



SUING THE EUROPEAN UNION IN THE UK: *TOMANOVIĆ ET. AL. V. THE EUROPEAN UNION ET. AL.*

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ABSTRACT: In its judgment of 13 February 2019 in the case of *Tomanović et.al. v. the European Union et.al.*, the English High Court of Justice dismissed several claims based on human rights violations by EULEX Kosovo. Although the High Court's dismissal was ultimately based on the lacking incorporation of the Treaty provisions on the Common Foreign and Security Policy into domestic law, the judgment contains extensive *obiter dicta* discussing key Union law matters. In this *Insight* I summarize, contextualize and reflect critically upon the High Court's reasoning. In particular, I focus on the extent of the Court of Justice's jurisdiction over – and the application of the *Foto-Frost* principle to – the CFSP.

KEYWORDS: domestic courts – Common Foreign and Security Policy – Art. 274 TFEU – Art. 275 TFEU – immunities – accountability.

I. INTRODUCTION

Does the EU, the Council, and/or the High Representative for Foreign Affairs have legal personality under English law? If so, does the European Communities Act, the Union's immunity, and/or the *Foto-Frost* principle prevent English courts from exercising jurisdiction? And finally: how does “Brexit” affect these issues?

These are the key legal questions answered by the English High Court of Justice in its 13 February 2019 judgment in the case of *Tomanović et.al. v The European Union, The Council of the European Union, The High Representative of the Union for Foreign Affairs and Security Policy, and the European Union Rule of Law Missions in Kosovo* (hereafter referred to simply as *Tomanović*).¹

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¹ High Court of Justice, Queen's Bench Division, judgment of 13 February 2019, *Tomanović et.al. v. the European Union et.al.* [2019] EWHC 263 (QB).

II. BACKGROUND

The underlying facts in *Tomanović* concern nine ethnic Serbs who were tortured, killed, or made to disappear because of their ethnicity. These crimes occurred in Kosovo in 1999 and 2000. The individuals bringing claims against the UK in *Tomanović* are immediate family members of the nine aggrieved Serbs. The claimants based their argument on the failure of the European Union Rule of Law Missions in Kosovo (EULEX Kosovo)² to investigate the crimes properly – in violation of e.g. Arts 2 and 4 of the Charter of Fundamental Rights of the European Union. The remedies the claimants sought before English courts were 1) a declaration that the European Union *et.al.* are in violation of their human rights, and 2) damages.

The defendants – the EU itself and an array of Union bodies and agents – were represented by the Commission. The Commission firstly argued that, among these, only the EU itself has legal personality under English law. Secondly, the Commission argued that English courts do not have the competence to order declaratory relief, and that jurisdiction to grant damages against the EU for non-contractual liability lies exclusively with the Court of Justice of the European Union (CJEU). English courts therefore had to dismiss the case for lack of jurisdiction.

Having read this far, one may wonder why this case ended up in English courts. The answer is that this was far from the first accountability mechanism that the claimants tried to avail themselves of. Back in 2014 the claimants brought their allegations of human rights violations before the Human Rights Review Panel (HRRP), which was set up to hold EULEX Kosovo accountable towards individuals. In 2015 and 2016, the HRRP found that the alleged human rights violations had occurred, and made several detailed recommendations for remedial action by EULEX Kosovo.³ Since the HRRP is “not empowered to order or recommend financial compensation”,⁴ its recommendations were insufficient from the claimants’ point of view.⁵ Moreover, EULEX Kosovo never fully implemented the HRRP’s non-binding recommendations.⁶

² For a comprehensive work on EULEX Kosovo, with a focus on accountability, see M. SPERNBAUER, *EU Peacebuilding in Kosovo and Afghanistan: Legality and Accountability*, Leiden: Brill, 2014.

³ HRRP: *L.O. v. EULEX* (Decision and findings, 11 November 2015) case 2014-32; *Veselinović et.al. v. EULEX* (Decision and findings, 19 October 2016) joined cases 2014-11 to 2014-17.

⁴ HRRP, *Zahiti v. EULEX* (Decision and findings, 4 February 2014) case 2012-14, para. 66.

