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ARTICLE

Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication?

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Abstract
This article considers the structural barriers that exist for individuals to hold the EU responsible for violations of human rights abuses in its CSDP missions, despite the theoretical availability of a framework for remedies. This is a result of jurisdictional complications with CFSP/CDSP measures, attribution difficulties, and ambiguity in what constitutes unlawful human rights conduct. While alternative measures exist to compensate individuals for violation of their rights, these do not align with the often-stated right to an effective remedy within the EU. As such, this Article argues that the field requires serious reform in order to ensure that legal relief for individuals against unlawful conduct by the EU is an effective and enforceable right.

Keywords: Human Rights; Non-Refoulement Principle; Operate Sophia; European Union; Foreign Policy; Damages

A. Introduction

How the Court of Justice of the European Union (CJEU) has interpreted its own jurisdiction within the realm of the EU's Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), is the subject of ongoing debate and scholarship.[1] By relying on Article 19 Treaty on the European Union (TEU), which accords the CJEU general jurisdiction, and the right to an effective remedy in Article 47 Charter of Fundamental Rights (CFR), the Court has increasingly held that it has jurisdiction in matters that are not explicitly mentioned in the Treaties.[2] What remains underexplored however is how—if at all—the right to an effective remedy can be safeguarded for human rights violations stemming from CFSP-CSDP measures even if the CJEU had jurisdiction. In other words, if the initial jurisdictional hurdle of access to the CJEU would be overcome, would individual rights-holders have access to an effective remedy in line with Article 47 CFR?

Although the limited case law on this topic render theoretical and empirical assessments difficult at best, this article argues that even if this jurisdictional hurdle would be overcome, individual rights-holders would still be deprived of access to an effective remedy. This article will demonstrate that the conditions to establish responsibility under the action for damages for

[1]*See* Sara 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 COMMON MARKET L. REV. 1045 (2022).
[2]*See infra at 174, 183 – 185.*

the EU's complicity in unlawful human rights conduct generally, and in its CSDP/CFSP specifically, are riddled with such ambiguity that the action cannot meet the requirements of an effective remedy under Article 47 CFR.

Although there have been cases before the Court of Justice of the European Union (CJEU) concerning the first EU naval mission—Operation Atalanta, formerly European Union Naval Force Somalia—these cases did not concern an application for damages lodged by individual right-holders.[3] To determine whether there is effective access to legal remedies for individual applicants claiming damages pursuant to EU unlawful human rights conduct, this contribution will analyze the terminated CSDP military operation EUNAVFOR MED Sophia (Operation Sophia)[4] as a reference frame.[5] This operation has sparked much controversy due to the human rights implications it has had on individual third-country nationals (TCNs), yet has not given rise to any legal review concerning the damage resulting therefrom.[6] Specifically, within this Operation, the EU made use, and continues to do so through its successor Operation Irini,[7] of aerial surveillance in order to locate and transmit location coordinates of individual TCNs in the Mediterranean to the Libyan Coast Guard. The Libyan Coast Guard subsequently pull back individuals to Libyan territory, where they are subject to a wide array of well-documented human rights abuses. In other words, through EU policy any and all physical contact between TCNs at sea looking for international protection is obliterated, and yet at the same time, push- and pullback operations to Libya are facilitated.

Using Operation Sophia as a reference frame, the procedural and substantive legal obstacles to obtain reparations for damages by individual TCNs will be identified. In turn, identifying these obstacles will help determine whether a legal responsibility gap tarnishes CSDP military missions in contravention of the overarching obligation to provide an effective legal remedy in a Union based upon the rule of law.[8]

Operation Sophia, given its external features as a CSDP military mission and its hybrid governance structure—involving, *inter alia*, Member States and the EU—operates at the intersection of EU law, public international law, and domestic law.[9] The different legal fields applicable to Operation Sophia, as well as its diffused hybrid governance structure, obfuscate what actor(s) is responsible and under what conditions, due to the multiplicity of actors involved and the legal regimes at play. The current article contributes to scholarship on the topic, by providing a concrete, systematic, and holistic examination of the obstacles faced by individual rights-holders in

[3]*See* Case C-658/11, Parliament v. Council, ECLI:EU:C:2014:2025 (Jun. 24, 2014); *See, e.g.*, Case C-134/19, Bank Refah Kargaran v. Council, ECLI:EU:C:2020:396 ¶¶ 63 (May 28, 2020) (discussing that an action of damages may be possible against CFSP-mandated restrictive measures taken on the basis of Article 215 TFEU, but this consideration is currently limited to restrictive measures referenced in Article 275(2) TFEU).

[4]*See* Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED), 2015 O.J. L157/51; Council Decision (CFSP) 2015/778 of 18 May 2015, on a European Union Military Operation in the South-Central Mediterranean, art. 1, 2015 O.J. (L 122) 31, 31.

[5]Operation Sophia was recently terminated in its entirety. Its tasks have been incorporated in CSDP mission EUNAVFOR MED Operation Irini (Operation Irini). This new mission has as the objective the implementation of the UN arms embargo on Libya. Additionally, it has taken over the former Operation Sophia tasks of conducting information gathering and aerial surveillance to control irregular migratory flows and the countering of human smuggling and trafficking in the area. *See* Council Decision (CFSP) 2020/472 of 31 March 2020 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED IRINI), O.J. L101/51 (demonstrating the considerations on aerial surveillance and the resulting de facto push and pull back that applied to Operation Irini).

[6]The limited case law precedent may be attributed to the fact that use is made of the Athena mechanism (which has individual legal personality) and/or (amicable) alternative dispute mechanisms. *See, e.g.,* Joni Heliskoski, *Responsibility and liability for CSDP operations*, *in* Research Handbook on the EU's Common Foreign and Security Policy 136–42 (Steven Blockmans & Panos Koutrakos eds., 2018).

[7]*See* Council Decision (CFSP) 2020/472 of 31 March 2020 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED IRINI), O.J. L101/4.

[8]*See* Case 294/83, Parti Ecologiste 'Les Verts' v. Parliament, 1986 E.C.R. 1339.

[9]*See* Heliskoski, *supra* note 6, at 132.

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holding the EU responsible for its complicity in unlawful human rights conduct stemming from Operation Sophia, and by exposing how current EU policy continues to facilitate evasion of legal responsibility[10] through its successor EUNAVFOR MED Operation Irini (hereinafter Operation Irini).

Matters of the EU's foreign policy, as embedded in its CFSP/CSPD, are generally exempted from the jurisdiction of the CJEU. However, relying on Article 19 TEU which provides the CJEU with general jurisdiction and the right to an effective remedy in Article 47 Charter of Fundamental Rights (CFR), the CJEU claimed jurisdiction in the *Rosneft* preliminary ruling procedure concerning restrictive measures. In what is considered by some as a conspicuous exercise of gap-filling in the EU's CFSP/CSDP[11] where the Court generally does not enjoy jurisdiction,[12] *Rosneft* widened the potential for legal review by the CJEU by linking effective judicial review with the foundational EU value of the rule of the law.[13] In *Opinion 2/13,* the CJEU had already held that it "has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters." [14] Incrementally, the CJEU thus appears to ensure legal review for matters related to CFSP/CSDP, despite the fact that that these developments have not yet come to "*full fruition*."[15] This is evidenced further by the recent judgement in *Bank Refah Kargaran v Council*, where the CJEU held that the EU courts have jurisdiction to hear and determine an action for damages for the harm caused by the adoption of restrictive measures under Article 29 TEU,[16] despite this not being explicitly foreseen by the Treaties.[17]

One of the remaining legal responsibility gaps not yet addressed by the CJEU[18] in the EU's CFSP/CSDP, is the access to an effective remedy for damages incurred by individuals as a result of unlawful human rights conduct caused by the EU.[19] Conceptually, an action for damages stemming from unlawful human rights conduct in CSDP/CFSP operational conduct, is not necessarily

[10]*In casu* international, legal responsibility refers to whether the EU as an entity can be held to account for its non-compliance with binding human rights obligations before a court of law. The notion of responsibility must be distinguished from the broader concept of accountability, which encompasses notions of redress beyond the legal sphere. It must also be distinguished from the concept of liability, which refers to the consequences arising from hazardous acts that are not necessarily prohibited by international law or do not necessarily constitute a strict violation of a binding norm. *See e.g.,* Alain Pellet, *The Definition of Responsibility in International Law*, *in* The Law of International Responsibility 8–11 (Kate Parlett, James Crawford, Simon Olleson & Alain Pellet eds., 2015); Arne Vandenbogaerde, Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles 36–38 (2016).

[11]*See* Graham Butler, Constitutional Law of the EU's Common Foreign and Security Policy–Competence and Institutions in External Relations 147 (2019).

[12]*See id*.; *see also* Christophe Hillion, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy, in* The European Court of Justice and External Relations Law: Constitutional Challenges 47 (Marise Cremona & Anne Thies eds., 2014) 69–70; Peter Van Elsuwege & Femke Gremmelprez*, Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice* 16 Eur. Const. L. Rev. 8, 8 (2020); Panos Koutrakos, *Judicial Review in the EU's Common Foreign and Security Policy*, 67 Int'l. Compar. Law. Q. 1 (2018).

[13]*See* Case C-72/15, PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others, ECLI:EU:C:2017:236 ¶ 73 (Mar. 28, 2017) [hereinafter Rosneft]; *See also* Case C-455/14P, H. v Council and Commission, ECLI:EU:C:2016:569 ¶¶ 41, 58 (July 19, 2016) [hereinafter H v. Council].

[14]Opinion 2/13 of the Court of 18 December 2014: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ¶¶251 ECLI:EU:C:2014:2454.

[15]Butler, *supra* note 11, at 145.

[16]*See* Opinion of Advocate General Hogan, Case C-134/19P, Bank Refah v. Council of the European Union, ECLI:EU:C:2020:793, ¶¶ 39–52 (Oct. 6, 2020).

[17]*See* Peter Van Elsuwege & Joyce De Coninck, *Action for Damages in Relation to CFSP Decisions Pertaining to Restrictive Measures: A revolutionary Move by the Court of Justice in Bank Refah Kargaran*, E.U. L. Analysis, http://eulawanalysis.blogspot.com/2020/10/action-for-damages-in-relation-to-cfsp.html; *see also* Poli, *supra* note 1.

