



José Martín y Pérez de Nanclares

Professor of International Public Law at the University of Salamanca

SECURITY AND FOREIGN ACTION IN THE EUROPEAN UNION: THE INCREASING IMPORTANCE OF THE EXTERNAL DIMENSION OF THE AREA OF FREEDOM, SECURITY AND JUSTICE*

This article examines security and defence in the European Union from its founding treaties to the present. Some of the major aspects covered include NATO's role in the incorporation of security and defence into the integration process, the fall of the Soviet bloc and the disappearance of the Cold War military threat.

One of the aspirations behind the founding of the European Community was the search for lasting peace. Common security and defence became part of the legal framework of the European Union with signature of the Treaty of Lisbon.

The European Area of Freedom, Security and Justice is one of the mechanisms in the shared efforts and cooperation to ensure the security of the continent.

European Union, European Area of Freedom, Security and Justice, Treaty of Lisbon, security and common defence

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I. GENERAL: THE CONTINUING DESIRE TO INCLUDE SECURITY AND DEFENCE ON THE EU AGENDA

A desire to establish common European defence has been ever present since the early rejection by the French parliament of the failed Treaty to create a *European Defence Community* in 1954 to the present. However, European integration and collective defence then took very different routes and did not come together again until the last decade. The ultimate objective of the three European Communities created by the Treaties of Paris (1952) and Rome (1957) indirectly addressed military issues, aiming to achieve a lasting peace in Europe by sidelining the thorny “French-German” issue¹. However, collective security in Europe has mainly been built around the Atlantic Alliance (NATO) and, to a far lesser extent, the Western European Union (WEU); in fact, renouncing its own military structure and remaining under the NATO umbrella was part of the WEU's DNA from its founding in October 1954 until its disappearance due to inactivity in 2010.

However, the new scenario resulting from the collapse of the “Eastern bloc” and the disappearance of the real military threat of the Cold War has created the conditions needed for these two paths to come together and to aspire to including security and defence on the European Union (EU) agenda. The Maastricht Treaty (1992) effectively

¹ A famous statement in the Schuman Declaration of 9 May 1950 establishes that “Europe will not be made all at once, or according to a single, general plan. It will be built through concrete achievements which first create a *de facto* solidarity”. This would require the “elimination of the age-old opposition of France and Germany” through integration that will establish “the first concrete foundation of a European federation indispensable to the preservation of peace”.

broke the ground². Subsequently, once the issue had started to be addressed by the barely noticeable reforms to intermediary stations in Amsterdam (1997) and Nice (2001)³, the Treaty of Lisbon (2007) ushered in a new legal framework enabling the EU to develop its own defences in the context of the *Common Foreign and Security Policy* (CFSP).

However, the issue of security in the EU now far exceeds the scope of the CFSP⁴. The international spread of terrorism and its establishment as a lasting international threat following 11 September has widened the panorama for collective security in a new globalised world in which Europe is now far from the epicentre. Moreover, the disappearance of frontiers between member states in the “single market” has resulted in compensatory security measures being required to control external borders (to combat illegal immigration) and for legal and judicial cooperation on criminal issues (to fight transnational crime). In this paper we will be concentrating on this dimension,

2 As Esther Barbé has stated, the Maastricht Treaty was “the meeting point for two processes that had over many years been formally separated: European construction and defence and security institutions”; BARBÉ, Esther: *La seguridad en la nueva Europa*, Catarata, Madrid, 1995, p. 157. In effect, the Maastricht Treaty, based on the seed of modest *European Political Cooperation* in the Single European Act (1986), was the first time that the then European Community had appeared on the European defence agenda. This was done in a way that was more programmatic (‘it could drive things’) than purely legal and, as shown by subsequent events, was more about intentions than realities. It was also articulated in a very nebulous way, as the three phase programme towards this European defence was still only hazily sketched out. Continuing with Esther Barbé’s metaphor in the aforementioned work on the ‘triad of European security’, the WEU would continue to play a ‘hinge role’ (linked to NATO for military issues and a basis for the Union’s defensive action) that did not serve to make a real defence policy for the EU possible. Also HERRERO DE LA FUENTE, Alberto A.: “Del ‘Informe Davignon’ a la Política Europeo de Seguridad y Defensa. Una evolución más aparente que real”, in ALDECOA LUZARRAGA, Francisco (coord.), *Los tratados de Roma en su cincuenta aniversario: perspectivas desde la Asociación Española de Profesores de Derecho Internacional y de Relaciones Internacionales*, Marcial Pons, Madrid, 2008, pp. 1249-1276.