⁵ And, arguably, also in light of the human right to remedy. See in this respect S.Ø. JOHANSEN, *The Human Rights Accountability Mechanisms of International Organizations: A Framework and Three Case Studies*, PhD thesis, University of Oslo, 2017, pp. 200-201, on file with the author.

⁶ HRRP: *L.O. v. EULEX* (Second decision on the implementation of the panel’s recommendations, 7 March 2017) case 2014-32; *Veselinović et.al. v. EULEX* (Decision on the implementation of the panel’s recommendations, 7 March 2017), joined cases 2014-11 to 2014-17.

Yet, in the face of insufficient remedies and non-compliance, wouldn't the CJEU⁷ be a more suitable forum than English courts? As long as the CJEU has sufficient jurisdiction, it would indeed be. But here lies the difficulty. While the jurisdiction of the CJEU is in principle general, there is one important exception: it shall not have jurisdiction over the provisions on the Common Foreign and Security Policy (CFSP).⁸

Three of the claimants nevertheless attempted to bring their cases before the CJEU first. One had her case dismissed by the General Court as due to manifest lack of jurisdiction and manifest inadmissibility.⁹ She did not appeal that decision to the Court of Justice. Two of the other claimants applied for legal aid to bring their cases before the General Court, but ultimately chose not to pursue their CJEU cases after the judgment of the Court of Justice in the *H v. Council* case was handed down in July 2016.¹⁰

Seeing no path to accountability before the CJEU, the claimants therefore brought their cases before English courts. It is neither obvious nor simple to explain the choice of English courts rather than the courts of other EU member states. Just over 6 months prior to filing the *Tomanović* claims before English courts, the claimants had filed a claim against the UK Foreign and Commonwealth Office, the Ministry of Defence and others (the FCO claim). The basis for the FCO claim was alleged failures to take measures to ensure that the UK complied with its human rights obligations in relation to a seconded employee that served as EULEX's Chief Prosecutor of the Special Prosecution Office of the Republic of Kosovo (para. 21). The FCO claim was not pursued by the claimants (para. 22). Nevertheless, it is possible that the fact that the Chief Prosecutor was a seconded UK official had some bearing on the choice of venue.

III. THE ISSUE OF LEGAL PERSONALITY

The first issue the High Court had to decide was whether the European Union, the Council, and/or the High Representative had legal personality under English law. Since treaties do not become part of English law unless and until they are incorporated by legislation, international organizations only attain legal personality in English law through legislation.

⁷ I use the term CJEU as referring to *the EU institution* composed of two courts: the General Court and the Court of Justice. This is also how the term is used in the EU treaties, see e.g. Art. 19, para. 1, TEU.

⁸ See Arts 19, para. 1, and 24, para. 1, TEU and Art. 275, para. 2, TFEU.

⁹ General Court, order of 14 December 2017, case T-840/16, *KS v. Council et al.* (unpublished, on file with author).

¹⁰ Court of Justice, judgment of 19 July 2016, case C-455/14 P *H v. Council et al.* [GC]. For commentary on the case, see e.g.: T. VERELLEN, *H v. Council: Strengthening the Rule of Law in the Sphere of the CFSP, One Step at a Time*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1041 *et seq.*; S.Ø. JOHANSEN, *H v. Council et al. – A Minor Expansion of the CJEU's Jurisdiction Over the CFSP*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1297 *et seq.*; G. BUTLER, *H v Council: Another Court Breakthrough in the Common Foreign and Security Policy*, in *EU Law Analysis*, 22 July 2016, eulawanalysis.blogspot.com.

With regard to the European Union itself, the High Court pointed to the fact that the European Communities Act incorporates the TEU and TFEU into English law. Consequently, the conferral of (international) legal personality to the Union by virtue of Art. 47 TEU also entails a conferral of English legal personality (para. 44).

With regard to the Council and the High Representative, the High Court found the TEU and TFEU silent on the question of legal personality. The International Organizations Act of 1968 did not confer personality on them either, as recognition of legal personality under that act requires an explicit “order-in-council” to recognize an organization’s legal personality under English law (para. 45). The High Court also referred to Art. 335 TFEU, as support for the conclusion that only the European Union shall enjoy legal personality in the domestic legal orders of EU member states (para. 47).