[18]*See* Opinion of A.G. Hogan note 16, ¶ 63; *see also* Christophe Hillion & Ramses A. Wessel, *The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP*, *in* Research Handbook on the EU's Common Foreign and Security Policy 136–42 (Steven Blockmans & Panos Koutrakos eds., 2018).

[19]For the sake of brevity, reference to the Union as a responsibility-holder, also encompasses its institutions, bodies, offices, and agencies, insofar they do not enjoy separate legal personality from the Union.

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the same as an action for damages stemming from EU imposed sanctions. While the latter does have some legal basis in the Treaties, even if not explicit, the former does not.

Article 340 TFEU requires that "the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."[20] Despite the aforementioned evolving case law concerning legal review for CFSP/CSDP restrictive measures more generally, the CJEU has not yet clarified whether legal review is also available for damages stemming from unlawful human rights conduct by the EU within the context of its military CSDP-missions.[21] The question inevitably follows whether it is possible at all for individual rights-holders to hold the EU legally responsible—independently and separately from its Member States[22]—and demand reparations for its role in unlawful human rights conduct stemming from CFSP/CSDP military missions.[23]

After briefly recalling the mandate, objectives, and legal peculiarities of Operation Sophia, the analysis focuses on the human rights responsibility regime within the EU legal order as applied to CSDP-missions generally, and Operation Sophia and its successor specifically. Reference is made to the procedural and substantive pitfalls that hamper access to legal review on an EU-wide level, with ancillary remarks on remedies before international and domestic courts. Finally, some additional observations are made on alternative remedies that may be pursued by individual applicants, as well as suggestions to improve the current regime(s) on legal recourse.

B. CSDP Mission EUNAVFOR MED Operation Sophia

Operation Sophia was the second of its kind and pursued the dismantling and disruption of the business model of smuggling and trafficking of TCNs across the Mediterranean.[24] Enacted under the CSDP-framework, Operation Sophia fit neatly within the second tier of the "four-tier access control model" of the EU's Integrated Border Management policy, due to the cooperation it pursued with Libyan authorities.[25] Cooperation with Libya was concretized through EU mandated training of the Libyan Coast Guard (LYCG), and the transmission of coordinates of distressed vessels trying to reach the EU to the LYCG by Operation Sophia-conducted aerial surveillance. The cooperation with the LYCG facilitated management and securitization of the EU external border[26] and demonstrated the nexus between a security-centric CSDP-approach and border

[20]Consolidated Version of the Treaty on the Functioning of the European Union art. 340, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[21]*See* Hillion & Wessel, *supra* note 18, at 71.

[22]An assessment of the responsibility of the Member States does not fall within the scope of this analysis. The 'equivalent-protection' doctrine elaborated upon by the European Court of Human Rights however, as well as the generic and automated application of the conditions for the responsibility of States—attribution and the determination of an internationally wrongful act—facilitate a responsibility gap and raise significant questions as to whether Member States can even be held responsible in joint actions such as CSDP-missions.

[23]*See* Marcelle Reneman, EU Asylum Procedures and the Right to an Effective Remedy 88–89 (2014) (describing how the right to an effective remedy is not dependent upon the outcome of a case, but *inter alia* on whether an individual applicant has access to legal procedures, without significant procedural and substantive hurdles and can obtain ". . . adequate redress for any violation that has already occurred.").

[24]See Recitals 2, 5, 7, 8, 9 Council Decision (CFSP) 2015/778 of 18 May 2015, on a European Union Military Operation in the South Central Mediterranean, art. 1, 2015 O.J. (L 122).

[25]*See* Violeta Moreno-Lax, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law 27–41 (2017) (describing how the 'four-tier access control model' maps the movement of TCN-protection seekers and seeks to regulate their movement by first imposing measures that control migratory movements in third countries, second via border checks at the external border of the European Union, third by exercising control measures within the Union, and finally by executing expulsions of individuals that do not meet the conditions for entry and/or stay in the Union).

[26]*See id.* at 41.

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management measures based upon Article 78 TFEU.[27] Despite continuous explicit reference to international human rights standards in the enactment of the operation however, accumulating testimonies of violations of the *non-refoulement* principle, render the lawfulness of its conduct questionable at best.[28]

I. Objectives

Operation Sophia was launched with the prevailing objective of "disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean . . . ."[29]in an attempt to securitize the external EU border and save lives at sea.[30] To achieve its objectives, the mission was structured in three different phases.[31] The first phase was limited to detection and monitoring of migration networks by patrolling and information-gathering on the high seas.[32] Phase two not only permitted "boarding, search, seizure and diversion on . . . of vessels suspected of being used for human smuggling or trafficking . . . ." on high seas (Phase 2A) but also permitted similar measures within the territorial and internal waters of a third state- *in casu* Libya (Phase 2B).[33] The third and final phase allowed—subject to consent of the coastal State or authorization via a Security Council Resolution—for the mission to take "all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking . . . ."[34]

[27]*See* Panos Koutrakos, *The Nexus Between CFSP/CSDP and the Area of Freedom, Security and Justice*, *in* RESEARCH HANDBOOK ON THE EU'S COMMON FOREIGN AND SECURITY POLICY 296, 296–302 (Steven Blockmans & Panos Koutrakos eds., 2018); Valsamis Mitsilegas, *Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade*, *in* CONSTITUTIONALISING THE EXTERNAL DIMENSIONS OF EU MIGRATION POLICIES IN TIMES OF CRISIS–LEGALITY, RULE OF LAW AND FUNDAMENTAL RIGHTS RECONSIDERED 292 (Sergio Carrera, Juan Santos Vara & Tineke Strik eds., 2019).

[28]Operation Sophia resulted in *de facto* push and pull-backs in cooperation with the Libyan Coast Guard (LYCG) and in violation of the *non-refoulement* principle. This was achieved by severing physical contact with individual TCNs in distressed vessels and the use of aerial surveillance, the transmission of coordinates to the LYCG, and the training of the LYCG. These practices evidenced a significant focus on the externalization of border and migration management, in favor of a consensual containment policy as opposed the claimed objective of dismantling smuggling and trafficking networks. Concerning inter alia aerial surveillance, see *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute* (Statewatch) (June 3, 2019); *EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk,* HUM. RTS. WATCH (July 25, 2018), https://www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk; Zach Campbell, *Europe's Deadly Migration Strategy*, POLITICO (Feb. 28, 2019), https://www.politico.eu/article/europe-deadly-migration-strategy-leaked-documents/. For scholarship on the matter see Moreno-Lax, *supra* note 25; Mariagiulia Giuffré & Violeta Moreno-Lax, *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, *in* RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW 85–90 (Satvinder Singh Juss ed., 2019); Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein & Brian Opeskin, *Securitization of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia,* 67 INT'L & COMPAR. L. Q. 334 (2018).

[29]Council Decision (CFSP) 2015/778 of 18 May 2015, on a European Union Military Operation in the South Central Mediterranean, art. 1, 2015 O.J. (L 122); Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED),O.J.2015, L157/51.

[30]Eugenio Cusumano, *Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya Between Humanitarianism and Border Control* 54 COOPERATION & CONFLICT 12 (2019).

[31]*See* Council Decision (CFSP) 2015/778 of 18 May 2015, on a European Union Military Operation in the South Central Mediterranean, art. 1, 2015 O.J. (L 122); Giorgia Bevilacqua, *Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities*, *in* THE FUTURE OF THE LAW OF THE SEA 165, 171–72 (Gemma Andreone ed., 2017); Graham Butler & Martin Ratcovich, *Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea*, 85 NORDIC J. INT'L L. (2016).

[32]*See id.* at 248.; Council Decision (CFSP) 2015/778 of 18 May 2015, on a European Union Military Operation in the South Central Mediterranean, art. 1, 2015 O.J. (L 122).

[33]Council Decision (CFSP) 2015/778 of 18 May 2015, on a European Union Military Operation in the South Central Mediterranean, art. 2(2)(b)(i), art. 2(2)(b)(9)(ii) 2015 O.J. (L 122).

[34]Council Decision (CFSP) 2015/778 of 18 May 2015, on a European Union Military Operation in the South Central Mediterranean, art. 2(2)(c), 2015 O.J. (L 122).

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Operation Sophia's mission was continuously amended, resulting in added supporting tasks, including the training of the LYCG,[35] aerial surveillance concerning illegal trafficking of oil exports, and aiding the implementation of an arms embargo on Libya.[36] These supporting tasks and the temporal extensions of the Operation were positioned to support the fight against irregular migration and sought to improve Libyan border management to ensure that irregular *departure* of TCNs would be significantly decreased.[37] The increased focus on the securitization of the external EU border, inevitably shifted focus away from the humanitarian objective of preventing human tragedies and the respect for the "principle of non-refoulement and international human rights law."[38]

II. Legal basis, Nature of the Competence and (Limited) Legal Review

The legal basis for the military naval Operation Sophia is found in Article 42-43 TEU, embedded within the overarching CFSP-framework. These provisions clarify the varying aspects of CSDP-military operations, including the scope, the objectives, and mandate. This framework provides, *inter alia*, for the necessary civilian and military assets for the purpose of engaging in peace-keeping missions and the strengthening of international security.[39] In adopting military measures, unanimity is required by the Council following proposals advanced by the High Representative of the EU for Foreign Affairs and Security Policy. Thus, the establishment of a military naval operation is the result of a Council decision, with limited input of other EU institutions.[40] Though they are not

[35]*See* Giuffré & Moreno-Lax, *supra* note 28, at 85, 90; Eur. Parl. Doc. (EEAS 835) 5–6 (2018); European Council Press Release, EUNAVFOR MED Operation Sophia: mandate extended until 30 September 2019 (Mar. 29, 2019).