3 The ample literature on the CFSP prior to the Treaty of Lisbon includes works by BARBÉ, Esther: “Evolución, presente y perspectivas futuras de la Unión Europea y de la Política de Seguridad y Defensa Común”, in PALOMARES LERMAN, Gustavo (ed.), *Política de Seguridad de la Unión Europea: realidades y retos para el siglo XXI*, Tirant lo Blanch, Valencia, 2002, pp. 23-40; FERNÁNDEZ SOLA, Natividad: “La política europea de seguridad y defensa en el debate sobre el futuro de la Unión Europea”, *Boletín Europeo de la Universidad de La Rioja* 2003, num. 11, pp. 10-26; GARCÍA PÉREZ, Rafael: *Política de Seguridad y Defensa de la Unión Europea*, UNED and the Instituto Universitario General Gutiérrez Mellado, Madrid, 2003; GONZÁLEZ ALONSO, Luis Norberto: “La política europea de seguridad y defensa después de Niza”, *Derecho Comunitario Europeo Journal* 2001, num. 9, pp. 197-240; HERRERO DE LA FUENTE, Alberto A.: “La política europea de seguridad y defensa”, in RAMÓN CHORNET, Consuelo (coord.), *Derechos y libertades ante las nuevas amenazas a la seguridad global*, Tirant lo Blanch, Valencia, 2005, pp. 79-130.

4 Now is not the time to get sidetracked on the interesting conceptual question of the scope of the idea of “collective security” and how this differs from other similar concepts, as we will be using the concept in a wide-ranging sense. However, it is interesting to read ORAKHELASHVILI, Alexander: *Collective Security*, Oxford University Press, Oxford, 2011, particularly pp. 4-21 (‘Essence and Definition of Collective Security’). Esther BARBÉ’s 1995 conceptual reflections are also of interest in the aforementioned work, *op. cit.* pp. 23-60.

which falls outside the scope of defence policy as such. In particular, we will be examining the *Area of Freedom, Security and Justice* (henceforth, the AFSJ) (II); within this, the external dimension is becoming increasingly important, and this (III) justifies focusing on the main actions undertaken by the Union in this area (IV) in order to assess its deficiencies and potential (V).

II. SECURITY IN THE EU: SOMETHING MORE THAN THE COMMON SECURITY AND DEFENCE POLICY

1. Security in the heart of the CFSP: towards a common security and defence policy

The new legal framework for the Union in relation to the CFSP established in the Treaty of Lisbon (arts. 21 to 46 TUE) not only pushed forward the implementation of a more efficient diplomatic policy through the High Representative and the European External Action Service (EEAS)⁵, it also cleared away many of the previous obstacles to development of a true defence policy within the Union (e.g. updating of the objectives of the Petersburg missions and the creation of the European Defence Agency). In terms of defence, the founding treaties refer to a *Common Security and Defence Policy* (CSDP) -previously, this had been discussed more generically as a European Security and Defence Policy (ESDP); there are at least three elements of particular importance to this. First, a combination of ambitious objectives (art. 3.5. and 21 TEU) but in a very modest set up⁶. Second, an interesting *mutual assistance clause*, under which if a Member State is subject to armed aggression on its territory, “the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the UN Charter” (art. 42.7 TEU)⁷. Third, defence is

5 There is abundant literature on the subject, including the recent collection coordinated by Francisco ALDECOA LUZARRAGA, *La diplomacia común europea: el Servicio Europeo de Acción Exterior*, Marcial Pons, Madrid, 2011.

