of Justice for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties*".

²⁵ The judgment in question was preceded first by an application by *Segi* to the ECtHR against the 15 EU Member States (cases n° 6422/02 and 9916/02) on two Council Common Positions adopted under the CFSP and JHA Titles of the TEU. The ECtHR declared it inadmissible in May 2002. *Segi* brought an action for damages in the EU Court of First Instance (Case T-338/02) which was rejected in June 2004 and then appealed in the ECJ. The ECtHR had inferred from the composition of the Council (representatives of each Member State) that "*by taking part in their preparation and adoption each State engages its responsibility. That responsibility is assumed jointly by the States when they adopt a CFSP decision*" (p. 4 of the ECtHR Decision). In 2006, in a case on the same Common Position, the Court of First Instance stated that such Position was "*an act of the Council, composed of representatives of the Governments of the Member States, adopted on the basis of Articles 15 EU [CFSP] and 34 EU [JHA]*" (see Case T-228/02, *OMPI*, judgment of 12 December 2006, p. II-4665, point 46).

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20. Article 19(1), second subparagraph, TEU, which was inserted by the Lisbon Treaty, obliges Member States "to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

21. An open question is whether, when applying Article 275 TFEU in the future, the ECJ will follow a reasoning similar to the one which resulted in its wide interpretation of ex-Article 35 TEU in *Segi*, i.e. whether the ECJ will interpret widely the scope of the second paragraph of Article 275. Likewise an open question is whether the ECJ will interpret Articles 268 and 340 TFEU on the non-contractual liability of the Union in a manner which will allow it to compensate damages for CFSP acts covered by its jurisdiction under Article 275 TFEU, notably for action of Union agents in Union operations (see paragraph 18 above).²⁶

Pending an authoritative interpretation by the ECJ on these questions, it has to be noted that a full system of judicial protection is not available against acts of the Union adopted in the area of CFSP and that it is for the Member States to put in place adequate remedies – which however may never go to the extent of declaring Union acts null and void and will thus always have an incomplete character.

C. Requirements of Articles 6, 13 and 34 of the Convention

22. Articles 6 of the Convention confers upon all persons the right to a fair and public hearing by an independent and impartial tribunal established by law in the determination of their civil rights and obligations or of any criminal charge against them. Article 13 of the Convention ensures the right of all persons whose fundamental rights and freedoms have been violated to have an effective remedy before a national authority.

²⁶ On the conditions which should be fulfilled for such liability, see Case T-341/07, *Sison*, judgment of 23 November 2011, notably points 28 to 40 (not yet published).

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23. On the right to a fair trial, the ECtHR stated that the right of access to the courts has a prominent place in a democratic society and that "*it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 - namely that civil claims must be capable of being submitted to a judge for adjudication - if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons*".²⁷

24. On the right to an effective remedy, settled case law of the ECtHR requires the provision of a domestic remedy allowing a competent national authority, which does not need to have judicial nature, both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. Contracting Parties have discretionary powers as to the manner in which they conform to their obligations under this provision. In addition, "*in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements*".²⁸ Further to that "*(...) Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention*".²⁹ In other words, the mere fact for the legal system in question not to provide for a remedy to control the constitutionality of laws was not considered to be contrary to Article 13 of the Convention.

25. In addition, Article 34 of the Convention, as interpreted by the ECtHR, provides that individual applications may be brought by persons, NGOs or groups of individuals to the ECtHR only if such persons are directly affected by the act or omission.³⁰

²⁷ See case *Oleynikov v. Russia*, n° 36703/04, 14 March 2013, § 58.

²⁸ See *Chahal v. UK*, n° 22414/93, 15 November 1996, § 145.

²⁹ See *James v. UK*, n° 8793/79, 21 February 1986, § 85.

³⁰ Under settled ECtHR case-law, "*an applicant cannot claim to be a "victim" within the meaning of Article 34 of the Convention unless he is or has been directly affected by the act or omission in question or runs the risk of being directly affected by it. (...) The Convention does not institute for individuals a kind of actio popularis for its interpretation and thus does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention*" (see Case *Monnat v. CH*, n°. 73604/01, 21 September 2006, § 31). See also the ECtHR *Segi* Decision (referred to in footnote 25), notably pages 6 to 9, where the ECtHR recalled that "*the right of individual petition cannot be used to prevent a potential violation of the Convention (...) it is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim (...) owing to the risk of a future violation*".