[36]*See Ghezelbash, Moreno-Lax, Klein & Opeskin*, *supra* note 28, at 334; Council of the European Union, *"Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell,"* EEAS 5 (July 6, 2018) https://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf; Political and Security Committee Decision (CFSP) 2015/1772 of 28 September 2015; concerning the transition by EUNAVFOR MED to the second phase of the operation, as laid down in point (b)(i) of Article 2(2) of Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) (EUNAVFOR MED/2/2015), (L 258/5); Council Decision (CFSP) 2015/1926 of 26 October 2015, amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) (L 281/13); Political and Security Committee Decision (CFSP) 2016/118 of 20 January 2016; Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (L 122); Political And Security Committee Decision (CFSP) 2016/1635 of 30 August 2016; concerning the implementation by EUNAVFOR MED operation SOPHIA of United Nations Security Council Resolution 2240 (2015) (EUNAVFOR MED operation SOPHIA/1/2016) (L 23/63); Political And Security Committee Decision (CFSP) 2016/1637 of 6 September 2016, on the commencement of the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) contributing to the implementation of the UN arms embargo on the high seas off the coast of Libya (EUNAVFOR MED/4/2016) (L 243/14); Council Decision (CFSP) 2017/1385 of 25 July 2017) amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (L 194/61); Council Decision (CFSP) 2018/717 of 14 May 2018 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (L 120/10); Council Decision (CFSP) 2018/2055 of 21 December 2018 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (LI 327/9); Council Decision (CFSP) 2019/535 of 29 March 2019 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (L 92/1).

[37]*See* Strategic Review Operation Sophia 2018, *supra* note 36, at 46.

[38]Recitals 1,6 Council Decision (CFSP) 2015/778 of 18 May 2015, on a European Union Military Operation in the South Central Mediterranean, art. 1, 2015 O.J. (L 122) 31, 31; Giuffré & Moreno-Lax, *supra* note 28, at 96; Daniel Fiott, *Military CSDP Operations: Strategy, Financing, Effectiveness*, in Research Handbook on the EU's Common Foreign and Security Policy 116–17 (Steven Blockmans & Panos Koutrakos eds., 2018); Mitsilegas, *supra* note 27, at 297.

[39]*See* Frederik Naert, *European Union Common Security and Defence Policy Operations*, *in* The Practice of Shared Responsibility, 670–71 (André Nollkaemper & Ilias Plakokefalos eds., 2017).

[40]*See* Butler & Ratcovich, *supra* note 31, at 239.

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legislative acts, Council decisions are an act of the EU—conceptually distinct from Member States merely working together.[41]

Recourse to a CSDP-military mission and its corresponding legal basis has immediate ramifications for the delineation of competences and the legal recourse available against resulting conduct. While CSDP competence is constitutionally embedded in the EU *acquis,*[42] it nevertheless remains of a *sui generis* nature,[43] as evidenced *inter alia,* by the fact that CFSP/CSDP measures are not included in the explicit typology of conferred competences in Articles 3–6 TFEU.[44] The *sui generis* nature of CFSP/CSDP competences is further highlighted by the fact that it is "subject to specific rules and procedures."[45] Again, different from the competences in Articles 3–6 TFEU. Mindful of these idiosyncrasies, competence in CFSP/CSDP has been referred to as "non-pre-emptive shared competence."[46]

Despite the incremental and case-specific widening of CJEU jurisdiction in the field, the precise contours of this "crippled conferral" cannot yet be definitively distilled. The extent of jurisdiction enjoyed by the CJEU, is ultimately left to the Court itself to determine.[47] While an extensive analysis of the foregoing falls outside the ambit of the current article,[48] it is crucial that the ambiguous nature of the competence division in CSDP and the limited availability of legal review before the CJEU are both informative of and determinative for the availability and effectiveness of legal recourse for individual TCNs.[49]

III. Political Control and Military Command

EU military operations involve Member States, EU institutions, and sometimes third parties all of which operate on the intersection of distinct legal orders.[50] Accordingly, the command-and-control structures, particularly the military chain of command *in theatre*,[51] may differ across various missions. This is relevant as to the manner in which military command is exercised, which may affect to what party unlawful conduct throughout the mission is attributed.

The Council enjoys the political and strategic command and is responsible for key decision-making through Council decisions. Such decisions may include provisions concerning legal responsibility, which may be further elaborated upon in additional planning documents such as the Operational Plan (OPLAN). The Council is supported in its work by a number of entities,[52]

[41]*See* Frederik Naert, *Responsibility of the EU Regarding its CSDP Operations*, *in* THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION: EUROPEAN AND INTERNATIONAL PERSPECTIVES, 335–36 (Malcolm Evans & Panos Koutrakos eds., 2013); Naert, *supra* note 39, at 672.

[42]*See* BUTLER, *supra note* 11, at 40–41.

[43]*See id.*

[44]Allan Rosas, *Exclusive, Shared and National Competence*, *in* THE EUROPEAN UNION IN THE WORLD- ESSAYS IN HONOR OF MARC MARESCEAU 17, 34–40 (Inge Govaere, Erwan Lannon, Peter van Elsuwege & Stanislas Adam eds., 2014).

[45]TFEU art. 24.

[46]*See* BUTLER, *supra* note 11.

[47]*See id.* at 155–157; Rosas, *supra* note 44, at 39–40; Inge Govaere, *To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon in Structural Principles, in* EU EXTERNAL RELATIONS LAW, 70–79 (Marise Cremona ed., 2018); Ramses A. Wessel & Leonhard den Hertog, *EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?, in* THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION–EUROPEAN AND INTERNATIONAL PERSPECTIVES 344 (Malcolm Evans & Panos Koutrakos eds., 2013).

[48]*See* Poli, *supra* note 1.

[49]*See infra* 183–188.

[50]*See* MELANIE FINK, FRONTEX AND HUMAN RIGHTS: RESPONSIBILITY IN 'MULTI-ACTOR SITUATIONS' UNDER THE ECHR AND EU PUBLIC LIABILITY LAW 66–67 (2018); Tom Dannenbaum, *Dual Attribution in the Context of Military Operations in International Organizations and Member State Responsibility*, *in* INTERNATIONAL ORGANIZATIONS AND MEMBER STATE RESPONSIBILITY 114 (Ana Sofia Barros, Cedric Ryngaert & Jan Wouters eds., 2016); Fiott, *supra* note 38.

[51]*See* Naert, *supra* note 39, at 674–675.

[52]*See* Naert, *supra* note 39, at 317.

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including the High Representative and the European External Action Service (EEAS)[53] –which provide support in the preparatory phases of CSDP missions.[54] The Council is additionally aided by a number of preparatory bodies including the Political and Security Committee (PSC) and the EU Military Committee (EUMC).[55] The PSC specifically, exercises political control, determines strategic direction of the mission and oftentimes exercises the authority to take decisions concerning planning documents (such as the OPLAN),[56] alterations of the military chain of command and the rules of engagement.[57]

The military chain of command, i.e. operational control, is determined on a case-by-case basis,[58] as the EU does not have standing military headquarters or contingents at its disposal, rendering it reliant upon voluntary Member State contributions made available per specific mission.[59] Through a transfer of authority or alternatively, a reversal of authority, the Operation Commander of a CSDP-mission is provided *operational command and control* of the mission by the Member States and the EU, which is defined as being the "authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location."[60] This includes the responsibility for drafting and implementing of the OPLAN, which details the particularities of the Operation and may include provisions on legal responsibility, the drafting and enacting of the rules of engagement, and strategic direction.[61] Further operational control is exercised by the Force Commander,[62] who acts under the authority of the Operation Commander and is appointed by the Council or the PSC.[63] The military chain of command is legally significant, as it may influence whether the EU can or cannot be held responsible for conduct under the *chapeau* of Operation Sophia.

Operation Sophia has resulted in the deflection of unsafe vessels[64] and fits within the "contactless control" paradigm as explained by MORENO-LAX and others.[65] By communicating location coordinates of distressed vessels carrying TCNs to the LYCG,[66] the EU eliminates any corporeal effective control over the individuals concerned, thereby limiting —if not severing—the jurisdictional nexus that would otherwise trigger the applicability of the ECHR and arguably the CFR.[67] Simply put, by using aerial surveillance, the EU's Operation Sophia and Irini obliterate any direct

[53]*See id.* at 672; *see also* Fergal O'Regan Anthony & Elpida Apostolidou, *Report on the European Ombudsman's meeting with the European External Action Service in case 935/2018/EA concerning the handling of requests for access to EUNAVFOR MED Operation Sophia's documents*, European Ombudsmen 3 (2018) https://www.ombudsman.europa.eu/en/report/en/106975.

[54]*See* Anthony & Apostolidou, *supra* note 53.

[55]*See id.*

[56]Planning documents are typically: Crisis Management Concept (1), Strategic Options (2), Concept of Operation (3), and an Operational Plan (4) From the outset it need be noted that these documents are not legal by nature and thus cannot be subject to annulment proceedings before the CJEU. For a detailed discussion *see* Naert, *supra* note 39, at 319.

[57]*See* Naert, *supra* note 39, at 318.

[58]*See* Fiott, *supra* note 38, at 112, 114.

[59]*See* Naert, *supra* note 39, at 674–675.

[60]*See id.*; Eur. Parl. Doc. EEAS (2019) 468 §§ 8–9, 11, 19, 28–29.

[61]*See* Naert *supra* note 39, at 319–320; Anthony & Apostolidou, *supra* note 53.

[62]*See* Naert, *supra* note 39, at 674–675.

[63]This operational control should not however, be confused with the retained full command by the Member States over seconded officers in military contingents, resulting in criminal and disciplinary Member State jurisdiction. *See id.*

[64]*See* Campbell, *supra* note 28.

[65]The authors discuss "contactless control" as a novel variant of the "deterrence paradigm" which allows for the elimination of any physical contact with the TCNs attempting to reach the external border of the EU and prevents any jurisdictional nexus from being established which would otherwise trigger the obligations inherent to the fundamental rights norms by which the Union and the Member States are bound. *See* Giuffré and Moreno-Lax, *supra* note 28, at 84, 93–95.

[66]Concerning aerial surveillance, see documented cases 7 and 11 in Annex 2 *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute* (Statewatch) (June 3, 2019); *see* Strategic Review Operation Sophia 2018, *supra* note 36, at 5, 13–15, 19.

[67]*See infra* 186–188.

