

Massimo Fichera*

The constitutional and historical relevance of the AFSJ and the CFSP/ESDP

Abstract

The purpose of this policy paper is to analyse the historical development and legislative framework of two areas of European Union (EU) law: the area of freedom, security and justice (AFSJ), and the Common Foreign and Security Policy (CFSP) and European Security and Defence Policy (ESDP). It considers the earlier forms of cooperation in these fields, and compares these with the recent provisions of the Treaty of Lisbon. It attempts to view these areas as essential components of a security–identity continuum, in the sense that they express a specific attitude of the EU to the global scene that can be studied from a constitutional law perspective. The evolution of the AFSJ and the CFSP/ESDP is particularly important in the light of the recent crisis in Ukraine and the relationship with the Middle East.

1 Introduction: The European Union from an international relations perspective

The EU has frequently been an object of study, both in the discipline of international relations and in constitutional law and theory. The discussion about the role of the EU in the world has produced analyses that have looked in various directions, focusing on its nature, or on its impact, or on it as an example of the globalization of law and policy-making. The first section of this paper contains a brief overview of international relations theories on the EU as a power. Many of these approaches take into account the developments of the CFSP/ESDP, but they very rarely link these with the policies implemented in the external dimension of the AFSJ. The second section aims to demonstrate precisely how these two areas of EU law have been growing steadily, initially at the margins of other areas. Since they embrace key aspects of State sovereignty, their intertwined development should not be underestimated, especially in the light of the complexity of the contemporary globalized world.

In fact, those scholars who represent the EU as a civilian actor (i.e. as a civilian group of countries wielding mainly economic and diplomatic power through the provision of aid and the conclusion of trade agreements) are keen to emphasize its non-coercive dimension (Duchêne 1973). This image corresponds to some extent to the EU's self-representation. For example, in a speech given in 2000, Romano Prodi, then President of the European Commission, made it clear that the ambition of the EU is to be a *global civil power* that ensures sustainable global development to guarantee its own strategic security.¹ From this perspective, the EU would be a promoter of regional cooperation and would rely on persuasion and mediation to achieve long-term economic and political goals. EU action would be characterized by the development of supranational institutions, the rule of law and human rights. Critics here have an easy role arguing that the EC/EU has merely been *allowed* to act as a civilian power, because, both before and after the Cold War, key issues such as security and defence could always be dealt

* Lecturer in European Studies, Network for European Studies, University of Helsinki.

¹ R. Prodi, '2000-2005: Shaping the new Europe', speech to the European Parliament, Strasbourg, 15 February 2000.

with in other (national and international) contexts.² On the other hand, it could be observed that, especially after the Cold War, the EU has been moving in a different direction, by increasingly taking up the role of a military power through its Common Foreign and Security Policy (CFSP) and, in particular, the security and defence policy (ESDP). In some analysts' view, this heralds the beginning of a new era, in which the civilian aspects have been dismissed once and for all (Smith 2000). The updated version of this theory identifies the EU as a *normative* power (in the sense of a post-Westphalian, ideational project to enforce across the globe norms such as peace, liberty, democracy, the rule of law, respect for human rights, solidarity, sustainable development and good governance) (Manners 2002), but it is not immune from the same objections, even when it concedes that unreflexive militarization might undermine the EU's function of norm-diffusion (Manners 2006). Ultimately, all narratives revolving around the notion of normative power reveal a liberal-institutionalist background of communicative rationality and Kantian cosmopolitanism when they maintain that the EU is able to export a model that goes beyond traditional power politics in international relations (Nicolaidis and Howse 2002; Eriksen 2006). As a result, they can be attacked from a realist perspective by pointing out that the EU is little more than a tool in the hands of the most powerful States for projecting their hegemonic visions on the rest of the world (Hyde-Price 2006).

This does not save instrumentalist analyses from the observation that norm-diffusion can be very effective in building up an area of influence and self-representation that is not necessarily restricted to national interests. After all, in a transnational or postnational setting, where sovereignty is contested, "(...) law becomes *particular* – the reflection of particular values and particular projects of individuals and groups, in competition with the values and projects of others" (Krisch 2010: 306). Norms and values easily migrate across legal systems regardless of national borders: "(...) the nation-state is no longer the sole focus of political loyalties", and "(...) loyalties to subnational groups meet (and conflict) with national allegiances, just as cosmopolitan leanings interact (sometimes clash) with loyalties for regional, national, subnational collectives" (Krisch 2010: 98).

This puts the question of the international projection of the EU into a new perspective. What is interesting about the EU is not only its capacity for norm-diffusion, but also its peculiar nature, which belongs *only to a limited extent* to international law. Many definitions have been used to classify the EU: unsurprisingly, international lawyers are often puzzled by those EU lawyers who have no qualms about its constitutional nature and employ terms such as "constitutional order of states" (Dashwood 1998), "multilevel constitution" (Pernice 1999: 707), or similar expressions (Weiler and Haltern 1998: 331). For most international lawyers, the EU is just a more refined *species* of a *genus*: no matter how compelling are the reasons to emphasize its unique features, it simply represents "(...) a model for other international organizations to emulate" (Klabbers 2001: 224).

