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The EU's Role in Global Governance

The Legal Dimension

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The European Union in the Global Security Architecture

*Panos Koutrakos**

1. Introduction

Whilst its genesis was focused on the economic dimension of market building, the whole process of European integration has always been, in essence, a security policy project. Seeking to ensure the impossibility of another war in Europe has been a central part of the DNA of the European polity. It was for this reason that the wars in the former Yugoslavia shocked the European Union (EU) system so profoundly. They also proved to be a powerful incentive for the development of the Union's foreign and security policy, both in terms of its legal grounding in primary rules and its increasingly prominent position in the rhetoric of the Union's elites.

However, to focus exclusively on its self-referential aspects is to ignore not only the direct interaction between the development of the EU's security and defence policy and the fundamental and constant changes of the international geopolitical landscape in the last twenty years, but also the distinct emphasis on the international outlook of the Union's strategic objectives and the relevant provisions of the Treaty of Lisbon. In terms of the geopolitical changes, whilst they have had an impact on the Union in various ways, two in particular are noteworthy. On the one hand, there has been a growing expectation by third parties, such as the United States, countries where EU missions are deployed and international organizations such as the African Union, that the EU shares the responsibility of monitoring international security. On the other hand, international organizations directly involved in global and regional security governance expect the EU to participate too.

This chapter explores the extent to which there is congruence between the current global security architecture and the Union's ambition to assert its identity on the international scene as a security actor. It identifies certain factors which are inherent in the genesis of the Common Security and Defence Policy (CSDP) and which have imposed a constraint on its development, preventing it from achieving the Union's ambition and meeting the expectations of other security actors.

2. Space for a Mutually Reinforcing Relationship

The last ten years have seen the EU attempt to define its security and defence identity in clearer strategic terms. Just three months after the terrorist attacks of September 11, 2001, the Laeken Declaration on the Future of the European Union, which initiated the process of reform of the Union's Treaties, refers prominently to 'Europe's new role in a globalized world' and raises the question: 'Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilizing role worldwide and to point the way ahead for many countries and peoples?'.¹ The role it seeks to

* I am grateful to Eileen Denza for comments on a previous draft of this chapter. The usual disclaimer applies.

¹ European Council, 14–15 December 2001, 2.

carve out is directly linked to 'its responsibilities in the governance of globalization' which 'Europe needs to shoulder'.²

The notion of responsibility becomes central in how the Union understands its international posture. The European Security Strategy, adopted in December 2003, states that: 'Europe should be ready to share in the responsibility for global security and in building a better world'.³ Its introduction in the Union's vocabulary is coupled with an increased emphasis on effective multilateralism. The latter features prominently in the European Security Strategy, which refers to '[s]trengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively' as 'a European priority'.⁴ Both responsibility and commitment to effective multilateralism also feature prominently in the 2008 *Report on the Implementation of the European Security Strategy*, which refers to the Union's 'achievements' in the area of security as 'the results of a distinctive European approach'.⁵

This apparently outward emphasis of the Union's international action in general and CSDP in particular has found its way into the Lisbon Treaty. In relation to its revamped Common Foreign and Security Policy (CFSP) and the CSDP provisions, its preamble refers to its aim to 'reinforc[e] the European identity and its independence in order to promote peace, security and progress in Europe and in the world'.⁶ In addition, there is an increasing emphasis in the EU's primary rules on the Union's commitment to multilateralism. By promoting its values, the Union 'shall contribute to peace [and] security in the world... as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.⁷ Setting out the principles which guide its external action in general as well as the CSDP in particular,⁸ Article 21(1) of the Treaty on European Union (TEU) provides that the Union 'shall promote multilateral solutions to common problems, in particular in the framework of the United Nations', whereas one of its objectives is to 'promote an international system based on stronger multilateral cooperation and good global governance'.⁹

The emergence of these linked concepts of responsibility in the context of the international security system and commitment to effective multilateralism as central pillars of the Union's understanding of its role in the world may not be viewed beyond its proper political and economic context. On the one hand, the constant shifting of the dynamics of the global security architecture in the first decade of this century, the unilateralist reflexes of the United States administration, particularly during the Bush Presidency, and the emergence of terrorism as the main security challenge for the international community gave rise to a de facto wider distribution of power¹⁰ and encouraged existing players to harbour greater ambition about their involvement in world affairs. It is striking that the then President of the European Commission Romano Prodi even suggested that George W Bush's close victory at the 2000 US presidential election would enable the EU to take centre stage and exercise a role akin to that of a world power.¹¹ On the other hand, the successful launch of the euro and the economic prosperity which appeared to prevail in the Union at the time spurred on the political elites to articulate a security role for the Union which would be commensurate to its perceived economic success.

² Ibid.

³ *A Secure Europe in a Better World—European Security Strategy* (Brussels, 12 December 2003) 1.

⁴ Ibid, at 9 which also refers to other international organizations such as the African Union.

⁵ S407/08 (Brussels, 11 December 2008), p 2.

⁶ Lisbon Treaty, 11th recital.

⁷ Art 3(5) TEU. See M Cremona, 'Values in EU Foreign Policy' in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders—Policy Interconnections Between the EU and the Rest of the World* (Hart Publishing, 2011) 275.

⁸ Art 23 TEU.

⁹ Art 21(2)(h) TEU.

¹⁰ See JS Nye Jr, *The Future of Power* (Public Affairs, 2011).

¹¹ *European Voice*, 5–11 April 2001, at 11–13.