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contact between TCNs trying to reach European shores and EU authorities. This contactless approach facilitates the deflection of migratory flows and distressed vessels by the LYCG to Libya, which is notorious for its poor human rights record and is considered an unsafe third country for the purpose of establishing whether the *non-refoulement* principle has been respected.[68]

C. EU Responsibility Deconstructed

To establish human rights responsibility of the EU, the EU courts must exercise jurisdiction of the contested conduct. Next, three *substantive* cumulative conditions would have to be met for human rights responsibility to arise. First, there must be damage caused by and attributable to the EU. Second, there must be unlawful (human rights) conduct, and third the rule of law at stake must have been intended to confer rights on the individual invoking its protection.

I. Two-Pronged Jurisdictional Mayhem

1. CFSP/CSDP Jurisdiction

A simple reading of Article 24 TEU, Article 40 TEU and Article 275 TFEU leaves the CJEU with limited jurisdiction in the realm of CFSP/CSDP measures, except where the Court is first called upon to monitor compliance with Article 40 TEU and second, concerning the legality of measures which provide for restrictive measures (sanctions) in accordance with Article 275(2) TFEU.[69] Drawing from the CJEU's general jurisdiction as established in Article 19 TEU, read in combination with the right to an effective remedy in Article 47 CFR, the CJEU has interpreted the CFSP-exclusion from its jurisdiction narrowly, and the "*claw-back*" exceptions to the exclusion from jurisdiction broadly.[70]

CFSP/CSDP-measures have given rise to two strands of case law before the CJEU. On the one hand there are the cases dealing with whether CFSP/CSDP measures of a cross-policy nature are based on the appropriate legal basis. In strand of case law, the use of an exclusive CFSP/CSDP legal basis was—at times, successfully—contested because the EU measure at stake also touched upon other treaty-based competences that fell *outside* of the CFSP/CSDP remit, prompting the claim that the CJEU should have jurisdiction. For example, in *H v Council*, the CJEU determined that the day-to-day staff management of seconded officers to the European Union Police Mission in Bosnia and Herzegovina—both by Member States and the Union—could not escape judicial scrutiny of the Court. The Court reasoned that this is because staff management of seconded staff to the CSDP mission, which was at heart of the dispute, falls within its jurisdiction.[71] This is relevant for Operation Sophia, as it too is a CSDP-mission of a cross-policy nature. The Operation—though it is a military naval mission based on a CSDP legal basis—additionally pursues migration and border management as foreseen by Article 78 TFEU.[72] The CJEU in *Mauritius* concerning Operation Atalanta, did not accept that Operation Atalanta was jointly based on a CFSP/CSDP legal basis and Treaty-based judicial cooperation in criminal matters according to Article 82 TFEU onward. Here however, the explicit references to border and migration management in the instruments governing Operation Sophia could lead to the opposite conclusion, that its dual objective of CFSP/CSDP and border/migration management policy "are inseparably linked without one being incidental to the other, so that various provisions of the Treaty are applicable."[73] Consequently

[68]*See* Mitsilegas, *supra* note 27, at 302–303; Hirsi-Jamaa et al. v. Italy, App. No. 27765/09, Eur. Ct. H. R., at 123–37 (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231.

[69]*See* Rosneft, *supra* note 13, at 60.

[70]*Id.*; Peter Van Elsuwege, *Upholding the rule of law in the Common Foreign and Security Policy: H v. Council*, 54 COMMON MARK. L. REV. (2017); Van Elsuwege & De Coninck, *supra* note 17; Poli, *supra* note 1.

[71]*See* Case C-455/14 P, H v. Council, EU:C:2016:212, ¶¶ 44, 55 (July 19, 2016).

[72]*See* Koutrakos, *supra* note 27, at 296–311.

[73]Case C-658/11, Parliament v. Comm'n, ECLI:EU:C:2014:2025, ¶ 43 (June 24, 2014).

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Operation Sophia could fall under the jurisdiction of the CJEU. However, this does not yet address whether the CJEU would have jurisdiction in an action for damages.

On the other hand, the second strand of case law focuses on the legality of restrictive measures. Article 275(2) TFEU holds that the CJEU retains jurisdiction on reviewing the legality of such measures "in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU]." Not inconceivably, the formulation of Article 275(2) TFEU raises the idea that the legality review mentioned therein, refers exclusively to the annulment procedure under the EU regime of adjudication. However, the Court has incrementally re-assessed the limits of its jurisdiction, including with respect to restrictive measures, which culminated in the infamous *Rosneft* judgment. There the Court held, drawing from Article 19 TEU *in juncto* Article 47 CFR, that Article 275(2) TFEU cannot be read in such a restrictive manner that the reference to Article 263 TFEU would rule out interpretative indirect jurisdiction of the CJEU via the means of a preliminary reference procedure, thereby establishing jurisdiction.[74]

As noted by Van Elsuwege and Gremmelprez, the views on how the CFSP/CSDP limitations to the jurisdiction of the Court should be interpreted, are exemplified by the Opinions of A.G. Kokott, Wahl, Wathelet in *Opinion 2/13, H v Council,* and *Rosneft* respectively.[75] On the one hand, A.G. Kokott and Wahl interpret the jurisdiction of the Court in CFSP/CSDP in a narrow manner, by emphasizing the "conscious choice made by the drafters of the Treaties."[76] A.G. Wathelet in *Rosneft* on the other hand, follows the more generalist trend also followed by the Court, whereby:

> a restrictive approach of the Court's jurisdiction relation to CFSP matters would be difficult to reconcile with the fact that the EU's international action is subject to its foundational principles, including respect for the rule of law and fundamental rights such as the right of access to a court and effective legal protection.[77]

This approach departs from a broad conceptualization of the Court's jurisdiction as a result of Article 19 TEU in conjunction with Article 47 CFR and reads the exclusion from jurisdiction in CFSP/CSDP in a very narrow manner.

Applying the foregoing to Operation Sophia, unlike the *Mauritius* case, the argument could be made that the pursued objectives of border and migration management and the prevention of illegal migration were not incidental to the CSDP objective of preventing smuggling and trafficking on the Mediterranean route. Thus, this *should* have resulted in a dual legal basis, as a result of which the CJEU would have limited jurisdiction. Additionally, following *Rosneft,* the argument could additionally be made that the Article 275(2) TFEU, should not be read in such a restrictive manner as to exclude the action for damages. A.G. Hogan follows this line of reasoning in the recent case of *Bank Refah Kargaran v. Council*, which had also already been hinted at by the CJEU in *H v. Council*[78], whereby actions for damages are possible for CFSP/CSDP measures when demanded in conjunction with a legality review. Crucially, this case concerns CFSP-mandated restrictive measures adopted in parallel based upon Article 215 TFEU.[79]

Although the incremental changes in the case law of the Court are promising from the perspective of the individual applicant, these cases cannot definitively inform how the Court would

[74]See Rosneft, *supra* note 13.

[75]*See* Van Elsuwege & Gremmelprez, *supra* note 17, at 14–18.

[76]Opinion of Advocate General, H v. Council, Case C-445/14P, ECLI:EU:C:2016:212 ¶ 49; View of Advocate-General Kokott, Opinion 2/13 (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), EU:C:2014:2475, ¶ 252.

[77]Opinion of Advocate General Wathelet, Case C-72/15, PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others, ECLI:EU:C:2016:381, ¶ 66 (May 31, 2016).

[78]*See* Case C-455/14 P, H v. Council, EU:C:2016:212, ¶ 69 (July 19, 2016).

[79]*See* Opinion of Advocate General Hogan, Case C-134/19P, Bank Refah v. Council of the European Union, ECLI:EU:C:2020:793, ¶¶ 40, 62 (Oct. 6, 2020).

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approach operational action, as opposed to restrictive measures, within the context of Operation Sophia and possible damages concerning international human rights violations as a result thereof. Overcoming the obstacle of CFSP/CSDP jurisdiction in this particular case, is currently dependent upon a number of hypotheticals, none of which bode well in terms of legal certainty for the individual applicant. While this strand of case law is still very much under development, fundamental rights violations occurring at the hands of the EU within the CSDP framework, have not currently been subject to review by the CJEU.[80]

2. Human Rights Jurisdiction

In addition to the jurisdictional hurdles inherent to CSDP-missions when seeking legal review, jurisdiction must also be established concerning the applicable human rights instruments. In other words, it must be established as a necessary precondition to any responsibility determination, whether the human rights provisions by which the EU is bound, were applicable to the situation at hand.

Jurisdiction in international law has traditionally been understood as primarily territorial. However, as demonstrated by a number of cases before the European Court of Human Rights (ECtHR) within the realm of *non-refoulement* in particular, the notion of jurisdiction to trigger the applicability of the European Convention on Human Rights (ECHR) has increasingly been understood in a broader, extra-territorial sense. A distinction is typically made between *spatial* jurisdiction, whereby a state exercises effective control over a particular territory, and *personal* jurisdiction, whereby a state exercises corporeal control over an individual.[81] Extra-territorial jurisdiction within the context of the ECHR, was elaborated on in the seminal *Hirsi* case where the Strasbourg Court held that:

> Italy cannot circumvent its 'jurisdiction' under the Convention by describing the events at issue as rescue operations on the high seas. In particular the Court cannot subscribe to the Government's argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned . . . .[82]

The Strasbourg Court solidified its stance on extra-territorial jurisdiction in exceptional circumstances, where a degree of corporeal control,[83] to be assessed on a case-to-case basis over an individual, may be sufficient to trigger the enforceability of the ECHR.[84] In addition, in a recent strand of case law, the ECtHR has likewise accepted extra-territorial jurisdiction, when "*special features*" warrant it.[85]

[80]*See* Heliskoski, *supra* note 6, at 137–138.

[81]Marko Milanovic, Extraterritorial Application of Human Rights Treaties – Law, Principles and Policy 209–227 (2011) (elaborating on a third model for (extra-territorial) jurisdiction by distinguishing between negative and positive human rights obligations).

[82]Hirsi, App. No. 27765/09, at 79.

[83]*See* Milanovic, *supra* note 81, at 58–67 (positing that the distinction between corporeal and non-corporeal control arguably made by the ECtHR to establish "effective control," is arbitrary insofar such measures result in analogous human rights violations).