The High Court thus declared that neither the Council nor the High Representative have legal personality under English law, and set aside claim forms served on them (para. 48). On the other hand, while the High Court found that the European Union possessed English legal personality, questions of jurisdiction and immunities remained.

IV. THE DECISIVE ARGUMENT: LACKING INCORPORATION OF THE CFSP PROVISIONS INTO DOMESTIC LAW

In the view of the High Court, the difficulties at the heart of *Tomanović* were “created by the political decision of the Member States to exclude the CFSP provisions of the Treaties from the jurisdiction of the Court of Justice”.

There is a different political decision, much closer to home, that ends up deciding the case, however: the non-implementation of the CFSP provision into English law. Interestingly, the provisions concerning the Common Foreign and Security Policy are explicitly carved out from the European Communities Act of 1972.¹¹ This “technical issue”, as the High Court termed it, was “an insurmountable hurdle” (para. 78):

“It is intrinsic to this claim that it arises out of the EU’s implementation of the EULEX Joint Action, which is a CFSP measure. This is a human rights claim arising under EU law in relation to a CFSP measure. This Court would only be able to assert jurisdiction by virtue of its nature as a CFSP-related claim. The human rights aspect and the CFSP aspect of the claim are inextricably linked. But we have not implemented the CFSP provisions of the Treaties in our law”.

Given the High Court’s characterization of the claim as CFSP-related, it had no choice but to decline to exercise jurisdiction. The High Court could even have wrapped up its judgment at this point, saying nothing further about the EU law issues of jurisdiction, immunities, etc. However, the High Court chose to discuss those issues in quite extensive *obiter dicta*.

¹¹ European Communities Act 1972 (as amended up until 1 April 2018) section 1, para. 2, let. s).

V. THE *OBITER DICTUM* ON JURISDICTION AND IMMUNITIES

V.1. THE HIGH COURT'S REASONING

The closely related issues of jurisdiction and immunities are key barriers to suits against international organizations in domestic courts. The constituent treaties of most international organizations contain provisions granting the organization so-called functional immunity.¹² Such treaty provisions are normally supplemented by a more detailed treaty or protocol on the privileges and immunities of the organization – within which it is routine to include provisions providing for absolute jurisdictional immunity.¹³

The provisions concerning the Union's jurisdictional immunity only partially mimic this classic pattern. Art. 343 TFEU grants the Union such immunities as are necessary for the performance of its tasks, "under the conditions laid down in" Protocol no 7 on the Privileges and Immunities of the European Union. Unusually, however, that protocol does not confer any *jurisdictional* immunity on the Union. Instead, the Union's jurisdictional immunity is set out in Art. 274 TFEU, which provides: "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 ground be excluded from the jurisdiction of the courts or tribunals of the Member States".

Read *a contrario*, Art. 274 establishes the Union's jurisdictional immunity in cases where the CJEU has exclusive jurisdiction. Due to the "extensive (and often exclusive) jurisdiction" of the CJEU, the Union's jurisdictional immunity is very broad.¹⁴ But it is not absolute.

In *Tomanović*, the High Court noted the lack of a provision in Protocol no 7 providing for absolute jurisdictional immunity for the Union (para. 75). However, it did not explicitly recognize the key role of Art. 274 TFEU plays in determining the scope of the Union's jurisdictional immunity. That said, the reasoning of the High Court implies that whether the CJEU has exclusive jurisdiction over a case is determinative of whether domestic courts may exercise jurisdiction.

The central jurisdictional issue for the High Court was thus whether the CJEU had (exclusive) jurisdiction over the claim. In other words: does the CFSP carve-out in Art. 24, para. 1, TEU and Art. 275, para. 2, TFEU apply in a *Tomanović* situation?

¹² See e.g. Art. 105, para. 1, Charter of the United Nations, and Art. 40, let. a), Statute of the Council of Europe.

¹³ See e.g. Art. II, section 2, of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, 1 UNTS 15; Art. III, section 4, of the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations of 21 November 1947, 33 UNTS 261; Art. 3 of the General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949, ETS no. 2.

¹⁴ R.A. WESSEL, *Immunities of the European Union*, in *International Organizations Law Review*, 2014, p. 402.