The Union's appetite for a more pronounced role in the governance of international security, along with its apparent deference to the role of the United Nations as the main guarantor of international peace, may also be viewed against the political and legal framework within which the UN has carried out this function. Chapter VIII of the UN Charter sets out a role for 'regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations'.¹² In accordance with Article 53 of the UN Charter, they may be relied upon by the UN Security Council 'for enforcement action under its authority'. The EU institutions have avoided referring to the Union as an organization within the meaning of Article 53 of the UN Charter, and the UN institutions have also avoided making such an inference.¹³ However, the flexible and pragmatic approach which the latter has adopted to its interactions with international organizations in the security sphere¹⁴ suggests that the legal framework set out in the UN Charter clearly offers scope for the security ambitions of the Union within the parameters set out in the Treaties.

Furthermore, the UN organs have developed over the years a security policy space in which regional organizations in general and the EU in particular may feature prominently. This became apparent in *An Agenda for Peace*, the report that the then UN Secretary General Boutros Boutros-Ghali drew up in response to a request from the UN Security Council.¹⁵ Opening up the range and scope of actors who may assist the UN in its security tasks after the end of the Cold War, this Report referred expressly to the Union and its important role in tackling the Balkan wars in the 1990s. The emphasis on the role of regional organizations became gradually more specific, as, for instance, the UN authorities referred with approval to the development of EU battle groups,¹⁶ the development of the Union's capabilities,¹⁷ and the involvement of the Union in regional conflicts.¹⁸

The osmosis between the UN and the EU is not confined to statements made by each of the parties in official documents. Instead, it has developed along two distinct but interrelated tracks. The first emerges in relation to a number of military and police missions which the Union has carried out in the last decade. For instance, it is noteworthy, and not just in terms of semantics, that the very first security and defence operation of the Union, the European Union Police Mission in Bosnia and Herzegovina launched in 2003, assumed the tasks previously carried out by the United Nations International Police Task Force.¹⁹ Whilst apparent, the link between the UN framework and the mandate of the CSDP missions may vary in its terms: for instance, the EU Police Mission in Bosnia and Herzegovina was welcomed rather than expressly authorized by the UN Security Council,²⁰ Operation Artemis in the Democratic Republic of Congo,²¹ on the other hand, was authorized under Chapter VII of the UN Charter to be deployed in a city in the north-east Congo which was

¹² Art 52, UN Charter.

¹³ See N White, 'The EU as a Regional Security Actor within the International Legal Order' in M Trybus and N White (eds), *European Security Law* (OUP, 2007) 329, 332–335.

¹⁴ See J Wouters and T Ruys, 'UN–EU Cooperation in Crisis Management' in J Wouters, F Hoffmeister and T Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (TMC Asser Press, 2006) 229, 231–232.

¹⁵ A/47/277-S/24111 (17 June 1992).

¹⁶ See Report of the Secretary General, A/59/2005, *In larger freedom: towards development, security and human rights for all* (21 March 2005), para 112.

¹⁷ General Assembly Resolution A/60/L.1 *2005 World Summit Outcome* (24 October 2005), para 93(a).

¹⁸ Report of the Secretary General A/61/204-S/2006/590, *A regional–global security partnership: challenges and opportunities* (28 July 2006), para 57.

¹⁹ See Joint Action 2002/210/CFSP [2002] OJ L70/1.

²⁰ See UNSC Resolution 1396 (2002), para 5. Similarly, see EUFOR ALTHEA in Bosnia and Herzegovina under Joint Action 2004/570/CFSP [2004] OJ L252/10 and UNSC Resolution 1551 (2004), para 10. EUPOL Afghanistan under Joint Action 2007/369/CFSP [2007] OJ L139/33 and UNSC Resolution 1746 (2007), para 11.

²¹ Joint Action 2003/423/CFSP [2003] OJ L143/50.

the epicentre of clashes between militias and forces originating in Uganda.²² The link between a CSDP mission and the UN may give rise to considerable legal debate, as illustrated by the Union's Rule of Law mission in Kosovo.²³ Launched on 4 February 2008, that is two weeks prior to the unilateral declaration of independence by Kosovo, the mission had been prepared in anticipation of a political settlement under the aegis of the UN and pursuant to UN Security Council Resolution 1244(1999) which never materialized. In this context, it has been argued that its deployment lacked an express UN authorization.²⁴ The drafting of Joint Action 2008/124/CFSP and its emphasis on Resolution 1244 suggest that the EU Council was acutely aware of this charge. It is noteworthy that the UN Secretary General subsequently welcomed the mission.²⁵

Growing from this ad hoc relationship which adjusts to the practical and political circumstances of the time, the second track on which an osmosis between the EU and UN has been developing is a process of more formalized interaction. In September 2003, the then UN Secretary General Kofi Annan and the EU Presidency signed a Joint Declaration on UN–EU Cooperation in Crisis Management which set up an institutional framework within which the two organizations would enhance the coordination and compatibility in civilian and military crisis management. They established a joint consultative mechanism at working level, known as 'the Steering Committee', to deal with planning, training, communication and best practices. This has given rise to some thinking within the EU as to the modalities of the provision of military capabilities by the Union to the UN.²⁶ It has also given rise to further consolidation of the consultation mechanisms between the two organizations.²⁷

This section has focused so far on the positioning of the Union in the UN security system. This is by no means to suggest a paucity of interactions with other parts of the global security architecture. On the contrary, the links with NATO have been significant²⁸ and have given rise to considerable legal, political and practical controversies.²⁹ Furthermore, the considerable focus of CSDP in Africa has also given rise to interactions with the regional organizations in the area.³⁰ It is in the light of the central position which the UN system is afforded in the Union's primary rules, as well as the limited length of this chapter, that the analysis focuses on the UN system.

²² UNSC Resolution 1484 (2003). Similarly, see EUFOR DR Congo under Joint Action 2006/319/CFSP [2006] OJ L116/98 and UNSC Resolution 1671 (2006); EUFOR Tchad/RCA under Joint Action 2007/677/CFSP [2007] OJ L279/21 and UNSC Resolution 1778 (2007), para 6.