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When dismissing its *Segi* case (see footnote 25), the ECtHR particularly noted that the contested Council common position was not directly applicable in the Member States, that the relevant provision (on cooperation between Member States) was not directed at individuals and did not affect them directly, and that the concrete measures for implementation of it "*would be subject to the form of judicial review established in each legal order concerned, whether international or national*". It concluded that "*the mere fact that the names of two of the applicants (...) appear in the list referred to in that provision as "groups or entities involved in terrorist acts" may be embarrassing, but the link is much too tenuous to justify application of the Convention*".

D. Risks involved by the proposed texts as to the compatibility with the Convention

26. The CoE proposal has the effect that all CFSP decisions, as such, are attributable to the Union, the attributability to Member States, not precluding the co-responsibility of the Union, being reserved to the implementation of such decisions. This has the obvious effect that matters which are not subject to the review of the ECJ would be subject to action before the ECtHR and that decisions taken in such matters by the Union institutions would be attributable to the Union.

27. Union responsibility for CFSP acts would, because of the limited ECJ jurisdiction on such acts, trigger the risk that such limited jurisdiction be considered by the ECtHR as contrary to Articles 6 or 13 of the Convention. This issue could arise with regard to CFSP acts which are not submitted to the ECJ jurisdiction unless it is demonstrated that other effective remedies exist that allow to deal with the substance of the alleged violation of the Convention and permit the granting of appropriate relief.

28. Therefore, the effect of the form of words proposed might ultimately have to oblige the Union and the Member States to modify their system of judicial guaranties.

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29. One could only form the hope that, as a result from the above described other remedies (paragraphs 19 and 20), CFSP acts would be found to be associated with an effective judicial protection, and that therefore, combined with the way in which the ECtHR has interpreted Articles 6, 13 and 34 (see paragraphs 23 to 25), a claim based on the violation of Articles 6 or 13 of the Convention by the Union concerning a CFSP act would not be successful.

In case the Union's responsibility would be sought indirectly through the co-respondent mechanism, there would be no risk of incompatibility with Articles 6 or 13 of the Convention because appropriate judicial remedy would have been made available by the courts of the respondent Member State.³¹

The risk could however not be excluded in case the Union's responsibility would be sought directly for CFSP acts. Indeed, given the extensive reliance on Member States for implementing these acts, such cases might not be numerous. In addition, should there be such cases, firstly, as recalled in paragraph 25 above, only persons directly affected by the act or omission could bring a case to the ECtHR. And secondly, the absence of any possibility to annul the act might not be found to be in itself contrary to Article 6 or 13 (see case *Chahal* referred to in paragraph 24), in presence of other adequate judicial remedies – if they exist.

³¹ In addition, pursuant to Article 3(1) of the draft accession agreement, prior exhaustion of domestic remedies will not be required from applicants with regard to a co-respondent application (see paragraph 34 of the explanatory report). Therefore, the existence or not of such remedies in the Union would not be looked at when it applies to become co-respondent in a case regarding a CFSP act.

E. Possible Union internal measures to complement available remedies

30. Given that what is important under the ECtHR case-law on Article 13 of the Convention is to provide for a remedy allowing an authority (which may be administrative) competent both to deal with the substance of the complaints regarding violation of human rights and to grant appropriate relief (see paragraph 24 above), the Union might be forced, after acceding in the terms proposed by the CoE secretariat, to consider internal arrangements aimed at complementing the remedies provided by national courts. This would follow up on the remarks made by the ECJ in point 50 of its *Segi* judgment under which "*a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged*". Such arrangements could comprise the granting by the Union of appropriate relief, under the control of Member States' courts or through an administrative or arbitration mechanism. Furthermore, given that national courts do not have the power to annul or declare illegal a CFSP act, it could be provided that in case such an act is found to violate human rights, the Union institution or body which has adopted this act could be called upon examine possible amending or corrective measures. However, most of these steps would require amending the Treaties.

IV. CONCLUSIONS

31. The Council Legal Service is of the opinion that:

In case the CoE proposal were retained, given the limited jurisdiction of the ECJ on CFSP acts, and despite the aggregate of different remedies available or which could be designed, the risk that the ECtHR would declare the EU Treaties to be contrary to Articles 6 and 13 of the Convention may not be excluded.