The scope of the CFSP carve-out has been the subject of a string of recent case law, to which the High Court referred.¹⁵ On this basis, it rightly found that “the exclusion of the jurisdiction of the Court of Justice is to be narrowly construed and the mere fact that an issue arises in an CFSP context does not mean it is excluded from the jurisdiction of the Court of Justice” (para. 79).

The High Court then went on to apply this to the case at hand. Branding the *Tomanović* case to be “the first case of its kind”, the High Court doubted that the CJEU would lack jurisdiction over it (para. 79). That was because the High Court found that there was “a strong argument” that a claim based on a human rights violation by one of the Unions organs or agents falls outside the scope of the CFSP carve-out if “the claim [...] does not seek to annul or declare invalid the sovereign policy choice that gives rise to that context” (para. 80).

The claimants in *Tomanović* were indeed not seeking to annul the CFSP decision that established EULEX Kosovo, but merely monetary damages (para. 81). Moreover, the one claimant that had her case dismissed by the General Court had sought a wide range of orders addressed to the Council, the Commission, and others to do various things – e.g. provide EULEX Kosovo with a budget that enables it to fulfil its mandate effectively. However, she apparently did not put forward a claim for damages before the General Court (para. 84).

The High Court put much emphasis on the fact that the General Court “did not have the opportunity to consider the arguments made by [her] in relation to a direct claim for damages” (para. 86). This – supported by a rather curious application of the *Foto-Frost* doctrine (see section VI below) – led the High Court to conclude, *obiter dictum*, that “the Court of Justice has exclusive jurisdiction over the matters raised” (para. 90).

Immediately thereafter, the High Court admitted that this conclusion was “uncertain”, and that it could only be resolved by a reference to the CJEU for a preliminary ruling (para. 90). Interestingly, though, the High Court went on to conclude that seeking such a preliminary ruling would not be proper. That was because the applicant had already gotten declaratory relief from the HRRP, and because any damages awarded by the High Court could not be enforced against the Union, due to its immunity against execution (para. 91).¹⁶ The High Court also hinted that it would not consider itself a *forum conveniens* (para. 92).

¹⁵ Court of Justice: judgment of 12 November 2015, case C-439/13 P, *Elitaliana SpA v. EULEX Kosovo; H v. Council et al.* [GC], cit.; judgment of 28 March 2017, case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty's Treasury et al.* [GC]; General Court, judgment of 25 October 2018, case T-286/15, *KF v. European Union Satellite Centre*.

¹⁶ With regard to the latter, see Protocol no 7 on the Privileges and Immunities of the European Union, Art. 1. What the High Court does not mention about this protocol is that the Court of Justice may authorize execution, see Art. 1. However, as I have argued in S.Ø. JOHANSEN, *The Human Rights Accountability Mechanisms of International Organizations*, cit., pp. 186-188, the CJEU should be precluded from au-

V.2. COMMENTS

The *obiter dictum* in *Tomanović* on the jurisdiction of the CJEU and domestic courts in CFSP matters is the most fascinating part of the judgment for European and international lawyers. It also appears to be the first of its kind. In the course of writing my PhD thesis,¹⁷ I tried my best to identify cases before domestic courts involving CFSP matters, but to no avail. Likely because there were no examples – until the High Court handed down its judgment in *Tomanović*.

The lack of attempts to bring CFSP matters before domestic courts is not surprising. Domestic courts tend to shy away from asserting jurisdiction over foreign states and international organizations.¹⁸ *Tomanović* lives up to this expectation of reluctance. The High Court's *obiter dictum* on jurisdiction and immunities indeed appears aimed at identifying (additional) grounds for dismissal, to further dissuade the claimants from pursuing their claims.

The strongest hint that the High Court pursued a strategy of avoidance is its tendentious interpretation of the case law on the CJEU's jurisdiction over the CFSP.

The cases referred to in support of that conclusion (*Elitaliana*, *H*, *KF*, and *Rosneft*)¹⁹ only nibble away at the outer edges of the CFSP carve-out. All of them concern the peripheral area of the carve-out, where its applicability is far from obvious. Indeed, in three of the four cases the exercise of jurisdiction hinges on the connections between the subject matter of the cases and other parts of Union law. *Elitaliana* concerned alleged violations of public procurement rules in the award of a contract “which gave rise to expenditure to be charged to the European Union budget”, and thus subject to the provisions of the Financial Regulation.²⁰ The *H* and *KF* cases concern “purely acts of staff management which [...] were not intended to support the conduct, definition or imple-

thorizing enforcement of a judgment against the EU concerning a CFSP matter, due to CFSP carve-out in Art. 24, para. 1, TEU and Art. 275, para. 2, TFEU.