²³ Joint Action 2008/124/CFSP [2008] OJ L42/92, last amended by Council Decision 2010/619/CFSP [2010] OJ L272/19.

²⁴ See E de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX' (2009) 103 AJIL 83.

²⁵ See *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 28 March 2008* (UN doc S/2008/211), para 5 and 12 June 2008 (UN doc S/2008/354), para 13.

²⁶ See *Elements of Implementation of the EU–UN Joint Declaration*, adopted by the European Council on 17–18 June 2004.

²⁷ See *Joint Statement on UN–EU Cooperation in Crisis Management* (Brussels, 7 June 2007) in which the UN 'recognizes the considerable contribution of human and material resources on the part of the European Union in crisis management' (para 1) and which refers to 'the achievements of the 2003 Joint UN–EU declaration' (para 50).

²⁸ See, for instance, *EUFOR ALTHEA in Bosnia and Herzegovina under Joint Action 2004/570/CFSP* [2004] OJ L252/10 which took over from a NATO-led Stabilization Force.

²⁹ See M Reichard, *The EU–NATO Relationship—A Legal and Political Perspective* (Ashgate, 2006).

³⁰ See, for instance, the EU Support AMIS II mission undertaken in support of the African Union mission to Sudan (Joint Action 2005/557/CFSP [2005] OJ L188/46). Over the years, the Union has channelled a considerable part of its energy in its broader security policy on Africa: in relation to non-proliferation, for instance, see P Koutrakos, 'The Non-proliferation Policy of the European Union' in Evans and Koutrakos, n 7 249, at 268–269. More generally, see A Abass, 'EU Crisis Management in Africa: Progress, Problems and Prospects', in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (TMC Asser Press, 2008), 327.

This brief overview suggests that the position of CSDP in the global security architecture is underpinned by a mutually reinforcing link between the international security structures and the EU: the former is willing to provide the legal and political space which would enable the latter to achieve its ambition to become a central security player. Whilst not fully formalized, relying on ad hoc arrangements and having to take into account not inconsiderable political and legal obstacles, this link sheds some light on the increasingly prominent commitment of the Union to effective multilateralism. However, the impact that this link has had on the security stature of the Union has been undermined by factors related to the Union's own approach to the development of its security and defence policy. These issues are examined in the following sections.

3. The State of CSDP after Lisbon

There has been more than a decade since the Union started focusing a considerable part of its energies on the development of its security and defence policy, and even though the rhetoric from both its official documents and officials appears to suggest a high level of activity, its relevance as a security and defence actor in practice is by no means apparent.

At the time of writing, the state of play is not encouraging. In terms of missions on the ground, the Union has only launched one operation since the entry into force of the Lisbon Treaty, namely Operation EUTM Somalia, a military mission of approximately 120 training approximately 2000 Somali soldiers.³¹ There has also been planning for a military operation in Libya which has not been launched: its scope is envisaged to be narrow (support for humanitarian assistance) and its duration quite short, approximately four months.³² Whilst this suggests a falling away in terms of CSDP missions, it is not accompanied by a general paucity of activity by Member States. In March 2011, a coalition of various states initiated a military operation against Libya under the authorization of United Nations Security Council Resolution (2011) 1973. This operation consisted of the enforcement of a no-fly zone and a naval blockade and led, controversially but inevitably, to strikes against forces remaining loyal to Gaddafi. The operation was not carried out by the EU but a number of individual states, most of which were European, led by the UK and France, whilst the US was for political reasons content to play second fiddle. It is worth noting that Germany abstained at the UN Security Council vote on Security Council Resolution 1973, in the company of China and Russia. It is also interesting that, in relation to this operation, British Prime Minister David Cameron, US President Barack Obama and former French President Nicolas Sarkozy wrote an article for *The Times*³³ in which there was no reference to the Union at all.

It has not been only in relation to CSDP activities that the Union's ambitions as a security player appear not to be borne out by its response in practice. In December 2010 and the first months of 2012, demonstrations and protests were organized in a number of countries in northern Africa and the Middle East.³⁴ Known as 'the Arab Spring', this led, amongst others, to regime change in Egypt, Tunisia, and Libya and bloody clashes in Yemen, Syria and Bahrain. The European Union has been criticized widely for tolerating the autocratic regimes ruling these countries and for failing to engage with the changes in a constructive way. Indicative of this approach is the title of an editorial in the *Financial Times*: 'Monstrous

³¹ See Council Decision 2010/96/CFSP [2010] OJ L44/16, amended and extended by Council Decision 2011/483/CFSP [2011] OJ L198/37.

³² Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) [2011] OJ L89/17, repealed by Council Decision 2011/764/CFSP of 28 November 2011 [2011] OJ L314/35. See the contribution by De Baere to this volume.

³³ David Cameron, Barack Obama and Nicolas Sarkozy, 'Libya's Pathway to Peace' *The Times*, 15 April 2011, 25.

³⁴ At the time of writing, the demonstrations are escalating in Syria, and are ongoing in Egypt.

in size, feeble in action', accompanied by the subtitle 'Arab tumult exposes the ineptitude of EU foreign policy'.³⁵

This is not the picture of a vibrant and dynamic security and defence policy which strives to achieve the grand objectives set out in the European Security Strategy. An unfortunate combination of circumstances may partly explain this state of affairs: not only do the actors at the helm of CSDP, including the High Representative, show disconcertingly little interest in security and defence, but the financial crisis has also focused the mind and energy of both the Union institutions and the Member States on other issues. Managing the distinct possibility of sovereign default within the eurozone, staving off the threat of contagion to economies which the euro members could not afford to save, seeking to tackle the political ramifications which the handling by the European powers of this extraordinary financial crisis has caused, all these are at the very centre of the current EU agenda. Their implications have been so profound that they have challenged further the much vaunted capacity of the foreign policy structures set out at Lisbon to transform the Union's action. This is even more so given the existential dimension which the crisis has taken for the EU elites.³⁶ And as if the lack of energy for CSDP activity has not been apparent enough, even the official rhetoric seems affected: in her speech in April 2011 to the European Parliament on the main choices on CFSP and CSDP, the High Representative of the Union for Foreign Affairs and Security Policy refers to security and defence only once and only in relation to the Libyan mission, which she views as an indication of 'how far we have come'.³⁷ There is a distinct dissonance between the underwhelming (and underwhelmed) tone of this statement and the earlier call for the Union to 'shoulder its responsibilities in the governance of globalization'.³⁸