[84]*See* for the most recent case on jurisdiction and refusal of entry to TCNs: *M.K. and others v Poland,* App. No. 40503/17, 42902/17 and 4364317, (July, 2020), https://hudoc.echr.coe.int/fre - {"itemid":["002-12916"]}.

[85]Carter v. Russia, App. No. 20914/07, ¶ 124 (Sept. 21, 2021) https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13414%22]}; Hanan v. Germany, App. No . 4871/16 ¶ 132–45, (Feb. 16, 2021) https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-208279%22]}; Güzelyurtlu and others v. Cyprus and Turkey, App. No. 36925/07, ¶¶ 178–87 (Jan. 29, 2019) https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5674802-7195201&filename=Judgment%20Guzelyurtlu%20and%20Others%20v.%20Cyprus%20and%20Turkey%20-%20lack%20of%20cooperation%20in%20murder%20investigation.pdf; *see also* Marko Milanovic, *European Court Finds Russia Assassinated Alexander Litvinenko*, Blog of the European Journal of International Law (Sept. 23, 2021) https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/.

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Unlike the ECHR, the CFR—applicable also to CFSP/CSDP measures[86]—does not contain a jurisdictional clause *territorially* limiting its application.[87] Instead, the Union-specific jurisdictional limitations for the Charter are spread out across the Charter itself, and consist of rights-specific limitations, as well as overarching jurisdictional applicability provisions as set out in Articles 51–53 of the Charter.[88] Article 51(1) CFR clarifies the applicability of the Charter by holding that Charter provisions "are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law."[89] This does not pose any significant problems within the context of Operation Sophia, as the military chain of command falls under the overall control of the Council,[90] which is for all intents and purposes bound by the Charter. Additionally, Article 52(3) CFR is crucial in assessing the responsibility of the EU in CSDP-missions. This provision requires that for corresponding rights in the Charter and in the ECHR—such as the *non-refoulement* principle—that the ECHR and its corresponding case law, functions as a normative baseline. In other words, protection concerning *non-refoulement* flowing from the Charter, can never fall below the minimum standards for *non-refoulement* set by the ECHR and the ECtHR. More extensive protection may however be permitted, insofar this does not jeopardize the autonomy of the EU legal order.[91]

By making use of "contactless control" measures under Operation Sophia,[92] the jurisdictional nexus as required under the ECHR was severed and arguably neither the EU nor the Member States acting within the context of Operation Sophia exercised any form of physical effective control over TCNs. Following the case law of the ECtHR, it would thus be difficult to establish jurisdiction *vis-à-vis* implicated Member States. However, this same jurisdictional obstacle does not arise when applying the Charter, as it does not impose any extra-territorial limitations on jurisdiction. The EU and its institutions are bound to respect its provisions, including *non-refoulement,* irrespective of territorial considerations, so long this heightened protection does not jeopardize the autonomy of EU law.

In summary, the largest jurisdictional hurdle in this case is that of the jurisdictional limitations of the CJEU *vis-à-vis* CFSP/CSDP measures. The applicability of the Charter does not appear to impose any significant burdens. Bearing these issues in mind, in the event that the CJEU would find that jurisdiction is established for applications for damages as a result of human rights infringements occurring within the context of a CSDP-mission, it would then have to be established whether the substantive conditions to establish human rights responsibility under the EU regime for damages is met, as dealt with below.

II. Substantive Conditions for Responsibility

The obligation to provide reparations for damage stemming from unlawful conduct by the EU is considered to be a principle of EU law and a manifestation of the principle of effective

[86]*See* Treaty of Lisbon Art. 21(1), Art. 23; Stian Øby Johansen, *Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?*, 66 Int'l & Compar. L. Q. 182 (2017).

[87]*See* Angela Ward, *Article 51–Scope*, *in* The EU Charter of Fundamental Rights: A Commentary 1422–1423(Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward eds., 2014); Cathryn Costello & Violeta Moreno-Lax, *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model, in* The EU Charter of Fundamental Rights: A Commentary 1662 (Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward eds., 2014).

[88]*See* Ward, *supra* note 87, at 1415–1416.

[89]Opinion of Advocate General Sharpston, Gerardo Ruiz Zambrano v. Office National de l'emploi, C-34/09, ECLI:EU:C:2010:560, ¶ 156 (Sept. 30, 2010)

[90]*See* Heliskoski, *supra* note 6, at 137.

[91]*See* Charter of Fundamental Rights of the European Union, art. 52(3), 2012 [hereinafter CFR]; *see also* Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303) 17.

[92]*See supra* 182.

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protection.[93] To invoke the responsibility of the EU before the EU courts, a number of procedures are theoretically available.[94] Mindful of the procedure specific conditions and difficulties that arise for TCNs wishing to invoke EU responsibility for human rights violations, the most appropriate avenue to obtain redress is the procedure concerning an action for damages caused by the EU embedded in Article 268 in conjunction with Article 340 TFEU.[95] In addition to the stringent procedure-specific conditions inherent to the alternative direct actions and indirect action before the Court, the obligation to provide reparations cannot be considered met by declaratory orders annulling or interpreting particular provisions or acts of EU law, as this would not place the individual in a position where the wrongs done would be in part rectified.[96] Consequently, the focus in what follows will be on the EU action for damages.

The Treaties foresee EU responsibility in Article 340(2) and 340(3) TFEU. However, these provisions do not clarify the constituent conditions for such responsibility to arise. This was intended to be developed by the CJEU "in accordance with the general principles common to the laws of the Member States . . . ."[97] The seminal cases to date on this matter are the *Schöppenstedt*[98] and the *Bergaderm*[99] judgments, with the latter being largely applicable today.[100]

The conditions for Member State responsibility further inform the conditions to establish non-contractual responsibility vis-à-vis the EU.[101] This parallelism was confirmed explicitly by the CJEU in *Bergaderm* where it held in particular that "the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances . . . ."[102] The advantage of this approach as noted by FINK, is that where legal gaps arise concerning responsibility of the EU or, vice-versa the Member States, recourse can be had to the parallel system of responsibility. Said parallelism may conjure up the idea that the EU system of non-contractual responsibility for Member States and the EU, operating under almost identical conditions, may thus constitute one single unitary system of responsibility, implemented by EU courts and Member State Courts alike.[103] However, upon closer inspection this is not the case due to *inter alia* the functional specialty of the EU. [104]

1. Independent Responsibility

Bergaderm clarified the required three cumulative conditions that must be met for EU responsibility to arise, holding that:

[93]*See* Opinion of Advocate General Geelhoed, Mediator v. Lamberts, Case C-234/02P, ECLI:EU:C:2004:174, ¶¶ 82–86, (July 3, 2003); Fink, *supra* note 50, at 183.

[94]*See, e.g.,* Koen Lenaerts, Ignace Maselis & Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak ed., 2015); On the basic conditions for responsibility, see Fink, *supra* note 50, at 15.

[95]Piet Eeckhout, *The European Convention on Human Rights, in* The European Union in the World – Essays in Honour of Marc Maresceau 95 (Inge Govaere, Erwan Lannon, Peter van Elsuwege & Stanislas Adam eds., 2014).

[96]Angela Ward, *Remedies under the EU Charter of Fundamental Rights, in* Research Handbook on EU Law and Human Rights 183–34 (Sionaidh Douglas-Scott & Nicholas Hatziz eds., 2017).

[97]Consolidated Version of the Treaty on the Functioning of the European Union art. 340(2), May 9, 2008, 2008 O.J. (C 115) 47.

[98]*See* Case C-5/71, Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Cmtys, ECLI:EU:C:1971:116, (Dec. 2, 1971).

[99]*See* Case C-352/98 P, Bergaderm and Goupil v. Commission, ECLI:EU:C:2000:361 (July 4, 2000) [hereinafter Bergaderm].

[100]*See* Fink, *supra* note 50, at 189; Lenaerts, Maselis & Gutman, *supra* note 94, at § 11.45.

[101]As this present study concerns solely the responsibility of the Union, Member State responsibility is only discussed in an ancillary manner, where this clarifies the conditions to establish responsibility vis-à-vis the Union. The scope of the present research neither warrants nor requires an exhaustive overview of the case law by the CJEU on the responsibility of Member States for measures stemming from EU law.

[102]Bergaderm, *supra* note 99; *see also* Fink, *supra* note 50, at 191–93; Ward, *supra* note 87, at 182–84.

[103]*See* Fink, *supra* note 50, at 191–93.

[104]*See infra* 195, 199.

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> [The] Court has held that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[105]

In other words, there must first be damage caused by (and attributable to) the EU, second an unlawful act—or omission—and third, the rule of law concerned must have been intended to confer rights on the individual invoking its protection.[106]

1.1 Causal act attributable to the EU

The first condition requires that acts resulting in damage must be caused by the EU, encompassing the notion commonly referred to as attribution.[107] When the EU acts alone, this does not pose any issues. Attribution to the EU will occur for acts that were instigated or committed by the bodies, offices, and agencies of the EU, subject to the condition that they do not enjoy separate legal personality from the EU. The particular case of CSDP military missions, such as Operation Sophia, complicate the matter due to the multiplicity of involved actors (the EU, Member States, agencies, external parties) and the intergovernmental nature of such operations.

Under the EU-*acquis,* attribution is determined by the decision-making powers in a given area.[108] Those decision-making powers are determined by the division of competences. The CJEU has clarified that when Member States lack competence in a given area, acts taken within that context may be attributable to the EU.[109] However, insofar Member States retain "*genuine discretion*" in the adoption of acts that stem from an underlying EU act—without being bound by specific instructions by the EU—the contested act will be attributable to the implicated Member State, and not the EU.[110] Thus, this approach combines the factual model of attribution and the institutional model of attribution.[111]

As previously mentioned, the precise contours of CFSP/CSDP measures have yet to be definitively determined. Depending on whether the competences are deemed non-pre-emptive shared competences or not, the margin of discretion on behalf of the Member States will differ.[112] In addition, the principle of loyal cooperation enshrined in Article 4(3) TEU and Article 24(3)

[105]Bergaderm, *supra* note 99; Lenaerts, Maselis & Gutman, *supra* note 94, at § 11.38; Fink, *supra* note 50, at 186.