¹⁷ S.Ø. JOHANSEN, *The Human Rights Accountability Mechanisms of International Organizations*, cit.

¹⁸ In addition to relying on jurisdictional immunity, domestic courts tend to use other “avoidance techniques” when faced with cases against international organizations, see A. REINISCH, *International Organizations Before National Courts*, Cambridge: Cambridge University Press, 2000, chapters 2 and 4.

¹⁹ These cases have been extensively discussed in the literature, see for example: C. ECKES, *Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction*, in *European Law Journal*, 2016, p. 492 *et seq.*; R.A. WESSEL, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 439 *et seq.*; M. CREMONA, “Effective Judicial Review Is of the Essence of the Rule of Law”: Challenging Common Foreign and Security Policy Measures Before the Court of Justice, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 671 *et seq.*; G. BUTLER, *The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy*, in *European Constitutional Law Review*, 2017, p. 673 *et seq.*

²⁰ *Elitaliana SpA v. EULEX Kosovo*, cit.; Regulation (EC, Euratom) 1605/2002 of the Council of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, as amended by Regulation (EU, Euratom) 1081/2010 of the European Parliament and of the Council of 24 November 2010.

mentation of the CFSP".²¹ In the fourth case, *Rosneft*, the Court of Justice merely expanded (or simply confirmed?) that the limited jurisdiction that the Court *does* have over CFSP matters may also be exercised in preliminary reference cases.²²

Tomanović, on the other hand, concerns the very core of what the CFSP carve-out intends to exclude from the CJEU's jurisdiction: the operational activities of a CFSP mission. There are already strong indications to that effect. As mentioned above, one of the claimants had her case dismissed by the General Court due to manifest lack of jurisdiction.²³ In doing so, the General Court distinguished the case before it from *H v Council* since it did not concern "the operational management of [...] personnel".²⁴ It also distinguished it from *Elitaliana*, as it was "not a case of a dispute over the validity of an act adopted for operational reasons by a CFSP body *but based on provisions covered by the TFEU*".²⁵

True, the General Court's dismissal does not finally determine the issue of CJEU jurisdiction – for two reasons: First, the claimant in question chose not to appeal it. Second, since the applicant did not bring a claim for damages, the General Court did not discuss whether its jurisdiction could be broader for such claims.

In *Tomanović*, the High Court latches onto the last of these straws, arguing that the CFSP carve-out may not cover actions for damages. This is not a novel idea.²⁶ However, Art. 24, para. 1, TEU and Art. 275, para. 2, TFEU do not refer to any particular heads of jurisdiction. Put differently, the CFSP carve-out is an exclusion of jurisdiction *ratione materiae*. This is plain from the text of the provision, and also supported by *Rosneft*, where the Court of Justice interprets the mention of Art. 263 in the text of Art. 275 as a reference to the type of decision rather than the form of action.²⁷ Moreover, the General Court has found that an action for damages "allegedly suffered as a result of the adoption of an act relating to the CFSP" are covered by the carve-out.²⁸

The High Court's *obiter dictum* conclusion that the CJEU would have jurisdiction is therefore not persuasive. Moreover, if the CJEU would not have jurisdiction over the claims brought in *Tomanović*, it follows from the text of Art. 274 TFEU that domestic courts would have jurisdiction. This would be the only way to uphold the notion that Union law has a complete system of judicial remedies, as well as Art. 19, para. 1, TEU and Art. 47 of the Charter of Fundamental Rights.

²¹ *KF v. European Union Satellite Centre*, cit., para. 91.

²² *Rosneft Oil Company OJSC v. Her Majesty's Treasury et al.* [GC], cit.

²³ *KS v. Council et al.*, cit.

²⁴ *Ibid.*

²⁵ *Ibid.*, para. 13 (emphasis added).

²⁶ See e.g. C. ECKES, *Common Foreign and Security Policy*, cit., pp. 508-511.