6 The specific regulation of the CFSP is so subject to institutional peculiarities (pre-eminence of the European Council and the use of unanimity, exclusion of the usual *ex ante* and *ex post* controls), legislative exclusions (non-adoption of legislative acts) and restrictions on competences (maintenance of the predominant role of the States) that from a material point of view we can talk fundamentally of an (imaginary) pillar of intergovernmental inspiration within the Union that otherwise exercises its competences (almost) fully in “community mode”. This is a conclusion we have already described in our “Preliminary study”, in MARTÍN y PÉREZ DE NANCLARES, José and URREA CORRES, Mariola: *Tratado de Lisboa — Textos consolidados del Tratado de la Unión Europea y del Tratado de Funcionamiento de la Unión Europea*, Marcial Pons, 2nd ed., Madrid, 2010, pp. 17-66, en p. 33. Refer for more detail to GONZÁLEZ ALONSO, Luis Norberto: “Quién dijo que desaparecen los pilares? La configuración jurídica de la acción exterior de la Unión en el Tratado de Lisboa”, in MARTÍN y PÉREZ DE NANCLARES, José (coord.), *El Tratado de Lisboa — La salida de la crisis constitucional*, Iustel, Madrid, 2008, pp. 393-403.

7 Refer for example to RUBIO GARCÍA, Dolores: *Las cláusulas de asistencia mutua y solidaridad introducidas por el Tratado de Lisboa: el refuerzo de la solidaridad y la defensa en la Unión Europea*, Fundación Alternativas-IEEE Working Paper 57/2011, Madrid, 2011.

considered an area for potential reinforced cooperation and possible permanent structured cooperation⁸.

As far as we are concerned here, the Treaty of Lisbon has opened new horizons for European security and defence in the general framework of the Union's external action⁹. However, questions of collective security are not limited to those established in the context of the CFSP. There are also at least two further areas with particular relevance and potential outside this.

2. Security beyond the CFSP: The increasing importance of the Area of Freedom, Security and Justice

The founding treaties in effect make provision outside the framework of the CFSP for other important provisions that also affect collective security and are in reality ultimately rooted in the desire to combat international terrorism and other threats to the *internal* security of the Union. These basically fall into two fundamental areas: one that straddles the CFSP and the Union's classic external action, and one that constitutes a whole sector of regulations with its own personality. Specifically, the first of these is the *solidarity clause* (art. 222 TFEU) in the external action title (title VII of Part V of the TFEU), rather than the defence title (title V). This originated in attempts post-11 September to combine resources and efforts in the fight against international terrorism, establishing that the Union and its Member States will act jointly in a spirit of solidarity, if any Member State is subject to a terrorist attack, or is the victim of a natural or man-made catastrophe¹⁰. This therefore goes beyond defence in its strictest sense, but it also has evident repercussions on this from the moment when the Treaty explicitly mentions the Union's obligation to mobilise all instruments at its disposal “including the military resources made available by the Member States”.

A second area of security regulation outside the CFSP and traditional external action is the aforementioned AFSJ. In fact, at present, one of the Union's main objectives is to

8 See. Protocol 10 on the permanent structured cooperation established in article 42 TEU. Further details of the character, scope and problems of these flexibility mechanisms can be found in URREA CORRES, Mariola: “La política (común) de seguridad y defensa en el Tratado de Lisboa: la eficacia como objetivo, la flexibilidad como instrumento y la ambición como propuesta de futuro”, *Revista Europea de Derecho Europeo* 2010, num. 13, pp. 91-120. More specifically, on the peculiar instrument of permanent structured cooperation, refer to RUIZ CAMPILLO, Xira and BARROSO CORTÉS, Francisco: *La cooperación estructurada permanente: propuestas para España*, Fundación Alternativas Working Paper 37/2009, Madrid, 2009; BISCOP, Sven and COELMONT, Jo: “Permanent Structured Cooperation for Effective Armed Forces”, *Security Brief*, num. 9, The Royal Institute for International Relations, Brussels, 2009.

9 For all six contributions refer to the collection *La política europea de seguridad y defensa (PESD) tras la entrada en vigor del Tratado de Lisboa*, Strategic Papers-Ministry of Defence 145, Madrid, 2010. For a view of the future, see PERRUICHE, Jean Paul: “Los nuevos horizontes de la defensa europea”, IEEE Working Paper 2/2011 of 11 October 2011, pp. 6-13.