To be sure, the idea of a model that shapes practices of cooperation and integration worldwide is very popular in EU-friendly academic and bureaucratic circles. However, as can be deduced from the few references mentioned above, what exactly this model consists of is still unclear. This lack of clarity may have practical consequences – for example, when it comes to deciding whether an international provision or an EU provision should apply to a particular case. It can be reasonably argued that EU law, should it be depicted as a self-contained regime, would amount to a *lex specialis* in its relationship with the general norms of international law (Simm and Pulkowski 2006: 516). The ambiguous nature of the EU has in some ways been enhanced by the Court of Justice of the European Union (CJEU), which has, in important rulings in the CFSP field such as *Kadi*, on the one hand, reiterated its classic formula of "autonomous legal order" and, on the other, never explicitly denied EU law's international legal roots.³

Whilst the CJEU is very cautious at the moment, and avoids employing a more clear-cut terminology, a convincing alternative is to frame EU law as a highly developed system of transnational law. Although the very use of the expression "transnational law" is contested, it is often observed that the increasing trend towards overlapping of sources of law and *legal hybrids* has blurred the distinction between international, national and EU law (Krisch 2010;

² For example, Bull noted that "the power of influence exerted by the European Community and other such civilian actors was conditional upon a strategic environment provided by the military power of states, which they did not control" (Bull 1982: 151).

³ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v. Council and Commission* [2008] ECR I-6351, para 285. Instead, according to the more self-referential Opinion of Advocate-General Maduro, "(...) the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law" (para 31).

Zumbansen 2010; Fichera 2014). It has even been argued that both the EU and the WTO are indicative of the need to go beyond the dichotomy between international and municipal law (Tuori 2014). Viewing EU law as transnational law does not hide the conflicts and tensions between principles and concepts belonging to different systems. This approach challenges the classical paradigm of State sovereignty and forces us to rethink legal categories by adopting many perspectives simultaneously. In other words, it is not just about the dialectic between, for example, human rights and trade or between different claims of legitimacy. It is also about *in whose name* the claims are made or the human rights enforced. Once the factual importance of conflict and structures of power is recognized, the idea of *model* takes on a more nuanced meaning. This makes it necessary to look at the historical and political context in which European integration has developed.

One of the most important elements of the EU's international identity is the joint development of the Area of Freedom, Security and Justice (AFSJ) and the CFSP/ESDP. These should be seen as tools for the projection of a model of integration through the assertion of Western values. The end of the Cold War and the attack on the Twin Towers have played a crucial role in the configuration of the European model.

Indeed, although the CFSP/ESDP and the AFSJ have been following distinct paths, there is an increasing convergence between them.

2 The historical and constitutional dimension of the AFSJ and the CFSP/ESDP

Let us begin with the CFSP/ESDP field. As early as the 1950s, proposals were made by France and the United Kingdom to set up a European army and a European defence minister: the Treaty establishing the European Defence Community (EDC) was signed one year after the Treaty on the European Coal and Steel Community (ECSC).⁴ The EDC was to be supranational, with common institutions, a common army and a common budget (Article 1). Police forces for the maintenance of internal order could be established on the territories of the Member States

(Article 11). The Treaty's provisions drew inspiration from the Schuman Plan and the ECSC Treaty and, indeed, the assumption was that the two forms of integration, military and economic, would proceed simultaneously. Obviously, the negotiations of the two Treaties and the Plevin Plan (upon which the EDC was modelled) reflected the intention of France, the United Kingdom and the United States to contain German economic and military power through an institutional framework that relied on a form of regional collective security against external threats – so much so that the system was tied to NATO (Kunz 1953).

Although the EDC Treaty was not particularly lucky, attempts were made up until the 1980s to create a common foreign and defence policy, despite (or perhaps thanks to) the long shadow cast by NATO. For example, the United Kingdom, France, Benelux and later Germany and Italy signed a Treaty setting up the Western European Union (WEU).⁵ The WEU was, just like the EDC, a system for collective security, linked to the United Nations (UN): each of the State Parties was committed, in accordance with Article 51 of the UN Charter, to afford assistance to the others in case of armed attack (Article V), and the Treaty was not to be interpreted in any way that could undermine the authority of the UN Security Council as regards the maintenance of international peace and security (Article VI). The WEU, too, had supranational elements. While created to counter-balance the influence of the Soviet Union in central Europe, its purpose was ultimately to promote unity and to encourage “the progressive integration of Europe” (Article VIII).⁶ It seems that the WEU worked mainly as a framework for consultation between countries and for joint actions in the context of regional conflicts, such as the Gulf War or the war in the former Yugoslavia. However, its mandate potentially extended to a wide range of issues: the WEU Council could be convened in case of a “threat to peace, in whatever area this threat should arise, or a danger to economic stability” (Article VIII). In practice, the expansive nature of security can have an impact not only on the powers and responsibilities conferred upon supranational bodies but also on their geographical extension: in subsequent years Portugal and Spain (1990) and Greece (1995) joined the WEU.⁷ The WEU was

⁴ Traité instituant la Communauté Européenne de Défense, Paris, 27 May 1952.

⁵ Treaty on Economic, Social and Cultural Collaboration and Collective Self-Defence, Brussels, 17 March 1948 and the Protocol Modifying and Completing the Brussels Treaty, Paris, 23 October 1954 (Paris Agreements).

⁶ See also www.weu.int.