²⁷ *Rosneft Oil Company OJSC v. Her Majesty's Treasury et al.* [GC], cit., para. 70.

²⁸ General Court, judgment of 18 February 2016, case T-328/14, *Jannatian v. Council*, paras 30-31. The same conclusion was reached by the CJEU in its pre-Lisbon case law, see the discussion in P. KOUTRAKOS, *Judicial Review in the EU's Common Foreign and Security Policy*, in *International & Comparative Law Quarterly*, 2018, pp. 27-28.

To conclude, it is highly unlikely that the CJEU would assert jurisdiction in a case like *Tomanović*. The High Court's conclusion to the contrary is therefore nothing but a fig leaf intended to conceal that its dismissal of the case will likely result in a complete denial of justice to the claimants.

VI. THE *OBITER DICTUM* ON THE SIGNIFICANCE OF *FOTO-FROST*

VI.1. THE HIGH COURT'S REASONING

The High Court relies on the *Foto-Frost* principle as a supporting argument for its conclusion that the CJEU does indeed have jurisdiction over the *Tomanović* claims. According to this principle, domestic courts do not have the power to annul Union acts.²⁹ Annulment of Union acts is one of the CJEU's prerogatives.³⁰

There has been some debate as to the applicability of the *Foto-Frost* principle to the CFSP. The High Court recognized this, by referring to the difference of opinion between AG Kokott in her view provided in the context of Opinion 2/13 (rejecting the applicability of *Foto-Frost*) and AG Wahl in his opinion in the *H* case (affirming the applicability of *Foto-Frost*).³¹ Since the CJEU has yet to decide the matter, the High Court was free to side with either. It preferred AG Wahl's view that the *Foto-Frost* principle is indeed applicable to the CFSP.

While the High Court followed AG Wahl in concluding that the *Foto-Frost* principle is applicable to the CFSP, it departed from AG Wahl's analysis when it came to the consequences of that. As AG Wahl explicitly states in his opinion, domestic courts lack the power to annul Union acts "in spite of the fact that there is no EU Court that can exercise that power".³² Conversely, the High Court used the applicability of the *Foto-Frost* principle as an argument in support of its conclusion that the CJEU has jurisdiction over the *Tomanović* claims (para. 89).

The High Court also construed the principle broadly, so that "a finding by a national court of non-contractual liability of the EU giving rise to damages [for a CFSP-related claim] would breach the *Foto-Frost* principle" (para. 89). In contrast, AG Wahl concluded that domestic courts could "suspend the applicability of the [CFSP-related] act vis-à-vis the applicant and, where appropriate, award damages".³³

²⁹ Court of Justice, judgment of 22 October 1987, case 314/85 *Foto-Frost*, para. 15.

³⁰ *Ibid.*, para. 17.

³¹ View of AG Kokott delivered on 13 June 2014, Opinion 2/13 of 18 December 2014, para. 100; Opinion of AG Wahl delivered 19 July 2016, case C-455/14 P *H v. Council et al.*, para. 102.

³² Opinion of AG Wahl delivered 19 July 2016, case C-455/14 P, *H v. Council et al.*, para. 102.

³³ Opinion of AG Wahl, *H v. Council et al.*, cit., para. 103 (emphasis added).

VI.2. COMMENTS

The question of whether the *Foto-Frost* principle is applicable to the CFSP is a tough one. On the one hand, the CFSP is “subject to specific rules and procedures”.³⁴ On the other, Union law is now one, integrated legal system. The pillars are gone, and the CFSP is a Union competence.³⁵ The “specificity of the CFSP, as envisaged and protected under EU primary law, is essentially of a procedural and institutional nature” – it is not fully shielded from the application of general principles of Union law.³⁶

As I have argued elsewhere, the argument that the *Foto-Frost* doctrine does apply seems strongest.³⁷ *Foto-Frost* was “not exclusively concerned with the uniformity of EC law, (but also) its supremacy”.³⁸ Divergent views between domestic courts on the validity of CFSP decisions could have “grave repercussions”.³⁹ Thus, “ruling out a *Foto-Frost* style rule [...] would solve the problem of access to court, but would do so by undermining the supremacy of Union law”.⁴⁰

Which position one takes on the general applicability of *Foto-Frost* to the CFSP should be immaterial in the present circumstances, however. If one’s view is that *Foto-Frost* does not apply, the consequence should be that domestic courts are unrestrained in handling CFSP-related cases. Alternatively, if one accepts that the *Foto-Frost* doctrine applies to the CFSP, its relevance to the *Tomanović* claims remains elusive.