However, it is not only the current economic and political climate which explains the CSDP state of affairs. There are other reasons which are more deeply rooted and which are related to the genesis and development of the policy, as well as the deeply idiosyncratic constitutional framework in which it is carried out. These will be outlined in the following section.

4. A Process-centred Policy

The CSDP has been developed in the context of the Union's CFSP, and the Lisbon Treaty defines it as 'an integral part of CFSP'.³⁹ It is not surprising, therefore, that it shares the

³⁵ Editorial, 'Monstrous in size, feeble in action—Arab tumult exposes the ineptitude of EU foreign policy' *Financial Times*, 24 February 2011, 12. Following the strong criticism, the EU has responded by seeking to reframe and refocus its approach to the Southern Mediterranean in general, see COM (2011) 200 Final of 8 March 2011, Joint Communication by the High Representative and the European Commission, *A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean* (Brussels) and COM (2011) 303 of 25 May 2011, Joint Communication by the High Representative and the European Commission, *A new response to a changing Neighbourhood* (Brussels). It has also established an EU–Tunisia Task Force aiming to coordinate the EU and international initiatives supporting the Tunisian transition to a fully functioning democracy. Co-chaired by the High Representative and the Tunisian Prime Minister, it met for the first time in September 2011.

³⁶ In his 2011 State of the Union address to the European Parliament, Commission President José Barroso referred to the crisis as the most important one in the Union's history: <http://ec.europa.eu/commission_2010-2014/president/pdf/speech_original.pdf>; German Chancellor Angela Merkel has stated time and again that the fight to save the euro is a fight to save the Union.

³⁷ Press Release A179/11 (Brussels, 11 May 2011), p 3 (the entire phrase is as follows: 'Or take Libya. There are members of this house who wish that the EU had a stronger defence and security policy. I say to them this—in the last weeks and months we've seen how far we have come in some ways, but in this, how far we have to go'). In December 2011, Baroness Ashton delivered a speech on CSDP in particular, the main theme of which was the need for the EU to use the financial crisis as a driver for closer cooperation (Press Release A512/11, Brussels, 13 December 2011). Countering the charge levelled at the EU for 'CSDP fatigue', she claims that '2011 has been a year of intensive work on CSDP with concrete results and ending with comprehensive, forward-looking Council conclusions'. The latter refers to the CSDP Conclusions of the Foreign Affairs Council of 1 December 2011 (17991/11) which referred to synergies between Member States, the latter and EU institutions, and the EU and NATO.

³⁸ Laeken Declaration, European Council, 14–15 December, 2001, 2.

³⁹ Art 42(1) TEU.

emphasis on rules and procedures which has characterized the development of the latter policy.⁴⁰ The position of CSDP in the evolving process which has shaped the Union's constitutional architecture in the last decade illustrates this clearly. All the milestones of this process (the 2001 Laeken Declaration, the drafting of the Treaty establishing a Constitution for Europe, the referendums which marked its long and painful death, the drafting of the Lisbon Treaty and its ratification process) have been characterized by a clear emphasis on the role of the Union as a security actor on the world scene. And the Lisbon Treaty, in so far as it may be defined as the tangible outcome of this process, bears out this emphasis by armouring the CSDP with an elaborate institutional framework and kitting it out with the appropriate rules and procedures. A detailed analysis of the Lisbon rules on CSDP is beyond the scope of this chapter.⁴¹ Suffice it to point out the elevation of this policy not only in terms of semantics (as it is defined as 'common' rather than merely 'European' and its provisions are set out in a distinct section in Title V TEU), but also in terms of substance: the European Defence Agency is provided for in the field of defence capabilities development, research, acquisition and armaments;⁴² flexibility is formalized pursuant to specific legal mechanisms;⁴³ the Member States undertake to improve their military capabilities⁴⁴ and commit them, along with their civilian capabilities, for the implementation of CSDP;⁴⁵ a mutual assistance clause is inserted.⁴⁶

However, whilst these legal developments may appear to suggest progress in strengthening the CSDP machinery, their impact in practical terms is far from apparent. The European Defence Agency, for instance, had been established and was operative well before the Lisbon Treaty entered into force.⁴⁷ As the Treaty provisions were unnecessary for its establishment, they are similarly of little impact on its record. Given the position of military capabilities at the core of national sovereignty, any progress in the work of the Agency is bound to rely entirely upon the willingness of the Member States to engage in real cooperation in this area. Indeed, the limits of the actual work which the Agency has carried out as well as the continuing disagreements amongst national administrations about its budget further underline the impact of this major factor. Similarly, the improvement of national defence capabilities is unlikely to be achieved by means of a legal duty imposed by the Treaty. This is a political commitment which Member States may or may not implement in the light of a wide range of domestic factors, mainly of a political and economic nature. It would be exceedingly difficult to envisage a Treaty provision capable of changing this reality—and yet, the latter is central to the implementation of security and defence policy.

As for the issue of flexibility, it should not be forgotten that the membership of the various CSDP missions at present varies considerably, as does the contribution from different Member States.⁴⁸ Whilst the new 'willing and able' clause and the permanent structured

⁴⁰ See D Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security and Defence' (2011) 7 *EuConst* 453.