⁷ Document WEU/SG (2003) 81 revision 5 ‘What is WEU Today?’, December 2009, at www.weu.int.

terminated in 2011, but is a prototype of the current CFSP, as will be seen below.⁸

In a similar vein, experiments were made with the Fouchet Plans and with European Political Cooperation (EPC). The Fouchet Plans (I and II) were not successful because of the failure by the French President, De Gaulle, and the representatives of the other State Parties, including Germany, the Netherlands and the United Kingdom, to reach a compromise (Wessel 2003: 269). The EPC was an attempt to revive the project by way of a framework of cooperation between foreign ministers, initially outside the formal structure of the EC.⁹ The EPC developed gradually through periodic meetings; however, these produced only common institutional positions on matters of foreign affairs (declarations and communiqués). This practice continued throughout the 1970s and 1980s before being incorporated into the Single European Act (SEA), which amended the Treaties of Rome and represented an important step in the process of European integration.¹⁰ However, the SEA, while establishing the European Council (bringing together the Heads of State or of Government of the Member States and the President of the Commission), conferring upon the EPC binding force under international law and committing the Member States to a common policy, kept the EPC formally separate from the European Community, with a distinct legal basis (Murphy 1989: 349). This formal separation is still reflected today, after the entry into force of the Treaty of Lisbon, in the current formulation of the CFSP.¹¹

This should not deceive the reader. The CFSP, as established by the Treaty of Maastricht in accordance with a proposal by the French and German Presidents, is functionally related to the EC/EU.¹² One of the most important aspects of this is precisely the link between the CFSP and the AFSJ (which was originally named justice and home affairs by the Treaty of Maastricht). This is not just about framing paradigmatic areas of State sovereignty, such as foreign

policy, defence, criminal law, immigration and asylum, within an intergovernmental mechanism of decision-making, i.e. the Second and Third Pillars of the EU. It is also about the *symbolic* force of this move. For example, the Rhodes Declaration on the International Role of the European Community (1988) already emphasized that coordination of the political and economic aspects of security had to be ensured for the protection of human rights, the free movement of people, “the establishment of a secure and stable balance of conventional forces in Europe” and “the strengthening of mutual confidence”. In this light, the European Council invited all countries “(...) to embark with the European Community as a world partner on an historic effort to leave to the next generation a Continent and a world more secure, more just and more free”.¹³ This statement expresses a *trait d’union* between the internal and the external dimensions of security. Indeed, the end of the Cold War meant that the ideological divide between capitalism and communism, which had been in the background during the construction of the European space, no longer had any reason to exist. The political and military threat of Europe’s political enemy, the Soviet Union, was over or, at the very least, had changed its nature. Partly in response to this, on the one hand, security no longer needed to be restricted to military strategies and, on the other, the European project could expand towards the East and commit itself to a deeper level of integration. This bi-directional move, towards the outside and towards the inside, was fundamental for the emergence of the binomial security–identity.

In parallel to the unfolding of the EC/EU foreign policy, described above, the predecessor of the AFSJ, TREVI, was also developed through informal structures in the 1970s. TREVI itself operated as part of the EPC and was a group of law enforcement officials meeting periodically and coordinating the fight against terrorism and, later, drug trafficking and organized crime (Anderson 1995: 53; Peek 1995).

⁸ Statement of the Presidency of the Permanent Council of the WEU on Behalf of the High Contracting Parties to the Modified Brussels Treaty, Brussels, 31 March 2010 at www.weu.int; Council Decision 2011/297/CFSP of 23 May 2011 amending Joint Action 2011/555/CFSP on the establishment of a European Union Satellite Centre, OJ L 136, 24.05.2011.

⁹ Final Communiqué of The Hague Summit, The Hague, 1-2 December 1969; *Davignon or Luxembourg Report* by the Foreign Ministers of the Member States on the problems of political unification, Luxembourg, 27 October 1970, both at www.cvce.eu.

¹⁰ Single European Act, 17 February 1986 OJ L 169 1.

¹¹ Art. 24 Consolidated Version of the Treaty on European Union OJ C 326, 26.10.2012. For example, the CFSP is subject to specific rules and procedures and in most cases the Court of Justice of the European Union (CJEU) has no jurisdiction.

¹² Treaty on European Union, 29 July 1992 OJ C 191; Letter from the German Chancellor Helmut Kohl and the French President François Mitterrand to the Irish Presidency of the EC, 19 April 1990, Agence Europe, 20 April 1990.

¹³ Rhodes Declaration on the International Role of the European Community, Rhodes European Council Presidency Conclusions, 2-3 December 1988, at www.europarl.europa.eu/summits/rhodes/default_en.htm.

The impulse for the formalization of the internal aspects of security also came from the Rhodes European Council (mentioned above), which observed that the internal market (especially the free movement of people) and the fight against cross-border crime were to be inseparable. As a result, a group of civil servants, later replaced by the so-called K4 Committee, produced a report (the Palma Document) suggesting the possibility of approximating national laws, with a view to achieving an area without internal frontiers.¹⁴

Rhodes, Maastricht and the fall of the Berlin Wall thus represent a turning point. Between the end of the 1980s and the beginning of the 1990s the EC/EU acquired a renewed self-awareness. Its role was no longer merely that of an economic organization: as mentioned in the previous section, its real ambition was to become a transnational and fluid space, acting as a catalyst for the transformation of the world – a world that would have to be shaped in accordance with its values and aspirations. The binomial security–identity is an essential component of this reconfiguration.