As mentioned above, the claimants were not seeking annulment of a CFSP act, but merely damages. As is plain from the *Foto-Frost* judgment, it is concerned with invalidity of acts, not other causes of action:

“On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in *International Chemical Corporation v. Amministrazione delle Finanze*,⁴¹ the main purpose of the powers accorded to the Court by Art. 177 of the Treaty establishing the European Community is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences

³⁴ Art. 24, para. 1, second subparagraph TEU.

³⁵ See e.g. Art. 24, para. 1, TEU, which opens with these words: “The Union’s competence in matters of common foreign and security policy”.

³⁶ C. HILLION, *Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy*, in *European Papers*, 2016, Vol. 1, No. 1, www.europeanpapers.eu, p. 55 *et seq.*

³⁷ S.Ø. JOHANSEN, *The Human Rights Accountability Mechanisms of International Organizations*, cit., pp. 184-186.

³⁸ B. DAVIES, *Segi and the Future of Judicial Rights Protection in the Third Pillar of the EU*, in *European Public Law*, 2008, p. 318.

³⁹ Opinion of AG Wahl, *H v. Council et al.*, cit., para. 102. But see *contra*: View of AG Kokott, Opinion 2/13, cit., para. 100.

⁴⁰ B. DAVIES, *Segi and the Future of Judicial Rights Protection in the Third Pillar of the EU*, cit., p. 318.

⁴¹ Court of Justice, judgment of 13 May 1981, case 66/80, *International Chemical Corporation v Amministrazione delle Finanze*.

between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty".⁴²

Adjudicating on an action for damages will normally not pose any threat to the unity of the EU legal order. In this regard, it is worth noting that in *Foto-Frost* the Court of Justice goes quite far in a permissive direction, by seemingly allowing domestic courts to disapply EU law while awaiting a reply from Luxembourg: "It should be added that the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures".⁴³

In the latter scenario, a judgment of the Court of Justice will eventually decide the matter. But the point is that this demonstrates that the *Foto-Frost* doctrine is neither absolute nor draconian. It is on the contrary rather open towards the domestic courts. In more recent case law the CJEU has also clearly emphasized the important role played by domestic courts.⁴⁴

In *Tomanović*, and probably most other cases of human rights claims against CFSP missions, domestic courts should easily be able to avoid the questions of validity and annulment. Instead, courts could focus on whether the claimant's fundamental rights were violated, and award damages if necessary.⁴⁵

I therefore submit that the High Court should not have used *Foto-Frost* as a supporting argument for finding that the CJEU has exclusive jurisdiction over such CFSP matters.

This raises a further question: would the High Court's conclusion on the jurisdiction of the CJEU have been the same, without the *Foto-Frost* argument? My educated guess is that it would. The discussion of the *Foto-Frost* principle is presented as a supporting argument, that merely "strengthen[s]" the High Court's conclusion (para. 88).

VII. THE IMPLICATIONS OF BREXIT

No current legal drama is complete without a Brexit element. In *Tomanović*, Brexit affects the case in at least two ways, which illustrate the complexity of undoing more than 45 years of legal integration.

First, the High Court used it as a supporting argument for not requesting a preliminary ruling from the Court of Justice, citing the "strong possibility" that the request

⁴² *Foto-Frost*, cit., para. 15.

⁴³ *Ibid.*, para. 19.

⁴⁴ See e.g. Court of Justice, Opinion 1/09 of 8 March 2011, *European and Community Patents Court*, notably paras 66 and 80.

⁴⁵ This approach has its limits. It would not work in the instances where a formal CFSP act itself violates human rights. Any finding of a human rights violation of a domestic court in such cases would entail an (implicit) determination of the act's validity, due to the Charter of Fundamental Rights' status as primary law.

would not be dealt with before the UK had ceased to be a Member State of the EU (para. 93). It is still unclear when and on what terms the UK will leave the EU. Until the so-called “Brexit day”, the UK is legally speaking in the same position as any other member state. To use an upcoming but yet indeterminate Brexit as a (supporting) argument for not requesting a preliminary ruling therefore appears suspect.