⁴¹ See P Koutrakos, 'The European Union's Foreign Affairs after the Lisbon Treaty' in D Ashiagbor, N Countouris, I Lianos (eds), *The EU After Lisbon* (CUP, 2012, 185); R Whitman and A Juncos, 'The Lisbon Treaty and the Foreign, Security and Defence Policy: Reforms, Implementation and the Consequences of (non-) Ratification' (2009) 14 *EFA Rev* 25.

⁴² Arts 42(3) and 45 TEU.

⁴³ Art 42(5) and (6), as well as Arts 44 and 46 TEU.

⁴⁴ Art 42(3), subpara 2 TEU.

⁴⁵ Art 42(3) TEU.

⁴⁶ Art 42(7) TEU.

⁴⁷ See Council Joint Action 2004/551/CFSP [2004] OJ L245/17. For an early analysis, see S Ferraro, 'The European Defence Agency: Facilitating Defence Reform or Forming Fortress Europe' (2006–2007) 16 *Transnat'l L and Contemp Probs* 549, and M Trybus, 'The new European Defence Agency: a contribution to a common European security and defence policy or a challenge to the Community *acquis*?' (2006) 43 *CML Rev* 667.

⁴⁸ On the Lisbon provisions on flexibility, see S Biscop, 'Permanent Structured Cooperation and the Future of the ESDP: Transformation and Integration' (2008) 13 *EFA Rev* 431. During the second half of 2010, there were discussions amongst Member States about formalizing flexibility in CSDP, the tenor of which suggested that the relevant provisions merely provided some food for thought. For a different view, see S Biscop and J Coelmont, 'CSDP

cooperation mechanism provide a framework which would allow for the formalization of different forms of the current realities, the rules they set out are quite vague as to their implementation⁴⁹ and, in any case, their impact would be in direct correlation to the willingness of the Member States to cooperate in the area of defence capabilities.

Similar considerations apply to the role of the mutual assistance clause which appears to impose a duty on Member States the scope of which is as broad as its nature rigorous. However, it is not a mutual defence clause and, in any case, there are questions as to how far Member States are required to go in order to comply with it, and how rigorous the enforcement of this duty can be. The significance of this clause is bound to be tested in such charged circumstances where its enforcement would be irrelevant. In fact, its presence in the Union's primary law is significant only at the level of rhetoric. The mutual assistance clause was regarded as key to the success of NATO, but was never actually invoked until the attacks of 9/11 on the United States.

This brief overview suggests that the importance of the much-praised provisions of the Lisbon Treaty on CSDP is in doubt on various grounds, not least the nature of the policy and the constitutional framework within which these provisions are applied. And yet, the Union institutions and the Member States have spent considerable energy drafting them and even greater political capital promoting them as a key that would enable the Union to assume its well-deserved place at the centre of the world stage. In that respect, the statement of President Sarkozy in August 2008 during the Russia–Georgia war is instructive: he argued that, had the Lisbon Treaty been in force, the Union would have had the institutions and tools which would have enabled it to act decisively and exert its influence.⁵⁰ This deeply held belief that it is institutions and procedures which an effective CSDP is missing also underpins the debate about the much-maligned role of unanimity in decision-making in this area. This emphasis on legal rules, principles and procedures may be explained in the light of the genesis of the CSDP in the Union's constitutional framework which had developed partly due to the considerable contribution of the law.⁵¹ However, it fails to account for the role of the States as fully responsible for their defence and for prioritizing their defence spending and availability of resources, the differences in their strategic priorities, and the prevailing role of political and economic assessments made by national governments.⁵² This affects both the principle and the practice of the development of CSDP in so far as it is entirely for each Member State to assess where, when and how to intervene and given that Member States have the capabilities which the Union needs in order to carry out CSDP missions. These considerations form the reality of security and defence policy and impose an inherent limit on the role of legal rules in the area.⁵³ Unless the specific underpinnings of these considerations are addressed, the CSDP will continue to be a deeply process-centred set of initiatives which hardly substitute for the absence of a unified policy. If anything, the post-Lisbon performance of the Union in CSDP illustrates with painful clarity how deeply misguided is the emphasis on rules and procedures in this area.

and the "Ghent Framework": The Indirect Approach to Permanent Structured Cooperation?' (2011) 16 *EFA Rev* 149.

⁴⁹ See, for instance, the protocol on permanent structured cooperation established by Art 42 of the Treaty on European Union.

⁵⁰ *Le Figaro*, 18 August 2008. See further the contribution by Blockmans to this volume.

⁵¹ As Weiler puts it, '[i]n some ways, Community law and the European Court were everything an international lawyer could dream about: the Court was creating a new order of international law in which norms were norms, sanctions were sanctions, courts were central and frequently used, and lawyers were important': JHH Weiler, *The Constitution of Europe* (CUP, 1999), 205–206.

⁵² 'Almost everything about defence in Europe remains resolutely national': *European Military Capabilities—Building Armed Forces for Modern Operations* (The International Institute for Strategic Studies, 2008) 149.

⁵³ See P Koutrakos, 'The role of law in Common Security and Defence Policy: functions, limitations and perceptions' in P Koutrakos (ed), *European Foreign Policy—Legal and Political Perspectives* (Edward Elgar Publishing, 2011) 235.