The second turning point for the development of the CFSP/ESDP and the AFSJ is located between the end of the 1990s and the beginning of the new century. The Treaty of Amsterdam¹⁵ coined the term AFSJ and explicitly mentioned that the CFSP would be implemented, *inter alia*, to safeguard the independence and integrity of the EU in conformity with the principles of the UN Charter, to strengthen its security *in all ways* and to promote international security. The Treaty stated that the WEU would be integrated into the EU: in fact, the WEU would be gradually dismantled following the conclusions of the European Council in Cologne.¹⁶ However, it was the Franco–British meeting in Saint-Malo that explicitly agreed that the EU “(...) must have the capacity for autonomous

action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises”.¹⁷ Saint-Malo crystallized a change in the attitude of the United Kingdom, which lifted its objections to an EU defence policy that was autonomous (but by no means detached) from NATO, as later confirmed by the Treaty of Nice.¹⁸ Interestingly, the United Kingdom was also behind the negotiations at Tampere leading to the establishment of the principle of mutual recognition in criminal matters, a key feature of the AFSJ.¹⁹ The events of 9/11 and the subsequent terrorist attacks in Madrid and London did not merely help to accelerate the Tampere agenda, as has been noted by many (Gilmore 2003). They also enhanced the security dimension of European integration by describing a new, undefined “enemy”, i.e. international terrorism, drawing inspiration from the United States’ global strategy.²⁰ Inevitably, this had an impact on the link between the CFSP/ESDP and the AFSJ, not merely from a symbolic point of view, but also in terms of legal ties.²¹

For example, even under the Treaty of Lisbon²² the CFSP/ESDP and the external dimension of the AFSJ potentially overlap and the distinction between them is not clear-cut. As a matter of fact, Article 3(5) TEU, according to which “in its relations with the wider world” the EU must contribute to peace and security, covers both areas. Article 24(1) TEU clarifies that the CFSP covers *all* questions relating to the EU’s security, and Article 43(1) TEU specifies that the EU tasks performed for the maintenance of international security (the so-called “Petersberg tasks”²³) may contribute to the fight against terrorism, and may include the support of third countries. These TEU provisions may be compared with TFEU provisions relating to the AFSJ, such as Article 75 TFEU, which requires the adoption of measures

¹⁴ See www.statewatch.org.

¹⁵ Treaty of Amsterdam, 10 November 1997 OJ C 340.

¹⁶ Cologne European Council Presidency Conclusions, 3–4 June 2000, at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm.

¹⁷ Joint Statement by the British and French Governments, Saint-Malo, France, 4 December 1998, at www.cvce.eu.

¹⁸ Treaty of Nice, 10 March 2001 OJ C 80. According to (then) Article 17 of the TEU, as amended by the Treaty of Nice, the EU would have “humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking”.

¹⁹ Tampere European Council Presidency Conclusions, 15–16 October 1999, at http://www.europarl.europa.eu/summits/tam_en.htm.

²⁰ *United States National Security Strategy*, September 2002, speech of President Bush, New York, ‘Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction’, p. 13.

²¹ See e.g. European External Action Service, ‘Strengthening Ties Between CSDP and FSJ: Roadmap Implementation’, Second Annual Progress Report, Brussels, 14 November 2013, Doc. 02230/13.

²² Consolidated version of the Treaty on European Union (TEU) and of the Treaty on the Functioning of the European Union (TFEU) OJ C 326 26.10.2012.

²³ The “Petersberg tasks” were laid out in the framework of the WEU in 1992 (Petersberg Declaration, WEU Council of Ministers, Bonn, 19 June 1992) and are now part of the ESDP. They include, *inter alia*, humanitarian and rescue tasks, peace-keeping and peace-making.

affecting the movement of capital, such as the freezing of funds, for the purposes of fighting terrorism, or Article 77 TFEU, concerning border control and policing. Neither the nature of the EU competence in the CFSP (either shared or exclusive) nor its scope are clear, even after the merging of the Pillars, and this, of course, leaves the executive powers ample room for manoeuvre (Eeckhout 2011: 165). The CJEU has in the past ruled on the delimitation of competences between the CFSP and other areas of EU external action, but it is not clear whether its case law is binding after the entry into force of the Treaty of Lisbon.²⁴

The question of the choice of the legal basis is certainly constitutionally relevant as regards the relationship between the CFSP/ESDP and the AFSJ. One can imagine a few situations in which it is not certain whether a measure falls within the scope of the AFSJ or that of the CFSP – such as, for example, an agreement on data protection with a third country²⁵ or individual sanctions against natural persons.²⁶ In a recent case, *European Parliament v. Council*, the CJEU ruled that Article 215(2) TFEU was a sufficient legal basis for Council Regulation 881/2002 on restrictive measures against certain terrorist organizations. By this ruling, it dismissed the Parliament's argument in favour of the application of Article 75 TFEU, which would have allowed the Parliament to participate more extensively in the adoption of the measure.²⁷ The core of the reasoning of the Court is that, whilst the fight against terrorism and its financing fall within the scope of the AFSJ, in line with Article 3(2) TEU, nevertheless preserving international peace and security is a general aim that is also pursued by the Treaty provisions on EU external action. The more limited role of the Parliament in CFSP matters is simply a choice made by the drafters of the Treaty of Lisbon.

