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## AG Ćapeta Opinion on the admissibility of a human rights action for damages in CSDP: filling the gaps in the EU system of legal remedies?

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In 2008, the European Union ('EU') established its largest civilian mission under the Common Security and Defence Policy ('CSDP'): the European Union Rule of Law Mission in Kosovo ('EULEX Kosovo'). Among the tasks conferred under the [Council Joint Action 2008/124/CFSP](#), the mission exercises investigative functions into the disappearances and killings occurred during the 1999 Kosovo conflict. Over the years, families of victims kidnapped and killed have been lodging complaints considering that the mission has not been complying efficiently with its investigative duty, which finds its legal basis both in the Host State law (inter alia: [Article 8 of the Law on Jurisdiction No. 03/L-053](#); [Article 5 of the Law on the Special Prosecution Office of Kosovo No. 03/L-052](#)), in the Council Joint Action and under the procedural limb of Article 2 of the [European Convention on Human Rights](#) ('ECHR').

On 23 November 2023, Advocate General ('AG') Ćapeta published her [Opinion](#) in Joined Cases [C-29/22 P and C-44/22](#) concerning a human rights action for damages brought before the Court of Justice of the European Union ('CJEU') by direct family members of persons who got killed or kidnapped – KS and KD – against the Council, the European Commission and the European External Action Service ('EEAS').

This blog post aims at discussing the Opinion of AG Ćapeta and the implications of the *KS & KD case* in light of the accountability gap characterising the Common Foreign and Security Policy ('CFSP') under EU law, on the one side, and the process of the EU's accession to the ECHR on the other.

## The background of the case

The first complaints concerning omissions to investigate killings and disappearances were [lodged](#) in relation to the [United Nations Interim Administration Mission in Kosovo](#) ('UNMIK') - an international civilian presence established by the UN in 1999 to provide an interim administration for Kosovo - before the [Human Rights Advisory Panel \(HRAP\)](#). With the takeover of executive functions by the EU-led mission EULEX Kosovo in 2014, complaints were subsequently lodged before the [Human Rights Review Panel](#) ('HRRP'): a quasi-judicial body, established under murky legal basis (no mention of the HRRP is made in Joint Action on 2008/124/CFSP establishing EULEX Kosovo. The only document providing for the creation of the Panel is the [Accountability Concept](#): an agreement among the sending states adopted in conjunction with the Joint Action that has never been made public), assessing complaints for human rights violations allegedly committed by EULEX Kosovo since 9 December 2008. As in the case of HRAP, this body can issue non-binding recommendations to the Head of Mission ('HoM'), with the exclusion of monetary compensation. In the cases of KS and KD ([HRRP Decision of 11 November 2015, Case No 2014-32](#); [HRRP Decision of 19 October 2016, Case Nos 2014-11 to 2014-17](#)), the HRRP established that EULEX Kosovo violated their rights while issuing recommendations to the HoM, whose follow-up had not been implemented in due time ([Decision on the Implementation of the Panel's Recommendations, 19/10/2016 Case No 2014-32](#); [Second Decision on the Implementation of the Panel's Recommendations, 7/3/2017 Case No 2014-32](#)).

Unable to find the appropriate follow-up to her complaint, on 19 July 2023 KS brought an action for damages before the General Court of the EU ('GC'). The GC [dismissed](#) the action for incompetence in CFSP matters.

While no appeal had been lodged before the Court of Justice, on 14 June 2018 KS and other direct family members of victims brought an action against the EU before a (former) Member State's court, the High Court of Justice of England & Wales, in the [Tomanović case](#) (and [another action directed against the Foreign and Commonwealth Office](#)). This case has already been thoroughly and extensively commented on by [S.Ø. Johansen](#). In summary, the UK court deferred jurisdiction to the CJEU.

The applicants therefore decided to turn to the Court of the Plateau de Kirchberg – again – and lodge an action for damages against the Council, the EEAS, and the European Commission for alleged breaches of Articles 2 and 3 ECHR and corresponding Articles 2 and 4 of the [Charter of Fundamental Rights of the EU](#) ('Charter'), of Articles 6(1) and 13 ECHR and Article 47 of the Charter. They also claim a misuse of or failure to properly exercise EULEX's executive power in the investigations. At first instance, the GC [considered](#) the action to be inadmissible. The applicants then filed an [appeal](#) before the Court.

Considering that the action had been brought against the wrong defendant, the European Commission also brought an [appeal](#) against KS, KD, the EU Council and the EEAS. The hearing was held on 27 June 2023.

### **The CJEU's jurisdiction in CFSP matters: which rules and which exceptions?**

Pursuant to Article 24(1) of the [Treaty on the European Union](#) ('TEU') and Article 275 of the [Treaty on the Functioning of the European Union](#), the CJEU's jurisdiction in CFSP matters is governed by a complex system of rules and exceptions. First, the Court is competent to review restrictive measures adopted under Article 29 TUE, within the meaning of the CJEU case law (i.e., measures of individual scope of application; see [Ben Ali v Council](#), para. 145) in the annulment procedure (Article 263(4) TFEU). Second, the CJEU can review the respect of the mutual non-affectation clause between the CFSP and TFEU policies under Article 40 TUE. The Court has developed a rich case law allowing for a narrow interpretation of its competence's exclusion concerning restrictive measures ([Rosneft](#), [Bank Refah](#)), public procurement and staff management ([Elitaliana](#), [H v Council](#)), and international agreements concluded under Article 37 TEU ([Mauritius](#)). Yet, *KS & KD* is the first action for damages concerning CFSP matters, other than restrictive measures, related to the operational context of a CSDP mission.