[106]With the exception of the third and last condition, the conditions to establish responsibility under EU law, largely correspond to the constituent elements to establish international responsibility under the Articles on the Responsibility of International Organizations (see *infra*), where it is held in Article 4 ARIO that the elements of an internationally wrongful act require conduct—act or omission—to be attributable to the international organization (1), and that said conduct constitutes a breach of an international obligation owed by that international organization (2), *See* International Law Commission, *Draft Articles on the Responsibility of International Organizations*, May 30, 2011, A/66/10.

[107]*See* Lenaerts, Maselis & Gutman, *supra* note 94, at §§ 11.18–11.19.

[108]*See id.* at § 11.25.

[109]*Id.; see also* Case C-104/89 & C-37/90, Mulder and others v. Council and Comm'n, ECLI:EU:C:1992:217, ¶ 9 (May 19, 1992); Pieter-Jan Kuijper & Esa Paasivirta, *EU International Responsibility and its Attribution: From the Inside Looking Out, in* The International Responsibility of the European Union – European and International Perspectives 59 (Malcolm Evans & Panos Koutrakos eds., 2013).

[110]*See* Lenaerts, Maselis & Gutman, *supra* note 94, at §§ 11.25-11.26.; Case C-89/86 & C-91/86, L'Etoile Commerciale and Comptoir National Technique Agricole (CNTA) v. Comm'n of the European Cmtys, 1987 E.C.R. §§ 16–21.

[111]*See* Andrés Delgado Casteleiro, The International Responsibility of the European Union – From Competence to Normative Control 63, 67–71, 72–75 (2016) (discussing how the *institutional or organic model of attribution* points to the formal organic tie and normative control between the organization and the implementing Member States. Under this model, Member States are perceived as mere instruments—organs—by virtue of their implementation of EU measures. It is far from decided, however, whether Member States can be perceived as organs in light of their obligation to implement Union law and the judicial control inherent thereto. The *factual model of attribution*, results in a case-to-case assessment of the effective control exercised in set of circumstances, prior to establishing to what entity an act or omission should be attributed). *See also* Wessel & Den Hertog, *supra* note 47, at 344.

[112]*See* Casteleiro, *supra* note 112, at 29; Kuijper & Paasivirta, *supra* note 110, at 59.

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TEU may also have the effect of affecting the discretion Member States have in the enactment of CSDP-missions generally.[113] Given this ambiguity, it becomes difficult to determine *a priori* to what entity unlawful conduct occurring in a CSDP-mission should be attributed. The CJEU has shed some light on the matter in *H v. Council*. Here the Court held that operational command and control in the European Union Police Mission in Bosnia and Herzegovina, was in hands of the Head of Mission, as instructed by the Civilian Operation Commander. The Civilian Operation Commander in turn, was under the control of the PSC, which falls under the control of the Council. Consequently, the CJEU held that the operational, effective control was retained by the Council and any alleged acts pursuant to this control were to be attributed to the Council.[114] However, the mission at stake in *H v. Council* concerned a civilian mission, as opposed to military nature of Operations Sophia and Irini under scrutiny. In addition, the particularities of each CSDP-mission are determined in reference to their specific needs and objectives as established in the Council decisions to which they are bound. While *H v. Council* may thus be indicative of the fact that operational measures falling under military operational command and control would be attributed to the Council, this is by no means certain or determinative for Operation Sophia. In fact, in a domestic German case concerning CSDP military Operation Atalanta, the contested act of transferring suspects of piracy, was attributed to the German authorities, leaving open the question of attribution to the Union.[115]

For Operation Sophia the actual division of competences, and responsibility, via the military chain of command and control, was elaborated upon in the OPLAN, which given the military nature of the Operation remains confidential. Additionally, this chain of command was subject to change, via transfers of authority throughout the Operation.[116] Without insight into this chain of command and control at any particular moment, and the extent to which Member States retained discretion to act without being under orders by the Council, it becomes extremely difficult, unless compelled to do so by national authorities *ex ante*, to determine whether acts or omissions should have been attributed to the Member States or the EU or both. As attribution is one of the cumulative conditions for the determination of responsibility of the EU, and in view of the legal fog surrounding the articulation of the *de jure* competence division in this field, this ambiguity constitutes yet another obstacle in establishing responsibility for human rights concerns within the context of Operation Sophia, to the detriment of individual rights-holders.[117]

1.2 Unlawful act (or omission)

Second, for non-contractual responsibility of the EU to arise, unlawful conduct must have been committed in violation of a norm of Union law, irrespective of whether the norm is founded in primary law, secondary law, or general principles of Union law.[118] The CJEU has clarified that for an unlawful act to be brought under an EU action for damages, the violation must qualify as "sufficiently serious."[119] This qualification was initially determined by reference to the amount of discretion retained by the Union and whether, being mindful of this discretion, the EU had "*manifestly and gravely*" overstepped the limitations the law concerned.[120] Accordingly when the EU enjoys little to no discretion, the mere violation of a rule of law will suffice in the qualification of an unlawful act.[121] Discretion of the Union is not assessed in a legal vacuum or in

[113]*See id.;* Wessel & Den Hertog, *supra* note 47, at 344.

[114]*See* Case C-455/14 P, H v. Council, EU:C:2016:212, ¶ 50–55, 66–68 (July 19, 2016).

[115]*See* Oberverwaltungsgericht Nordrhein-Westfalen, Urteil vom 18. September 2014, http://openjur.de/u/731026.html; Heliskoski, *supra* note 6, at 149–150.

[116]*See* Fiott, *supra* note 38, at 115.

[117]*See id.* at 29.

[118]*See* Lenaerts, Maselis & Gutman, *supra* note 94, at §§ 11.49–11.51; Case T-47/03, Jose Maria Sison v. Council of the European Union, ECLI:EU:T:2007:207, ¶ 234 (July 11, 2007).

[119]*See id.* at § 11.45; *see also* Bergaderm, *supra* note 99, at §§ 42–43.

[120]*See* Lenaerts, Maselis & Gutman, *supra* note 94, at § 11.45.

[121]*See id.*

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reference to a general domain of Union law, but is determined with reference to a specific situation, underscoring that whether an unlawful act has occurred, will be determined entirely depending on a case-to-case assessment by the Union courts *ex post facto*.[122]

Discretion of the Union has consistently permeated as a crucial and oftentimes overwhelming criterion in determining whether an unlawful act has occurred.[123] However, it is not the sole criterion, nor does it upstage other factors any longer.[124] This is demonstrated by the fact that the CJEU has increasingly turned to factors such as the complexity of a case,[125] the clarity of the concrete, binding legal obligations upon the Union[126], and the intentional character of the act or omission[127] to determine whether an act or omission was indeed unlawful or whether it could be considered excusable.[128] In the current analysis, the criterion of a clear and legally unambiguous provision of law particularly, may pose a problem in determining responsibility for the following reason.

Irrespective of the *nature* of the competence accorded to the Union within the realm of CSDP, Member States have effectively transferred powers to the Union to enact measures and policies in this field. By establishing Operation Sophia, the EU has acted and made use of these acquired competences, thereby triggering the applicability of Article 51 CFR and the Charter more generally. This provision holds that the rights and principles in the Charter "are addressed to the institutions and bodies of the Union . . . ." as a result of which the EU in enacting Operations Sophia and Irini, is directly bound by the *non-refoulement* principle in Article 19 CFR.[129]

Crucially however, the legal obligation of the EU to adhere to the *non-refoulement* principle, does not inform as to the concrete obligations, procedural and substantive, as well as negative and positive, that must be met by the EU to comply with this abstract legal obligation.[130] Human rights are not enforced and applied as abstract normative standards. To comply with human rights, such as the *non-refoulement* principle, a series of concrete positive and negative obligations must be met, both of a procedural and substantive nature. However, such enforceable concrete obligations have been consistently interpreted, enacted, and applied *vis-à-vis* States, the traditional duty-bearers of such obligations, and not yet *vis-à-vis* the EU. In the *Reparations Advisory Opinion* by the ICJ, it was held that "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights" and "the legal personality and rights and duties (of an international organization are not) the same as those of a state."[131] This raises the question of whether it is even possible to simply transplant the concrete obligations stemming from the

[122]*See* Fink, *supra* note 50, at 208–209.

[123]*See* Lenaerts, Maselis & Gutman, *supra* note 94, at § 11.45.

[124]*See* Fink, *supra* note 50, at 219.

[125]*See* Case T-364/03, Medici Grimm KG v. Council of the European Union, ECLI:EU:T:2006:28, ¶¶ 87 (Jan. 26, 2006).

[126]*See* Case C-392/93, The Queen v. H.M. Treasury, *ex parte* British Telecommunications, ECLI:EU:C:1996:131, ¶ 43 (Mar. 26, 1996); Case C-283/94, Denkavit Int'l and Others v. Bundesamt für Finanzen, ECLI:EU:C:1996:387, ¶¶ 51–52 (Oct. 17, 1996).

[127]*See* Case T-364/03, Medici Grimm KG v. Council of the European Union, ECLI:EU:T:2006:28, ¶ 87 (Jan. 26, 2006).

[128]*See* Case C-282/05, Holcim (Deutschland) v. Comm'n, ECLI:EU:C:2007:226, ¶ 50 (Apr. 19, 2007); Lenaerts, Maselis & Gutman, *supra* note 94, at § 11.60.

[129]Indirectly, the Union is arguably also bound by the *non-refoulement* principle as protected in Article 3 ECHR due to Article 52(3) CFR concerning corresponding rights. As held by the Explanations to the Charter, the prohibition of *refoulement* in Article 19(2) CFR corresponds to Article 3 ECHR, as a result of which protection under the Union regime may not fall below the normative baseline provided by the ECHR and corresponding case law. Anne Thies, *Principles of EU External Action*, *in* EU External Relations Law 56–57 (Ramses A. Wessel & Joris Larik eds., 2020); Case C-402/05P, Yassin Abdullah Kadi and Al Barakaat Int'l Found. V. Council of the European Union and Comm'n of the European Cmtys, ECLI:EU:C:2008:461, ¶¶ 278–330 (Sept. 3, 2008).