More generally, the external dimension of the AFSJ stretches across the whole spectrum of external policies of the EU, including not only the CFSP/ESDP, but also, for example, development cooperation, the European Neighbourhood Policy and the relationship of the EU with the Mediterranean region (Koutrakos 2011; Longo 2011). As regards the external dimension of the AFSJ, it has been argued that it “appears as a necessary external instrument

and complement to the internal efforts to construct an AFSJ without internal borders” (Monar 2012: 13).

In both areas of EU law discussed above, intergovernmentalism and flexible legislation (such as enhanced cooperation and emergency brake procedures) have been a constant feature and have survived the collapse of the Pillars. This has led to considerable criticism, mainly from two points of view: consistency and respect for the rule of law. Concerning the latter, many aspects can be highlighted. For example, Article 36 TEU provides for a limited role (mostly involving the right of consultation) for the European Parliament in CFSP matters; and Article 275 TFEU and Article 24(1) TEU, whilst enabling the CJEU to review the legality of CFSP acts providing for restrictive measures against natural or legal persons, still exclude the CJEU's jurisdiction in most cases. Although an argument can be made in favour of the Court's jurisdiction whenever international agreements covering the CFSP are concluded by the EU (Article 218 TFEU), there are still many obstacles to the full constitutionalization of the CFSP. Similarly, in the AFSJ the CJEU cannot scrutinize the validity or proportionality of law enforcement operations or the exercise of municipal responsibilities concerning law and order and internal security (Article 276 TFEU); unanimity still applies in certain sensitive areas; and Member States continue to share a right of legislative initiative with the Commission in some situations. Concerning the weak consistency of the CFSP and the AFSJ, many examples may again be cited, in the context of both internal and external consistency. After all, even though the EU is to comply with the obligation to “ensure consistency between the different areas of its external action and between these and its other policies”, as provided in Article 21(3) TFEU, the CFSP is “subject to specific rules and procedures” and is “defined and implemented by the European Council and the Council acting unanimously”, as specified by Article 24(1) TEU. Similarly, the areas in which the UK, Denmark and Ireland may “opt out” of the AFSJ provisions of the Treaty have been expanded and now include not only immigration, asylum and judicial cooperation in civil matters, but also judicial and police cooperation in criminal matters. This has, of course, increased the complexity and weak consistency of AFSJ law.²⁸

²⁴ ECJ C-91/05 *Commission v. Council* [2008] ECR I-3651. The Court annulled a decision containing elements from both the CFSP and the area of development cooperation, neither of which are incidental to the other, following the former Article 47 TEU.

²⁵ Article 16 TFEU; Article 39 TEU.

²⁶ Articles 75 and 215(2) TFEU.

²⁷ ECJ C-130/10 *European Parliament v. Council* [2012] nyr.

²⁸ Treaty of Lisbon, Protocol 21 on the position of Ireland and United Kingdom in respect of the Area of Freedom, Security and Justice; Protocol 22 on the position of Denmark, OJ C 83, 30.03.2010.

3 The relationship between the AFSJ and the CFSP/ESDP and the international role of the EU

How is the connection between the AFSJ and the CFSP/ESDP reflected in the international role of the EU?

The general attitude of the EU is, first, in favour of cooperation with third countries to improve democratic governance and the protection of human rights and, second, in favour of multilateralism within the framework of global institutions such as the United Nations, the OSCE, the Council of Europe and the World Bank.²⁹ Two examples are particularly significant: the EU–Russia Common Spaces on Freedom, Security and Justice and on External Security, and the European Security Strategy. Both should be considered in the context of the expansion of the external competence of the EU in security matters. This expansion has been confirmed by the European Council in the Stockholm Programme, which emphasized the relevance of the external dimension of the AFSJ and clarified that “addressing threats, even far away from our continent, is essential to protecting Europe and its citizens”.³⁰ Moreover, the European Council has confirmed that the CFSP and the external dimension of the AFSJ pursue shared objectives and should be more coherent.

The EU–Russia Common Spaces on Freedom, Security and Justice and External Security were launched in 2005.³¹ They are just one example among many that demonstrate the increasingly active role of the EU in promoting partnership or association agreements with international organizations, countries or groups of countries across the world (Mitsilegas 2007; Lavenex 2011), including the United States.³² What is more, freedom, security and justice are an important component of the EU Enlargement strategy, as can be seen in the Progress Reports on Croatia and Turkey.³³

There are four EU–Russia Common Spaces (freedom, security and justice; external security; economy; and research

and education), and they were agreed upon at the Saint Petersburg Summit in 2003 to improve the relationship between Russia and the EU. It is noteworthy that the part devoted to security (for example, the fight against terrorism, money laundering, and organized crime) is more developed than those relating to freedom and justice. It remains to be seen to what extent the creation of a common space with Russia (which was a political enemy during the Cold War) is part of a policy of the universalization of European values or is, more modestly, a piece in the jigsaw of inter-regional cooperation.

On the other hand, the European Security Strategy (ESS)³⁴ is rather straightforward. It condenses the key elements of the EU security discourse: the interdependence of the internal and external dimensions of security; the representation of Europe as a transnational, fluid space that has succeeded in preserving peace and prosperity; the existence of undefined threats to this space, which makes it necessary to act at the global level; and the repositioning of the EU as a multilateral actor promoting democracy and human rights worldwide.