The analysis so far has highlighted the erroneous assumption that legal rules and procedures are the key to enabling the Union to become an effective security and defence actor. However, this is not to suggest that law is irrelevant in this area. In fact, when interpreted and applied properly, it may provide an impetus for development. A case in point is Article 346 of the Treaty on the Functioning of the European Union (TFEU): interpreted incorrectly for years for reasons of, amongst others, political sensitivity and institutional timidity, it was viewed as rendering the defence industries beyond the scope of application of EU law. It was only recently that a combination of judicial activity and initiatives by the Commission introduced a degree of normalization in the legal regime governing this sensitive sector.⁵⁴

5. The Organic Link Between CSDP and Other Strands of EU External Action

The analysis so far has focused on the legal framework within which the Union carries its security and defence policy and the emphasis of the institutions and the Member States on legal rules and procedures in the area. This section will examine some other factors which are inherent in the development of CSDP and which may constrain its conduct. These may be better understood in the light of the objectives of the Union's external action in Article 21(3) TEU. It is recalled that one of the innovations of the Lisbon Treaty is the articulation in this provision of objectives common to all the different strands of the external policies. The wide range of these objectives and their overarching application to the Union's external action aim to enhance the coherence and effectiveness of the EU's international role.⁵⁵

There are two interrelated developments which are worth examining. The first is the increasing securitization of the various strands of the Union's external action. This has become more pronounced since the terrorist attacks of 9 September 2001 as well as those in Madrid on 11 March 2004 and London on 7 July 2005. In the European Security Strategy, the wide definition of security is apparent in various ways: the range of threats facing the Union is understood as wide in both its sources and nature; there is a clear emphasis on the multifarious causes and implications of these threats (for instance, in relation to terrorism, reference is made to 'the pressures of modernization, cultural, social and political crises, and the alienation of young people living in foreign societies';⁵⁶ there is also a corresponding emphasis on what the Union traditionally does in the world, ie the other strands of external action such as development, trade, environmental policies, as well as the overarching requirement of coherence. The same view of security is apparent in the 2008 *Report on the Implementation of the European Security Strategy* which, if anything, underlines it further with its emphasis on cyber security, energy security, and climate change.

The other side of the coin reveals a similar picture. In the area of development, for instance, the link between development and security is pronounced in a distinct manner in the *European Consensus on Development*.⁵⁷ This is the case not only in terms of the general position of development within the broader context of the Union's security policy, but also regarding specific security challenges such as the non-proliferation of weapons. Similarly, the links between the Area of Freedom, Security and Justice (AFSJ) and security and defence policy are also quite pronounced.⁵⁸

⁵⁴ See P Koutrakos, 'The Application of EC Law to Defence-related Industries—Changing Interpretations of Article 296 EC' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing, 2009) 307.

⁵⁵ See the chapter by L Jorik in this volume.

⁵⁶ *The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C115/1.

⁵⁷ [2006] OJ C46/1.

⁵⁸ See P Koutrakos, 'The External Dimension of the Area of Freedom, Security and Justice and Other EU External Policies' in M Cremona, J Monar, and S Poli (eds), *The External Relations of the European Union's Area of Freedom, Security and Justice* (Presses Interuniversitaires Européennes/Peter Lang, 2011) 139.

Therefore, in the different strands of its external action, the Union articulates a broad understanding of security with increasing clarity and confidence over the years. This is tied in with a second development, namely the link between internal and external security which has also become more pronounced over the years. This is apparent in various strands of EU policies, such as the AFSJ where the Stockholm Programme sets it out clearly,⁵⁹ as well as the European Security Strategy itself, and, even more so, in the Internal Security Strategy.⁶⁰

Therefore, what emerges is an evolving process of interweaving policies and objectives which were originally developed in different contexts: the original European Security Strategy put forward a broad understanding of security based, amongst others, on the link between internal and external security, which is affirmed emphatically in the 2008 Report; this construction of security encompasses policies such as the AFSJ which are pursued on the external plane in order to achieve internal security objectives.

The broad understanding of security and the links between internal and external security are not confined to the level of principle. A considerable number of CSDP operations carried out so far have ingrained in them the DNA of other strands of the Union's external action. The rule of law missions, for instance,⁶¹ seem as if they have grown organically from the Union's objectives in the AFSJ. They have also a very distinctive development dimension. The border assistance missions have a very clear AFSJ dimension too,⁶² whereas the development aspect of security sector reform missions⁶³ is central to their design and deployment.⁶⁴

The two interlinked premises set out above (the broad understanding of security and the links between internal and external security) are by no means unique to the Union. In *An Agenda for Peace*, for instance, the then UN Secretary General put forward a very wide definition of security which, he felt, would need to govern the policies of the states and organizations following the end of the Cold War.⁶⁵ Viewed from this angle, the general dimension of the Union's policy is entirely consistent with the general understanding of what the maintenance of security entails in these volatile times. What makes its relevance to the EU's posture interesting, however, is the specific political and constitutional context within which this understanding applies. Whilst it would be absurd to expect that security and defence missions would be carried out in a policy and legal vacuum, independently from what the Union does in its external policies, their organic link to them is so strong that the CSDP also inherits the legal and policy idiosyncrasies which define these policies. Put differently, even though the CSDP touches upon the very core of national sovereignty and its management is intergovernmental in nature, its DNA is deeply ingrained in the other, traditional features of the Union legal order and the policies which it has pursued over the years.

The profound impact that this inheritance has had on the conduct of CSDP may be illustrated by a number of interrelated themes which have emerged over the years. The first is about the choice of policy initiatives which the EU undertakes in the world, as CSDP operations are normally carried out in areas where the Union has been active in the context of its other policies. Whilst entirely consistent with the position of security within the

⁵⁹ [2010] OJ C115/1.

⁶⁰ 5942/2/10 (Brussels, 23 February 2010).

⁶¹ EUJUST Themis in Georgia: Joint Action 2004/523/CFSP [2004] OJ L228/21; EUJUST Lex in Iraq: Joint Action 2005/190/CFSP [2005] OJ L62/37; EULEX Kosovo: Joint Action 2008/124/CFSP [2008] OJ L42/92.

⁶² EUBAM Rafah: Joint Action 2005/889/CFSP [2005] OJ L327/28; EUBAM Moldova-Ukraine: Joint Action 2005/776/CFSP [2005] OJ L292/13.