10 Cf. RUBIO GARCÍA, Dolores: *op. cit.* (*The clauses...*).

“offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime” (art. 3.2 TEU). To achieve this, the Union currently has wide-ranging competence shared with Member States (art. 4.2 j TFEU) to adopt the measures required to develop border control, immigration, asylum and civilian judicial cooperation polices, and for intensive police and judicial cooperation on criminal issues (arts. 67 to 89 TFEU)¹¹. Not in vain in the light of progressive incorporation of state competences in this delicate area of internal and justice issues into the community fold, over the last three decades, the Union has approved a wide range of regulations of very varied natures¹². We only have to think of the multiple actions undertaken by the Union under the successive Tampere (1999-2004)¹³, Hague (2005-2009)¹⁴ and Stockholm (2010-2014)¹⁵

11 We dealt with the question of regulation of the AFSJ following the Treaty of Lisbon in depth in our previous work “El nuevo espacio de libertad, seguridad y justicia en el Tratado de Lisboa”, *Revista de las Cortes Generales* 2007, nums. 70-71-72, pp. 85-125. Also refer to, DIAZ BARRADO, Cástor M.: “El Espacio de Libertad, Seguridad y Justicia en el Tratado de Lisboa”, in *ib.* and FERNÁNDEZ LIESA, Carlos R. (coord.), *El Tratado de Lisboa — Análisis y perspectivas*, Dykinson, Madrid, 2008, pp. 81-96; VALLE GÁLVEZ, Alejandro del: “Espacio de Libertad, Seguridad y Justicia y Tratado de Lisboa”, in MARTÍN y PÉREZ DE NANCLARES, José (coord.), *El Tratado de Lisboa — La salida a la crisis constitucional*, Iustel, Madrid, 2008, pp. 417-435. Works in languages other than Spanish include PEERS, Steve: *EU Justice and Home Affairs Law*, 3rd ed., Oxford University Press, Oxford, 2011; *ib.*: “Mission accomplished? EU Justice and Home Affairs law after the Treaty of Lisbon”, *Common Market Law Review* 2011, pp. 661-693; KADDOUS, Christine: “Un nouveau cadre pour la dimension externe de l’espace de liberté, de sécurité et de justice”, in *ib.* and DONY, Marianne (coords.), *D’Amsterdam à Lisbonne — Dix ans d’espace de liberté, de sécurité et de justice*, Heilbing & Lichtenhahn, 2010, pp. 61-79.

12 It is worth noting that this incorporation of competences for internal issues and justice into the Union’s material actions has taken place through a range of successive methods that differed substantially in nature and intensity of competences. First, via jurisprudence, with the Court of Justice giving a *wider* interpretation of internal market regulations affecting issues such as visas and the legal position of nationals of certain other non-member states. Similarly, treaties constituting international agreements, such as Schengen and Dublin, that use the mechanisms of International Law to regulate aspects of external border control and the determination of asylum claims by the responsible State, for which the then European Community had no competences, have been agreed *extramurally*. Subsequently, as also occurred with the CFSP, this was also done on the inter-government basis introduced by the Maastricht Treaty; in other words, in an extra-Community pillar for internal and justice issues. The subsequent agreement of the Treaty of Amsterdam rechanneled some areas (immigration, visas and asylum) to the community method, but still left the aspects of the AFSJ most closely linked to national sovereignty (police and judicial cooperation on criminal issues) on the extra-Community pillar. And finally, the Treaty of Lisbon created a legal and institutional framework for all AFSJ questions that, unlike the continuing situation for the CFSP, is fully compatible with that for any other area within the competence of the Union.

13 Conclusions of the Tampere European Council of 15 and 16 October 1999.

14 Conclusions of the Brussels European Council of 4 and 5 November 2004.

15 Conclusions of the Brussels European Council of 1 and 2 December 2009.

Programmes, and their corresponding Action Plans¹⁶. These have created a complex web of regulations with intensive effects on national regulations in areas closely identified with the concept of sovereignty.

The fundamental point that we must underline is that the entry into effect of the Treaty of Lisbon brought to an end a lengthy process that, unlike the CFSP, is concluding with the full “Communitisation” (in competences, institutions and regulations) of this area¹⁷. Therefore, as with all other Union competences, this action includes both an internal action (in relation to the Member States) and an external action.

Nevertheless, until very recently, the external dimension of the AFSJ had remained in the background, with relations with other countries and participation in the work of international organisations related to the area being basically in the hands of the Member States. Furthermore, although the founding treaties provided competences for the Union to enter into international agreements, it retained a duality of legal bases, decision-making procedures and political and legal control mechanisms, depending on whether the international agreement dealt with a topic falling on the community pillar (visas, immigration and asylum) or the extra-Community pillar (police and judicial cooperation). In practice, this represented a serious obstacle to effective, coordinated and coherent action; the Treaty of Lisbon overcame this.