### **Breaches of fundamental rights cannot be a political choice**

Recognising the novelty of the question at hand, AG Ćapeta's reasoning focuses on the need to provide applicants with access to the CJEU for an action for damages in the field of CFSP, in the name of a trypic of constitutional values: the rule of law (Articles 2, 19(1) and 21 TEU), effective judicial protection (Article 47 of the Charter) and human rights (Articles 2, 21 and 23 TEU).

The fundamental question at stake concerns the balance to be found between the obligation 'to follow the law' binding upon EU courts in the form of abidance to the spirit of Articles 24 TEU and 275 TFEU, on the one side, and the need to guarantee effective judicial protection under EU law on the other. In other words:

'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?' (para. 95)

According to the AG, the Court shall not adjudicate on political choices, such as the decision to deploy a mission (para. 118). Yet, the [Ledra Advertising](#) judgement, reaffirming the need to respect the Charter even when EU institutions are acting outside the EU legal framework, is applied a fortiori to the present case (para. 89): if EU institutions are bound by the Charter while acting outside the EU legal system, they are even more so when implementing a Council decision adopted under an EU policy (i.e., CFSP).

In sum, for the AG, the long-debated question on the scope of the CJEU's jurisdiction in CFSP matters is circumscribed by a clear 'redline': breaches of fundamental rights are an integral part of the Court's mandate. Articles 24 TEU and 275 TFEU cannot exclude, in principle, the EU Courts' jurisdiction to review any CFSP measure, including a political or strategic one, if they affect disproportionately fundamental rights (para. 116). As argued [here](#), this could be at odds with the logic underpinning the principle of conferral.

If followed by the CJEU, this approach would allow it to establish its jurisdiction in action for damages resulting from alleged human rights violations in CSDP missions and operations, therefore adding a piece to the complex puzzle of judicial review in CFSP.

### **First stop: Luxembourg!**

The *KS & KD* cases could be also read as one of missing pieces of the so-called '[Basket 4](#)' of the '46+1' negotiations on the EU's accession to the ECHR: the issue of review of EU acts in the area of the CFSP that has been left to the EU to be solved internally, according to the [provisional agreement](#) reached in March 2023.

In [Opinion 2/13](#), the CJEU established that it "has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters" (para. 251). Despite important developments in the CJEU case law since this Opinion, the scope of the CJEU's jurisdiction still does not fully cover the CFSP remit, as it was already recognised in Opinion 2/13 (para. 251).

According to AG Ćapeta, two strands of review still fall outside the CJEU's jurisdiction: (i) the review of CFSP acts in the light of CFSP Treaty provisions (while not excluding this review against any other provision of the Treaties, see [AG Wathelet, para. 46](#)); and (ii) the interpretation of CFSP provisions and CFSP acts, limiting the CJEU's review to whether the provision at stake disproportionately affects rights protected under the Charter. AG Ćapeta thus recognises the absence of uniform interpretation of EU law in CFSP, in line with her [Opinion](#) delivered in another pending case before the CJEU - [Neves 77 Solutions](#), in which she excluded the CJEU's competence to interpret provisions of restrictive measures (see

[Graham Butler's Op-Ed](#) for a cross-reading of both cases). These gaps affect the resolution of Basket 4.

Interestingly, during the hearing of *KS & KD*, the agent of the Czech Republic described the relationship between the CJEU and the ECtHR with the following metaphor: "every train that may end up in Strasbourg first needs to stop in Luxembourg". Following this line of argumentation, a potential contribution to resolving Basket 4 would be granting the CJEU the role of final arbiter of issues relating to EU law (i.e., breaches of the Charter). In this way, applicants shall exhaust existing national and EU legal remedies, before turning to the Strasbourg court.

Yet, the *KS & KD* case would not solve entirely the obstacles to the EU's accession. The opening of the CJEU's jurisdiction to human rights damages actions in CSDP missions would address only partially this issue: as pointed out by the AG, the review of conformity of CFSP acts with CFSP Treaty Provisions and the interpretation of CFSP provisions and secondary acts still represent a gap in the review of the Court of Justice in CFSP matters. A clarification by the CJEU on the role of national courts would yet be a welcome development to this regard.

### **Conclusion: the much-awaited judgement and the way-forward**

It still needs to be seen whether the Luxembourg judges will follow the Opinion of the AG (conquering 'the Gallic village one case at a time' as discussed [here](#)) and will interpret the Treaties as "a living instrument", as suggested by the legal representative of the applicants, QC Randolph, by balancing the will of the Treaties' Masters and the need to ensure effective judicial protection upon which the "Union of law" ([Inuit, para. 91](#)) is founded.

Whether in case law or in statutory law, reparations to victims of human rights violations in the context of CSDP missions and operations shall be understood as an integral part of the EU's obligation to guarantee effective judicial protection. Failure to do so would confirm the accountability gap in CFSP and amount to a denial of justice for victims of human rights violations in the multi-layered EU system of legal remedies.