[130]*See* Casteleiro, *supra* note 112, at 14; Pierre Klein, *Responsibility*, *in* The Oxford Handbook of International Organizations 1034–35 (Jacob Katz Cogan, Ian Hurd & Ian Johnstone eds., 2016); Jan Klabbers, An Introduction to International Institutional Law 284 (2009).

[131]*See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11); Pellet, *supra* note 10, at 7.

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applicable (state-centric) human rights standards to the EU. Contrary to the view adopted by NAERT who argues that substantive legal interoperability issues will not arise in CSDP operations between Member States and the EU, it is argued that in fact Member States and the EU should be and are subject to *different* concrete substantive obligations under the human rights framework.[132] This line of reasoning is put forward by Pellet, who argues more generally that the principle of specialty (limiting the functional competences of organizations), as well as the limited resources available to international organizations prevent automated transplants of concrete state-oriented obligations to international organizations.[133]

Applying this to Operation Sophia and the *non-refoulement* principle, it is hard to conceive how the EU could abide for example, by the procedural positive obligation of a "duty to investigate, proprio motu, any situation of need for international protection . . . ."[134] This is precisely because the prerogative of border control remains integral to the sovereignty of States.[135] Similarly, it is uncertain how the Union can abide by the negative obligation to refrain from sending individuals back to Libya without having any actual border guards at its disposal. While the Union is bound on the surface, to respect the Charter, *de facto* it is unclear what concrete standards would have to be met. Similarly, concerning aerial surveillance conducted by Operation Sophia, it is uncertain whether the EU has overstepped any *enforceable* legal obligations, despite the actions resulting in the essence of the *non-refoulement* obligation being violated.

The *ClientEarth* case arguably provides some guidance in this respect.[136] The case concerned the Aarhus Convention[137] which was invoked by the Applicant ClientEarth, in order to challenge Regulation 1049/2001 concerning public access to documents. Article 4(2) of Regulation 1049/2001 had been invoked by the European Commission in an attempt to prevent full access to studies concerning Member State compliance with environmental safeguards, which ClientEarth reasoned was at odds with Article 4(4) of the Aarhus Convention.[138] Although Member States and the Union alike are party to the Aarhus Convention, the CJEU held that "that convention was manifestly designed with the national legal orders in mind, and not the specific legal features of institutions of regional economic integration, such as the European Union, even where those

[132]*See* Naert, *supra* note 39, at 679, 684–85. Naert refers to "legal interoperability" to indicate when in one operation, different actors are subject to differing international obligations, claiming that the substantive obligations will not differ within the context of CSDP operations. This would entail that practically, it is of little relevance whether an unlawful act within the context of CSDP operations and human rights law, is attributed to the Union or the Member States. However, international organizations have limited and functional legal personality, which cannot be equated to that of States. Whereas the contemporary, international human rights framework has been developed and interpreted to regulate the dynamic between Member States and individuals, it is difficult to maintain that the same substantive obligations that are applicable to States, should be merely transposed to international organizations such as the EU. *See also* Christian Tomuschat, *Attribution of International Responsibility: Direction and Control*, *in* THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION – EUROPEAN AND INTERNATIONAL PERSPECTIVES 8–9 (Malcolm Evans & Panos Koutrakos eds., 2013); Jean-Marc Thouvenin, *Responsibility in the Context of the European Union Legal Order, in* THE LAW OF INTERNATIONAL RESPONSIBILITY 868 (Kate Parlett, James Crawford, Simon Olleson & Alain Pellet eds., 2015).

[133]*See* Pellet, *supra* note 10, at 7.

[134]*See* Hirsi-Jamaa et al. v. Italy, App. No. 27765/09, Eur. Ct. H. R., at § 11 (2012), Concurring Opinion of Judge Pinto De Albuquerque; Moreno-Lax, *supra* note 25, at 424.

[135]*See* Hirsi-Jamaa et al. v. Italy, App. No. 27765/09, Eur. Ct. H. R., at § 113 (2012).

[136]*See* Case C-612/13P, ClientEarth and Pesticide Action Network Europe (PAN Europe) v. European Food Safety Auth., ECLI:EU:C:2015:489, ¶ 489 (July 16, 2015).

[137]*See* Council Decision of 2005/370 of 17 February 2005 on the Conclusion, on Behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2005 O.J. (124) 1 (EC).

[138]*See, e.g.*, Laurens Ankersmit and Benedikt Pirker, *Review of EU Legislation under EU international agreements revisited: Aarhus receives another blow*, EUR. L. BLOG (Nov. 17, 2015), https://europeanlawblog.eu/2015/11/17/review-of-eu-legislation-under-eu-international-agreements-revisited-aarhus-receives-another-blow/.

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institutions can sign and accede to the Aarhus Convention, under Articles 17 and 19 thereof."[139] Following this reasoning, the CJEU held that nothing in the invoked provisions by the Applicants could be construed as "imposing a precise obligation on the EU legislature," which would result in the invalidation of Regulation 1049/2001.[140] In other words, within the realm of environmental law—a shared competence between the Union and its Member States—it is posited that being legally bound by the same agreement does not have as a necessary consequence that the concrete obligations under such multilateral agreements are analogously applicable to the Member States and the Union. This could suggest a reluctance of the Court to simply transpose the substantive obligations of the fundamental rights directed at Member States—under the CFR and the ECHR—to the EU[141]

1.3 Rule of law intended to confer rights

Additionally, the EU responsibility regime holds that non-contractual responsibility will only arise insofar a rule of law was intended to confer rights on an individual. This condition has been subject to some debate and has appeared in the case law of the Court in various terminological variations, which in turn, inevitably results in ambiguity as to its scope and meaning.[142] However, the CJEU has already clarified that the foregoing condition does not require the rule of law to have direct effect.[143] *Grosso modo* it can be held however, that direct effect is at the very least an indication that the provision concerned is intended to confer rights on an individual.[144] While provisions in the Charter may not always enjoy direct effect, they are intended to confer rights on individuals, as a result of which this particular condition will not pose any significant difficulties for individual TCNs claiming damages from the EU.

2. Joint responsibility

Finally, as is the case under international law, the CJEU has recognized the possibility of both independent EU responsibility, as well as joint responsibility between the EU and the Member States.[145] Nollkaemper compellingly argues that joint responsibility serves the purpose of facilitating and ensuring legal redress for individual applicants who would otherwise be unduly burdened in attempting to identify what actor is responsible for what acts, and would incentivize the EU to determine *ex ante* what actors bear which burden.[146]

Without delving into the various different conceptualizations of joint responsibility under both domestic and international law,[147]which is beyond the remit of the present Article, suffice it to say that much ambiguity persists as to the precise meaning of such forms of responsibility.[148] The CJEU has, on sparse occasions, acknowledged, particularly in the field of mixed agreements generally and environmental law specifically, that such joint responsibility may be possible insofar no initiatives were taken to the contrary.[149] Given the seemingly broad reference to joint

[139]Case, C-612/13P, ClientEarth and Pesticide Action Network Europe (PAN Europe) v. European Food Safety Auth., ECLI:EU:C:2015:489, ¶ 40 (July 16, 2015).

[140]*Id.* at §§ 40–43.

[141]*See e.g.,* André Nollkaemper, *Joint Responsibility Between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements, in* The External Environmental Policy of the European Union–EU and International Law Perspectives 328 (Elisa Morgera ed. 2012).

[142]*See* Lenaerts, Maselis & Gutman, *supra* note 94, at § 11.48; Fink, *supra* note 50, at 209.

[143]*See* Lenaerts, Maselis & Gutman, *supra* note 94, at § 11.48; Fink, *supra* note 50, at 199–200.

[144]*See* Fink, *supra* note 50, at 200.

[145]*See* Nollkaemper, *supra note* 141.

[146]*See id.* at 306 (noting in this regard however, that the Union and its Member States may purposely facilitate this ambiguity precisely to avoid potentially successful claims for damages).

[147]Joint responsibility predominantly finds its inspiration in domestic legislation and has only been used sparsely in international legal instruments and case law.

[148]*See* Nollkaemper, *supra* note 141, at 308 –319.

[149]*See* Case C-239/91 Comm'n of the European Cmtys v. French Republic, 2004 E.C.R. I-09325; Nollkaemper, *supra* note 141, at 305.

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responsibility, it could be argued that joint responsibility here would refer both to the notions of *concurrent* or *cumulative* responsibility, whereby the EU acts in a matter that facilitates an internationally wrongful act committed by (a) Member State(s), as well as *cooperative* responsibility whereby the Member State(s) and the EU alike commit one undivided unlawful act leading to injury and the need for reparation.[150] Irrespective of the type of joint responsibility however, a number of precursory remarks are in order.

First, joint responsibility refers to situations where multiple actors are involved in the commission of one—or potentially composite—unlawful act(s). Particularly in the field of cooperation between Member States and international organizations such as the EU, it is very conceivable unlawful human rights conduct,[151] may be attributed to both the EU and Member States on account of joint involvement therein. However, EU legislation does not, unlike international law, make a clear conceptual distinction between scenarios where the Union could be held individually responsible, or alternatively, where both Member States and the EU alike could be held responsible.[152] Rather, the determination of the extent to which and what actor will ultimately be held responsible, as well as what actor will have to make good on the damages claimed, is ultimately determined by attribution. In turn, as established by the CJEU, attribution of conduct under EU law will be determined by the competences enjoyed by the respective actors *and* by the margin of discretion that is retained by the various actors in the exercise of those competences, entailing an assessment *ex post facto*.[153]

Second and in any event, it would be necessary to determine by what human rights obligations the Union is effectively bound. [154] The mere fact that both the Member States and the EU are bound by the same legal instrument, does not automatically entail that the concrete obligations imposed upon the various actors will be identical.[155] Irrespective of the form or nature of the joint responsibility, the constituent elements of action for damages under the EU regime would still have to be met. In other words, even under joint responsibility, it would still need to be determined whether there was an unlawful act at the behest of the Union resulting in damage that is attributable to the EU. Consequently, the same issues, as discussed previously, that arise under independent responsibility, would also arise under joint responsibility.