The ESS is, in this sense, the epitome of European complacency. In the post-Cold War environment, which is characterized by “increasingly open borders”, security is essential to prosperity. The notion of security relies on the idea of existential threat, which is expanded both geographically and conceptually. On the one hand, because security is “a precondition of development”,³⁵ particularly *sustainable* development, it becomes necessary to address not only classic threats such as terrorism, the proliferation of weapons of mass destruction, organized crime, regional conflicts and state failure, but also threats to social infrastructure, economic activities, energy and natural resources.³⁶ On the other hand, modern threats no longer come merely from military aggression towards one State. They are “dynamic” and stretch worldwide: “[i]n an era of globalization, distant threats may be as much a concern as those that are near at hand”.³⁷ Because threats are undefined

²⁹ Communication from the Commission to the Council and the European Parliament, *The European Union and the United Nations: The choice of multilateralism*, COM (2003) 526 final, Brussels, 10 September 2003.

³⁰ European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, 04 May 2010, OJ C 115, p. 33.

³¹ 2005 Road Map for the Common Space on Freedom, Security and Justice, http://eeas.europa.eu/russia/common_spaces/index_en.htm.

³² See the very recent Joint Statement on enhancing transatlantic cooperation in the area of Justice, Freedom and Security, Riga, 3 June 2015.

³³ Croatia Comprehensive Monitoring Report, SWD (2012) 338 final, Brussels 10.10.2012 p. 12; Turkey 2012 Progress Report, SWD (2012) 336 final, Brussels 10.10.2012 p. 75.

³⁴ European Council, *A Secure Europe in a Better World – European Security Strategy*, Brussels, 12 December 2003.

³⁵ European Security Strategy, *supra*, p. 2.

³⁶ *Ibid.* pp. 3–5.

³⁷ *Ibid.* p. 6.

and can emerge at any time, Europe should always be ready to face them, with whatever means are necessary: not merely with military means, but also through the police and the judiciary, and humanitarian and economic methods. Threats are potentially everywhere. As a result, the powers necessary to manage them must be as broad as possible and must allow intervention not only in neighbouring regions, but also in any area of the world in which a regional conflict arises. This should occur within a “rule-based international order”, under the auspices of the United Nations. There are no limits to this global project and nobody should stand in its way: a new world is coming and the EU is its herald. Those countries that “(...) have placed themselves outside the bounds of international society”, quite simply, “(...) should understand that there is a price to be paid, including in their relationship with the European Union”.³⁸

In much the same tone, the 2008 Report on the Implementation of the ESS points out that “[p]reventing threats from becoming sources of conflict early on must be at the heart of our approach” and, as a result, “[t]o build a secure Europe in a better world, we must do more to shape events. And we must do it now.”³⁹ Recent reports on the implementation of the Internal Security Strategy (ISS) highlight the emergence of new threats, such as cyber-security, together with old ones, such as organized crime.⁴⁰

In fact, the EU’s emphasis on a broad conception of security, going beyond the militaristic approach to include such things as development or the environment, reflects a trend of recent decades, as has been noted in the discipline of international relations (Buzan and Hansen 2009). This expansion plays an important role in the construction of the EU international identity, especially after the entry into force of the Treaty of Lisbon, which has conferred upon the EU a single legal personality and has replaced the Pillar structure with a single structure. Although there are still elements of complexity, the spirit of the Treaty is to ensure

consistency and coherence between the areas of external action as well as between external and internal policies.⁴¹ The Treaty’s provisions clearly depict the image of a space of prosperity and peace, with the EU seeking to uphold and promote its values across the world, in compliance with international law.⁴²

European values are, in this vision, a high achievement of humanity, and must, as a result, be spread as much as possible. As the European Commission often points out, the EU “(...) is ultimately a union of values”.⁴³

4 Conclusions

Our brief overview of the connection and interaction between the AFSJ and the CFSP/ESDP helps us point out a few key aspects. First, the parallel development of the AFSJ and the CFSP/ESDP is very important for the configuration of the international role of the EU. This is particularly true after the end of the Cold War and the 9/11 attack on the Twin Towers. Second, it is no longer possible to ignore or underestimate the constitutional relevance of these two areas for the functioning and the self-representation of the EU. This observation should alert us not only to the question of the legitimacy of the policies pursued in this context, but also to the challenges deriving from their internal and external consistency. Persistent questions about their legal basis highlight tensions and gaps, and these will continue in the coming years. Third, and finally, the EU has been increasingly reliant on a broad concept of security, which goes beyond a mere militaristic approach and embraces areas as diverse as the environment and development. The EU’s relationship with its neighbours, including Ukraine and Russia, as well as with other significant regional and global powers, is likely to be increasingly affected by this trend.

³⁸ Ibid. p. 10.

³⁹ Report on the Implementation of the European Security Strategy, *Providing Security in a Changing World*, Brussels, 11 December 2008 S407/08 p. 9 and 12.

⁴⁰ First Annual Report on the implementation of the EU Internal Security Strategy, COM (2011) 790 final, Brussels, 25.11.2011; Second Report on the implementation of the EU Internal Security Strategy, COM (2013) 179 final, Brussels, 10.04.2013.