⁶³ EUSEC RD Congo: Joint Action 2005/355/CFSP [2005] OJ L112/2; EU SSR Guinea-Bissau: Joint Action 2008/112/CFSP [2008] OJ L40/11.

⁶⁴ On the link between CSDP and development, see P Koutrakos, 'The nexus between the European Union's Common Security and Defence Policy and Development' in A Arnall, C Barnard, M Dougan and E Spaventa (eds), *A Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, 2011) 589.

⁶⁵ A/47/277 S/24111 (17 June 1992).

broader EU policy framework, this and the intrinsic link between the subject matter of CSDP missions and other EU actions raise legal questions. For instance, the distinction between projects managed under the Instrument for Stability⁶⁶ and police missions is not always immediately apparent.⁶⁷ This ambiguity provides fertile ground for inter-institutional disputes, breeds administrative inefficiencies and undermines the effectiveness of the Union's action.

Second, there is a distinct emphasis on internal coherence and coordination, a concern to manage the coexistence of CSDP and other EU initiatives in all documents which set out the main parameters of CSDP missions. This concern has two aspects: on the one hand, it relates directly to policy and is about the consistency between the implementation of a CSDP mission and other aspects of EU external action; on the other hand, it has a distinct legal dimension, as there is an underlying preoccupation to respect the competences of the various actors involved. This is played out in a context of a very considerable institutional and procedural density, not only within the CSDP context but also beyond it.⁶⁸ Coherence as a policy and legal imperative is tied in with what may be the strength of the Union's security posture: as it relates to its ability to have recourse to a wide range of policies and instruments, it touches upon what the 2008 *Report on the European Security Strategy* refers to as 'distinctive European approach to foreign and security policy'.⁶⁹ However, the management of coherence, and the policy and legal linkages which it entails is by no means straightforward, as it requires that the missions invest considerable energy and has a direct impact on their efficiency.⁷⁰ The European External Action Service (EEAS) was introduced in order to enhance the effectiveness of the Union's external action. Whilst it is premature to assess EEAS, it is worth noting that the inter-institutional squabbles which have marred its establishment, the compromises to which the agreement on its remit and management gave rise and the ambiguities resulting from the drafting of Council Decision 2010/427/EU⁷¹ illustrate the very traits which the EEAS purports to address.⁷²

Third, the choice of approaches adopted in the context of CSDP missions draws upon the methodology employed in other strands of EU action. The principle of local ownership, for instance, one of the cornerstones of the European Neighbourhood Policy, has been transplanted in CSDP missions and applied with varying intensity.⁷³ As it happens, in both contexts the relationship between the mission and the local authorities which emerges is considerably less mutual than the rhetoric of the term suggests.⁷⁴

The fourth theme may have to do with the European Court of Justice. The role it plays in the development of EU external relations is so profound that, in the light of the increasing

⁶⁶ Reg 1717/2006 [2006] OJ L327/1.

⁶⁷ See, for instance, the activities set out in SEC (2009) 932 *Commission Staff Working Paper Accompanying Annual report from the European Commission on the Instrument for Stability in 2008* (COM (2009) 341), 7. On the relevance of actions supported by the Instrument for Stability to CSDP, see the Conclusions of External Relations Council Conclusions of 17 November 2009, para 127.

⁶⁸ The role of EU Special Representatives and the various issues of coordination which their presence entails in areas where the EU carries out a CSDP mission is a case in point.

⁶⁹ S407/08 (Brussels, 11 December 2008) 2.

⁷⁰ See, for instance, A Juncos, 'Of Cops and Robbers: European Union Policy and the Problem of Organized Crime in Bosnia' in B Balamir-Coskun and B Demirtas-Coskun (eds), *Neighborhood Challenge: The European Union and its Neighbors* (Universal Publishers, 2009) 47.

⁷¹ [2010] OJ L201/30.

⁷² See S Duke, 'A difficult birth: the early days of the European External Action Service' in P Koutrakos, *The European Union's External Relations a Year after Lisbon*, 2011/3 CLEER Working Papers 69, and S Duke 'The European External Action Service: Antidote against Incoherence?' (2012) 17 *EFA Rev* 45.

⁷³ See, for instance, the EU LEX Iraq: Joint Action 2005/190/CFSP [2005] OJ L62/37, amended and extended by Council Decision 2010/330/CFSP [2010] OJ L149/12 and, more recently, by Council Decision 2011/380/CFSP [2011] OJ L169/27 and EULEX Kosovo: Joint Action 2008/124/CFSP [2008] OJ L42/92, last amended by Council Decision 2010/619/CFSP [2010] OJ L272/19 missions.

⁷⁴ See, for instance, S Keukeleire, A Kalaja and A Çollaku, 'The European Union's policy on Kosovo' in Koutrakos, n 53, 172.

congruence between CSDP and the other strands of EU external action, it raises questions about its potential impact on CSDP. Given the exclusion of this area from its jurisdiction, the ECJ may be called upon to adjudicate on a dispute about the legal basis of an external initiative as it did in *ECOWAS*.⁷⁵ Its approach in this case, along with the undiminished appetite of the Union actors for inter-institutional disputes and the increasingly pronounced nexus between security and development, may raise the question whether the temptation to interfere with the conduct of CSDP might be too strong for the ECJ to resist. This would add yet another layer of complexity in a legal and political context which needs it least.

The above themes, which seem to govern the links between CSDP and the other strands of EU external action, impose a considerable constraint on the ability of the Union to achieve its ambitions as a global security player. Does the complex DNA of the CSDP and the ways in which it has affected its missions impose too narrow a view on what the EU may do in the world? Whilst the scope of the operations which the Union may carry out is quite wide,⁷⁶ it is interesting how little the CSDP missions undertaken so far have to do with defence. Furthermore, it is not easy to assess the impact of the military operations carried out so far on the overall development of the CSDP identity, as their scope was limited and the security climate in which they were carried out was invariably favourable, given that the hard defence questions had already been answered by pre-existing forces and pursuant to other arrangements.