Second, the claimants were concerned that UK’s coming exit from the Union would have the consequence of extinguishing the (alleged) jurisdiction of British courts. The exception to the Union’s immunity laid down in Art. 274 TFEU indeed gave them cause for alarm, since the exception is only for the benefit of “courts or tribunals of the Member States”. However, the judgment of the High Court does not touch upon this issue.

VIII. CONCLUSION

Since it found the non-implementation of the CFSP provisions of the EU treaties to be “an insurmountable hurdle” (para. 78), the High Court concluded that the case had to be dismissed.

The applicant sought permission to appeal, which the Court of Appeal refused on 29 March 2019.⁴⁶ The *Tomanović* judgment is therefore final.

It is unclear whether the claimants have access to some other court. As I have demonstrated above, the High Court’s *obiter dictum* conclusion that the CJEU would have jurisdiction over the case is flawed. It is therefore likely that this is the end of the road for the claimants – an ending in the form of a denial of justice.

Denial of justice should never be an acceptable outcome. The obvious question to ask in the wake of *Tomanović* is thus how the current system of accountability mechanisms for CFSP missions may be reformed. While there is no room for a thorough discussion of this issue here, I would like to conclude by sketching out three points of departure.

First, it appears that it is necessary to provide access to a court. The experience of the Human Rights Review Panel set up to hold EULEX Kosovo to account show that such non-binding mechanisms, while useful, are not sufficiently effective remedies.⁴⁷ In cases of (alleged) human rights violations, Art. 47, para. 1, of the Charter of Fundamental Rights of the EU indeed requires access to a *court*.⁴⁸ Theoretically, domestic courts could take on this role. However, as exemplified by the *Tomanović* case, they are gener-

⁴⁶ Order by Lord Justice Males, Court of Appeal (Civil Division) 29 March 2019, reference: B3/2019/0506.

⁴⁷ S.Ø. JOHANSEN, *The Human Rights Accountability Mechanisms of International Organizations*, cit., pp. 193-201; M. SPERNBAUER, *EU Peacebuilding in Kosovo and Afghanistan*, cit., pp. 367-370.

⁴⁸ See in this regard the Explanations relating to the Charter of Fundamental Rights: “The first paragraph [of Art. 47] is based on Art. 13 of the ECHR [...] However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court”. According to Art. 52, para. 7, Charter of Fundamental Rights these Explanations should be “given due regard” when interpreting the Charter.

ally unwilling to assert jurisdiction over international organizations – even when immunity is not a hurdle.⁴⁹

Second, one must remember that courts also have downsides. Formal court proceedings are usually lengthy, expensive, formal, and strictly legal in character. A well-functioning system of accountability mechanisms should have multiple mechanisms that complement each other. For example, Ombudspersons or Inspection and Review Panels, like the HRRP, are good first line mechanisms. Proceedings before them are often swift, free or inexpensive, informal, and take into account not just the black letter of the law, but also the ethos of good governance.

Third, one cannot rely on reform through developments in practice. Formal changes are needed – most likely treaty change. That is because the CJEU's monopoly on interpreting and applying Union law, as laid down in Art. 344 TFEU, clearly limits the possibility of establishing courts *outside* the Union's existing court system. And, *within* the existing system, the CFSP carve-out in Art. 24, para. 1, TEU and Art. 275, para. 2, TFEU functions as prohibition of reform that is not in the form of treaty change.

These points of departure are, admittedly, ambitious – some may even say unrealistic. There is little appetite for treaty change at present. The CFSP carve-out exists for a reason: the lacking political will to give the CJEU jurisdiction over such matters. That said, I do not think that legal scholars should be overly constrained by political considerations when suggesting reforms. Who knows what the future holds? As we have seen over the last few years, the (political) future is less predictable than one tends to think. Also, more fundamentally: if scholars are not to make bold suggestions, then who?

⁴⁹ See also S.Ø. JOHANSEN, *The Human Rights Accountability Mechanisms of International Organizations*, cit., pp. 182-189.