⁴¹ Article 21(3) TEU and Article 7 TFEU.

⁴² See e.g. Articles 3 5), 8(1), 21-41 TEU.

⁴³ See e.g. European Commission, *Second Annual Report on the Stabilization and Association Process for South East Europe*, COM (2003) 139 final, 26.03.2003, p. 3.

Bibliography

- H. Bull, 'Civilian Power Europe: A Contradiction in Terms?' (1982) 21 *Journal of Common Market Studies* 149
- B. Buzan, L. Hansen, *The Evolution of International Security Studies* (CUP 2009)
- A. Dashwood, 'States in the European Union' (1998) 23 *European Law Review* 201
- F. Duchêne, 'The European Community and the Uncertainties of Interdependence' in M. Kohnstamm, W. Hager (eds.) *A Nation Writ Large? Foreign-Policy Problems before the Community* (Macmillan 1973)
- P. Eeckhout, *EU External Relations Law* (OUP 2011)
- E. O. Eriksen, 'The EU – A Cosmopolitan Polity?' (2006) 13 *Journal of European Public Policy* 252
- M. Fichera, 'Law, Community and Ultima Ratio in Transnational Law' in M. Fichera, S. Hänninen, K. Tuori (eds.) *Polity and Crisis: Reflections on the European Odyssey* (Ashgate 2014) 189
- A. Hyde-Price, 'Normative Power Europe: A Realist Critique' (2006) 13 *Journal of European Public Policy* 217
- J. Klabbers, 'The Changing Image of International Organizations' in J. M. Coicaud, V. Heiskanen (eds.) *The Legitimacy of International Organizations* (United Nations University Press 2001) 221
- P. Koutrakos, 'The External Dimension of the AFSJ and other EU External Policies – An Osmotic Relationship' in M. Cremona, J. Monar, S. Poli, *The External Dimension of the European Union's Area of Freedom, Security and Justice* (P.I.E. Peter Lang 2011) 139
- N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law* (OUP 2010)
- M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice?' (1999) 36 *Common Market Law Review* 351
- J. Kunz, 'Treaty Establishing the European Defense Community' (1953) 47 *The American Journal of International Law* 275
- S. Lavenex, 'Channels of Externalisation of EU Justice and Home Affairs' in M. Cremona, J. Monar, S. Poli, *The External Dimension of the European Union's Area of Freedom, Security and Justice* (P.I.E. Peter Lang 2011) 119
- F. Longo, 'The Mediterranean Dimension of the Area of Freedom, Security and Justice' in M. Cremona, J. Monar, S. Poli, *The External Dimension of the European Union's Area of Freedom, Security and Justice* (P.I.E. Peter Lang 2011) 367
- I. Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235
- I. Manners, 'Normative Power Europe Reconsidered: Beyond the Crossroads' (2006) 13 *Journal of European Public Policy* 182
- V. Mitsilegas, 'The External Dimension of EU Action in Criminal Matters' (2007) 12 *European Foreign Affairs Review* 457
- J. Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice – Progress, Potential and Limitations after the Treaty of Lisbon', *SIEPS Policy Brief* 2012:1
- K. Nicolaïdis, R. Howse, 'This is my EUtopia: Narrative as Power' (2002) 40 *Journal of Common Market Studies* 767
- J. Peek, 'International Police Cooperation within Justified Political and Juridical Frameworks: Five Theses on Trevi' in J. Monar, R. Morgan (eds.) *The Third Pillar of the European Union: Cooperation in the Fields of Justice and Home Affairs* (EIP Brussels 1995) 85
- I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 *Common Market Law Review* 703
- E.-U. Petersmann, 'Theories of Justice, Human Rights, and the Constitution of International Markets' (2003) 37 *Loyola of Los Angeles Law Review* 407
- B. Simma, D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483
- K. Smith, 'The End of Civilian Power EU: A Welcome Demise or Cause for Concern?' (2000) 35 *The International Spectator* 11
- J. Weiler, U. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz' in A. M. Slaughter, A. Stone Sweet, J. Weiler (eds.) *The European Courts and National Courts – Doctrine and Jurisprudence* (Hart 1998)
- R. Wessel, 'The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice' (2003) 8 *Journal of Conflict & Security Law* 265
- P. Zumbansen, 'Transnational Legal Pluralism' (2010) *Transnational Legal Theory* 1

European Policy Analysis available in English

2015

2015:23epa

The constitutional and historical relevance of the AFSJ and the CFSP/ESDP

Author: Massimo Fichera

2015:22epa

Intelligence and decision-making within the Common Foreign and Security Policy

Author: Björn Fägersten

2015:20epa

The Regulatory Cooperation Chapter of the TTIP Challenges and Opportunities

Author: Alberto Alemanno

2015:19epa

Low Inflation and Deflation in EU Countries Outside the Euro Area: Should Policymakers be Concerned?

Authors: Plamen Iossifov and Jiří Podpiera

2015:17epa

Social Housing in Europe

Authors: Kathleen Scanlon, Melissa Fernández Arrigoitia and Christine Whitehead

2015:15epa

The Balance of Power over the EU Budget: European Expenditure since the Lisbon Treaty

Author: Giacomo Benedetto

2015:14epa

The Usefulness of the Scoreboard of the Macroeconomic Imbalances Procedure in the European Union: Potentials for Reform

Author: Tobias Knedlik

2015:13epa

The impact of mega regional agreements on international investment rules and norms

Author: Steve Woolcock

2015:12epa

The Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Spanish Regions – A Preliminary Analysis

Authors: José Villaverde and Adolfo Maza

2015:11epa

Transatlantic Market Integration, Business and Regulation: Building on the WTO

Authors: Bernard Hoekman and Petros C. Mavroidis

2015:10epa

Juncker's investment plan: what results can we expect?