[150]In this study "joint responsibility" functions as an umbrella term that references both composite acts by different actors that result in one undivided injury, joint unlawful acts between the Member States and the Union that also result in one undivided injury, as well as any other dynamic that results in one undivided injury. The relevance of the terminological distinctions in joint responsibility is limited in the present study as the constituent elements to determine whether such responsibility has arisen, still require that attribution and an internationally wrongful act be established. The issues that arise with respect to the determination of attribution and an internationally wrongful act under *independent* responsibility, remain applicable under any conceptualisation of joint responsibility. *See* André Nollkaemper, *Shared Responsibility for Human Rights Violations: a Relational Account, in* Human Rights and the Dark Side of Globalisation – Transnational law enforcement and migration control 29–30 (Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen eds., 2017).

[151]*See* Johansen, *supra* note 86, at 182.

[152]In fact, the CJEU conflates the notions of joint responsibility under international law and joint responsibility under EU law at times. *See* Nollkaemper, *supra* note 142, at 319–20.

[153]*See* Lenaerts, Maselis & Gutman, *supra* note 94, at § 11.25.

[154]*See supra* 192–196.

[155]*See* Case C-612/13P, ClientEarth and Pesticide Action Network Europe (PAN Europe) v. European Food Safety Auth., ECLI:EU:C:2015:489, ¶¶ 40–41 (July 16, 2015); Nollkaemper, *supra* note 142, at 328. In the aforementioned case, a declaration was attached to the Aarhus Convention, which reiterated that "*the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.*" § 41. In addition, the references are of course relevant to the field of environmental law. However, analogies may be drawn with respect to human rights law, as following Article 51 CFR, the EU and Member States alike are bound by the Charter, albeit that the binding nature of the Charter may not adversely affect the competences of the Union.

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C. Analysis and Alternative Forms of Legal Recourse

The principle at the basis of Article 340 TFEU, is that the actor causing the injury or damage must be held responsible and pay reparations.[156] Despite the deceptive simplicity of this principle, a number of—sometimes—significant obstacles, hamper access to an effective remedy for TCNs who were subjected to push and pull practices as a result of Operation Sophia. First, significant jurisdictional issues arise with respect to CFSP jurisdiction before the EU courts, and this despite the more expansive approach adopted by the Court in recent years. Additionally, practice shows that the determination of what actor caused the damage oftentimes results in murky waters, because this is determined by reference to the decision-making powers of the EU and the Member States, as well as the retained discretion in specific cases.[157] This again requires a subjective *ex post facto* case-to-case assessments. The standard used to assess this discretion is that of "genuine discretion," comparable to the standard used in international law. However, when applying this to Operation Sophia particularly in the field of non-pre-emptive shared competences and operational measures enacted by both Member States and the EU, it becomes near impossible to determine what actor was responsible for what acts and omissions "in theatre." Finally, the functional specialty inherent to international organizations generally, and the EU specifically make it difficult to entertain the idea that the EU and the Member States would both be bound by the same concrete human rights obligations, frustrating any attempt to hold the EU responsible for contributing to violations of the *non-refoulement* principle. Nevertheless, it is clear that by making use of aerial surveillance and training the LYCG, the EU's Operation Sophia contributes to situations where TCNs are prevented from leaving Libya *and* from asking for international protection. This is aggravated by the absence of effective legal pathways to facilitate access to international protection procedures from abroad.[158] The combined effect of these measures, ensure that the essence of the *non-refoulement* principle is disregarded altogether, without any effective access to legal review of these measures.

Recourse to the EU on responsibility does not provide any *effective* access to legal redress to TCNs on account of both procedural and substantive obstacles and cannot be considered a self-contained regime[159] to be relied upon by individuals within the context of Operation Sophia. Alternatively, recourse to general international law on the responsibility of international organizations—as incorporated in the Articles on the Responsibility of States—could be considered as an alternative path for redress. However, here too responsibility is conditioned on attribution and the determination of an internationally wrongful act.[160] Despite the terminological variations, the same pathologies that apply to attribution under the EU-regime and the determination of what concrete human rights obligations the EU is bound by, (re-)surface here as well. Furthermore, from a procedural perspective, there is currently no international court or tribunal with jurisdiction to assess the EU's conduct in its CFSP/CSDP-missions and any attempt to bring the EU before international adjudication would first require overcoming the hurdle of extra-territorial application of fundamental rights.

Heliskoski notes that it is not excluded for domestic Member State Courts to exercise jurisdiction concerning damage claims against the EU for conduct during CFSP/CSDP missions. Based on the Article 274 TFEU holding that "Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that

[156] *See* Lenaerts, Maselis & Gutman, *supra* note 94, at § 11.24.

[157] *See id.* at § 11.25.

[158] *See* Moreno-Lax, *supra* note 25, at 450; Case C-638/16, X. and X. v. État belge, ECLI:EU:C:2017:93, ¶ 158 (Mar. 7, 2017); Opinion of Advocate General Mengozzi, Case C-638/16, X. and X. v. État belge, ECLI:EU:C:2017:93, ¶ 173 (Mar. 7, 2017); M.N. v. Belgium, App. No. 3599/18, Eur. Ct. H. R. (2020).

[159] *See* Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483 (2006).

[160] *See* International Law Commission, Draft Articles on the Responsibility of International Organizations, May 30, 2011, A/66/10.

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ground be excluded from the jurisdiction of the courts or tribunals of the Member States," AG Kokott advances in *Opinion 2/13* that the principled monopoly on jurisdiction enjoyed by the CJEU following Article 275 TFEU, does not apply to CFSP/CSDP measures.[161] This same line of reasoning was followed by AG Wahl in *H v. Council*.[162] This however, negates the exclusive jurisdiction the CJEU enjoys in terms of actions for damages against the EU in accordance with Article 268, 340 and 344 TFEU. From a more practical perspective, it would be anyone's best guess how domestic Member State courts could make such determinations concerning attribution and the determination of an unlawful act, much less the means by which potential findings of responsibility would be enforced.[163] Finally, in the hypothesis that the Member States *would* enjoy certain limited jurisdiction in the matter, the risk of forum shopping and the risk of inequality between individual applicants would have to be avoided, in order not to upset the duty of loyal cooperation, the principle of legal certainty, and the effectiveness of EU law. As it stands domestic courts also do not appear to be a plausible path for legal recourse against conduct by the EU in CSDP-missions such as Operation Sophia.

D. Conclusion

When assessing whether the EU can be held responsible for alleged complicity in human rights violations in CSDP Operation Sophia, a number of interim conclusions can be drawn. Despite the available theoretical normative framework for the determination of responsibility, and notwithstanding the incremental developments in the case law of the Court concerning CFSP/CSDP, in practice structural obstacles arise and hamper an effective remedy against acts of the EU for Operation Sophia.

In addition to the jurisdictional pitfalls inherent to CFSP/CSDP measures, as well as the complicated competence-division bearing relevance on the attribution question, the determination of an unlawful act or omission further complicates the EU responsibility. Given the functional and heterogenous legal personality of the EU which distinguish it from its member states and other subjects of international law, it is currently not possible to definitively distill pre-defined, concrete positive, negative, substantive, and procedural obligations the EU is bound by. Recalling that traditionally, human rights have regulated the dynamic between States and the individual, this has as a consequence that it is hard to determine when, if at all, an international organization such as the EU has effectively violated a fundamental right through act or omission.

The reliance on international law or domestic jurisdictions does not convincingly or sufficiently provide TCNs with an effective remedy against acts of the EU in CSDP-missions, entailing that currently, a significant responsibility and reparations gap tarnishes the adjudication regime of the EU. Member States remain responsible for their own conduct in such missions and could ultimately be the addressee of TCN claims for damages within domestic jurisdictions.[164] Similarly, the Athena mechanism with its own legal personality could be addressed by individual applicants in legal proceedings in attempts to obtain relief.[165] Finally, alternative, amicable, dispute mechanisms and claims commissions are triggered and used to settle any claims stemming from CFSP/CSPD-measures.[166] And while these alternative paths may meet the immediate reparations needed by individual applicants, the *ad hoc* nature of these mechanisms as well as the lack of transparency thereof, do not appear reconcilable with the right to an effective remedy and a EU based on the

[161]Opinion of Advocate General Kokott, 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms), EU:C:2014:2475, ¶¶ 99-100 (June 13, 2014).

[162]*See* Opinion of A.G. Wahl of 7 April 2016, *H v. Council,* C-445/14P, ECLI:EU:C:2016:212, §§ 41–44, 101–103.

[163]*See* Johansen, *supra* note 86, at 203–204.

[164]*See* Heliskoski, *supra* note 6, at 147; BUTLER, *supra* note 11, at 157; Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98 ¶ 152 (June 30, 2005).

[165]*See* Heliskoski, *supra* note 6, at 139–142.

[166]*See id.* at 136.

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rule of law that was so boldly proclaimed in *Rosneft* and repeated numerously since. Nor do these Member State-oriented procedures answer the question whether it is even possible for the Union to discharge its duties under Article 340 TFEU in the realm of CFSP/CSDP.

Mindful of the ongoing negotiations on the accession of the EU to the ECHR, the increasingly prevalent rule of law arguments within the Court's case law and the legal lacuna that persists in CFSP/CSDP missions which prevents individual applicants from enjoying the right to an effective remedy, a cognitive shift is needed. The focus of any accession agreement should be on the *raison d'être* of fundamental rights, and the *effective* enforcement of these rights in an evolving governance landscape. *Ad hoc* and *post-facto* determinations of attribution and the wrongfulness of conduct in the absence of clearly defined rules, should be limited where possible in favor of legal certainty. In doing so, *substantively* tailored accession of the EU to the ECHR, where sufficient pre-emptive consideration is given to individual human rights provisions and *how* the obligations stemming therefrom should be discharged by the EU, could prove to be instrumental in ameliorating effective remedies within and outside of the scope of CFSP/CSDP. More generally, an exploration into "relational human rights responsibility"—inspired by Nollkaemper's study of shared responsibility—is crucial. Relational human rights responsibility could entail a new regime for the allocation of legal responsibility, which more adequately captures the dynamic at play when states, and international organizations (as well as private corporations) cooperate in overcoming transnational concerns, and such cooperation detrimentally impacts individual human rights. Absent any evolution in the matter, legal relief for individual applicants against unlawful conduct by the EU—particularly in CFSP/CSDP—is at risk of being no more than smoke and mirrors.

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