6. The Issue of Military Capabilities

It is not only the ambition of the security and defence missions which has been affected by the umbilical cord between CSDP and the other Union policies. The energy required to manage this coexistence, along with the constraints of legal rules and procedures, have somehow shifted the emphasis away from the factors which would actually make a difference to the conduct of the missions. A case in point is the area of military capabilities.

The grave problems facing the military capabilities of the Member States have by no means been new. Since the end of the Cold War, they have been plagued by, amongst others, decreasing defence budgets, duplication of resources, shortages in certain areas, and under-investment in research and development. The perilous state of defence industries has a tangible impact on the ways in which the Union carries out its CSDP operations. On the one hand, and despite the grand pronouncements about the international role of the Union, Member States are reluctant to commit personnel and resources, not least because the cost of contributing, maintaining and replacing them is immense. This gives rise to delays in the deployment of missions and considerable problems in their management. It is indicative of the state of the Member States' military capabilities that, in EUFOR Chad, the Union had to rely upon Russian helicopters. The problem becomes more pronounced given that the Member States face similar difficulties in the context of other operations. In the Libya operation, for instance, the UK contributed about a dozen fighter aircraft, a couple of frigates and a submarine, and yet its military chiefs suggested that no more was possible and that they would have had serious problems had the operation lasted into the autumn of 2011; France faced similar problems.⁷⁷ And, even though the operation was not US-led, the United States provided 70% of all air support sorties.

A speech given in June 2011 by the then outgoing US Defence Secretary Gates on the future of NATO highlights the perilous state of the European military capabilities with

⁷⁵ Case C-91/05 *Commission v Council* [2008] ECR I-3651.

⁷⁶ See Art 43(1) TEU which formalizes pre-existing practice.

⁷⁷ *The Financial Times*, 25 March 2011, 13.

brutal honesty.⁷⁸ He refers to ‘the very real possibility of collective military irrelevance’ and argues as follows:

‘The blunt reality is that there will be dwindling appetite and patience in the US Congress—and in the American body politic writ large—to expend increasingly precious funds on behalf of nations that are apparently unwilling to devote the necessary resources or make the necessary changes to be serious and capable partners in their own defense. Nations apparently willing and eager for American taxpayers to assume the growing security burden left by reductions in European defense budgets.

Indeed, if current trends in the decline of European defense capabilities are not halted and reversed, future US political leaders—those for whom the Cold War was not the formative experience that it was for me—may not consider the return on America’s investment in NATO worth the cost.’

The exasperation expressed in this statement does not bode well for the ambition of the Union to become an important global security player. This is even more so considering that factors extraneous to the Union’s political agenda may exercise pressure on the Union to take the practical underpinnings of its security and defence policy more seriously. These include the shift of the US security interest in South East Asia and the Pacific region⁷⁹ and the decision of the US administration to cut its defence budget by \$500 billion starting in 2012.

7. Conclusion

This chapter has highlighted the fit between, on the one hand, the increasing dispersal of power on the global scene and the willingness of the international security institutions to grant new players legal and political space and, on the other hand, the oft-repeated ambition of the EU to occupy that space and become a central security player. It examined the dissonance between this aim and the conduct of CSDP as a process-centred initiative whose organic links with the other strands of the Union’s external action are both its strength and its weakness. It pointed out the heavy emphasis that the Union’s institutions and the Member States put on rules and procedures and their failure to tackle the problems facing the practical underpinnings of security and defence.

It has been argued that what the Union needs in the current volatile and increasingly interdependent geopolitical climate is a grand strategy for its global role.⁸⁰ The analysis in this chapter has suggested that the function of such a strategy for the process-centred security policy of the Union would be irrelevant at best. The constraints on the Union’s security role are internal and deeply embedded. If at all possible, addressing them would be very difficult at the best of times. And this is not the best of times. The ongoing financial crisis which has plagued the eurozone and the rest of the Union, and its implications for the international economy, are bound to have a profound impact on the role of the EU as a security actor. The pace of the deterioration of the financial stability of the eurozone is staggering, the political instability facing the countries seeking to avoid sovereign default tangible, and the risk of contagion unsettling. The interest of the Member States in the conduct of CSDP appears to be in inverse proportion to the energy which has been required to enable them and the Union institutions together to tackle the financial crisis. Furthermore, the crisis has led to further acceleration in the reductions which national governments have introduced in their defence budgets and which are bound to be further prolonged as

⁷⁸ Speech delivered on 10 June: <<http://blogs.wsj.com/washwire/2011/06/10/transcript-of-defense-secretary-gates-speech-on-natos-future/>> (last accessed 26 January 2012).

⁷⁹ See the speech by President Obama in the Australian Parliament on 17 November 2011 (*The Economist*, 25 November 2011).

⁸⁰ J Howorth, ‘Why the EU Needs a Grand Strategy’ in Loukas Tsoukalis and Janis A Emmanouilidis (eds), *The Delphic Oracle on Europe—Is there a Future for the European Union?* (OUP, 2011) 149.

the Union struggles to extricate itself from the crisis.⁸¹ In this context, the economic case for the rationalization of the military capabilities of the Member States appears even stronger and the potential benefits for the security role of the Union considerable. Whether the Member States will find the energy and courage to engage in such an exercise is a different matter.

⁸¹ In March 2011 the NATO Secretary General stated that, whilst in 2002 the US accounted for about half of the defence spending of all NATO countries, that share is now closer to 75%. During 2010–2012, spending by the European members of NATO shrank by \$45 billion, equivalent to the entire German defence budget: *The Financial Times*, 25 March 2011, 13.