Author: Martin Myant

2015:9epa

Russia's economic troubles – a perfect storm of falling oil prices, sanctions and lack of reforms

Author: Torbjörn Becker

2015:8epa

Entering a World of Footloose Tax Bases: Can the EU Generate Its Own Income?

Author: Daniel Tarschys

2015:7epa

Britain and the EU: a negotiator's handbook

Author: Roderick Parkes

2015:6epa

Europe's pivotal peace projects: Ethnic separation and European integration

Author: Lynn M. Tesser

2015:5epa

Groundhog Day in Greece

Author: Thorsten Beck

2015:4epa

The Greek elections of 2015 and Greece's future in the eurozone

Author: Dionyssi G. Dimitrakopoulos

2015:3epa

The diplomatic role of the European Parliament's parliamentary groups

Author: Daniel Fiott

2015:2epa

Social Policy and Labour Law during Austerity in the European Union

Author: Niklas Bruun

2015:1epa

International Trade Union Solidarity and the Impact of the Crisis

Authors: Rebecca Gumbrell-McCormick and Richard Hyman

2014

2014:9epa

Making Sense of Subsidiarity and the Early Warning Mechanism – A Constitutional Dialogue?

Author: Jörgen Hettne

2014:7epa

A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the eurozone

Author: Claire Kilpatrick and Bruno De Witte

2014:4epa

Why vote at an election with no apparent purpose? Voter turnout at elections to the European Parliament

Author: Mark N. Franklin

2014:3epa

The EU Budget and Balance of Powers Between the European Parliament and the EU Governments

Author: Sara Hagemann

2014:2epa

Between a rock and a hard place: the future of EU treaty revisions

Author: Carlos Closa

2014:1epa

Scrutiny in Challenging Times – National Parliaments in the eurozone Crisis

Authors: Katrin Auel and Oliver Höing

2013

2013:18epa

The outer reach of state obligations under deposit guarantee schemes – What can we learn from the Icesave case?

Authors: Thor Petursson and Asta Solillja Sigurbjörnsdottir

2013:17epa

Towards Cruising Speed? Assessing the EU Strategy for the Baltic Sea Region

Authors: Kristine Kern and Stefan Gänzle

2013:16epa

The European Council – the new centre of EU politics

Author: Uwe Puetter

2013:15epa

Why the 2014 European Elections Matter: Ten Key Votes in the 2009–2013 European Parliament

Author: Simon Hix

2013:14epa

Germany at the polls – what Europe can expect

Author: Julian Rappold

2013:13epa

The First Leadership Test: What to Expect from the Lithuanian Presidency of the EU

Author: Margarita Šešelgyte

2013:11epa

Enlarging the European Union and deepening its fundamental rights

Author: Christopher Hillion

2013:7epa

Strategic Use of Public Procurement – Limits and Opportunities

Author: Jörgen Hettne

2013:7epa

Strategic Use of Public Procurement – Limits and Opportunities

Author: Jörgen Hettne

2013:6epa

Alternative Dispute Resolution for Consumers in the Financial Services Sector: A Comparative Perspective

Author: Iris Benöhr

2013:3epa

The EU Neighbourhood Competence under Article 8 TEU

Author: Christophe Hillion

2013:2epa

The creation of an internal market for mortgage loans: A never-ending story?

Author: Christian König

2013:1epa

What to Expect from Ireland's Presidency of the Council of the European Union

Author: Linda Barry

2012

2012:15epa

Evaluating the Prospects for Enhanced Solidarity in the Common European Asylum System

Authors: Eiko Thielemann and Carolyn Armstrong

2012:14epa

Consumers' Interest and the EU: A Framework for Analysis, with Evidence from the Italian Case

Author: Paolo R. Graziano

2012:13epa

New Paradigms for Banking Regulation

Author: Xavier Freixas

2012:12epa

Response to Crisis

Author: Axel Leijonhufvud

2012:11epa

Stuck in the Exit: the Dynamics of British-EU Relations

Author: Roderick Parkes

2012:10epa

The EU and Nuclear Safety: Challenges Old and New

Author: Anna Södersten

2012:8epa

The Commission's Posting Package

Authors: Jonas Malmberg and Caroline Johansson

2012:7epa

The Greek Elections of 2012 and Greece's Future in the eurozone

Author: Dionyssi G. Dimitrakopoulos

2012:6epa

Common Fisheries Policy Reform and Sustainability

Author: Jill Wakefield

2012:4epa

Eurobonds, Flight to Quality, and TARGET2 Imbalances

Author: Erik Jones

2012:3epa

The Hungarian Constitution of 2012 and its Protection of Fundamental Rights

Author: Joakim Nergelius

2012:2epa

The EU and Climate Treaty Negotiations after the Durban Conference

Author: Katak Malla

2012:1epa

The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession

Author: Milada Anna Vachudova and

Aneta Spendzharova