III. THE EXTERNAL DIMENSION OF THE AREA OF FREEDOM, SECURITY AND JUSTICE: A NEW SCOPE OF ACTION FOR THE UNION

1. The inseparability of the internal and external dimensions of the AFSJ: the Union's necessary external action in the AFSJ

In this new post-Lisbon legal set up, external action under the AFSJ is considered to be one of the Union's priorities in both the Stockholm Programme and its Action Plan¹⁸. The only clear conclusion we can draw at present from the Union's actions with

16 COM (2005) 184 final of 10.5.2005 (Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice); COM (2010) 171 final of 20.4.2010 (Delivering an area of freedom, security and justice for Europe's citizens).

17 The limitations and deficiencies that can still be identified in current AFSJ regulations are discussed in detail in ZAPATER DUQUE, Esther: “La dimensión exterior del Espacio de Libertad, Seguridad y Justicia en el Programa de Estocolmo: el reto de la integración y de la coherencia”, in PI LLORENS, Montserrat and ZAPATER DUQUE, Esther (coords.), *¿Hacia una Europea de las personas en el Espacio de Libertad, Seguridad y Justicia?*, Marcial Pons, Madrid, pp. 19-44; LIROLA DELGADO, Isabel: “La cooperación judicial en materia penal en el Tratado de Lisboa: ¿Un doble proceso de comunitarización y consolidación a costa de posibles frenos y fragmentaciones?” *Revista General de Derecho Europeo* 2008, num. 16, <http://www.iustel.com>.

18 A legal assessment of this external dimension of the AFSJ is given in the interesting paper by CREMONA, Marise: “EU External Action in the JHA Domain — A Legal Perspective”, in *ib*, MO-

regard to the AFSJ is that its internal and external dimensions are indissolubly linked¹⁹. Moreover, the external dimension is an essential instrument for achieving the AFSJ's internal objectives: without coherent and coordinated external action, it will be impossible for the Union's actions inside the borders of its Member States to be effective.

There are three main reasons for this. This is firstly because, as with all other competences attributed to the Union, all community policies have an external dimension, as the Court of Justice has recognised through its well-established *in foro interno in foro externo*²⁰ doctrine. Secondly, this inseparability of the internal and external dimensions manifests itself much more evidently in the specific scope of the AFSJ as, through the very definition of the area being regulated, the measures adopted in the internal ambit of the Unit already possess *per se* a certain external dimension affecting other countries. Thirdly, there are also specific actions that in themselves are a clear manifestation of this external dimension. For example, these might include readmission agreements, judicial cooperation agreements and even data transfer agreements with other countries.

It is therefore worth briefly pausing to delimit the legal scope of the external competences of the Union in this area.

2. The external competence of the Union in the ambit of the AFSJ: the fruitful set of express and implicit external competences

As we have already discussed, the Treaty of Lisbon has achieved full “communitisation” of the whole of the AFSJ. As a result, the Union's current shared competence in this area does not differ from that it has in other areas, such as the internal market, the environment and consumer protection. Consistently with this, the Union's external action in the AFSJ context is governed by the same general rules applicable to any of the Union's other shared competences, unlike the situation with the CFSP. Therefore, briefly summarising the complex regime of external competences currently existing under EU Law, we can talk of two basic mechanisms through which the Union can intervene in the international arena to achieve the security objectives set out in the AFSJ.

On the one hand, in accordance with the general provision in this area, the Union can enter into international agreements “where the Treaties so provide” (art. 216.1 TFEU). In this regard, there are *ad hoc* external competences to enter into interna-

NAR, Jörg and POLI, Sara (eds.), *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Peter Lang, Brussels, 2011, pp. 77-115.

19 In this context, it is also worth consulting FLAESCH-MOUGIN, Catherine (ed.), *Union Européenne et sécurité: aspects internes et externes*, Bruylant, Brussels, 2009; SANTOS VARA, Juan: “The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty”, *European Law Journal* 2008, pp. 577-597.

20 See below, II, 2.

tional agreements with other countries for the readmission of illegal immigrants (art. 79.3 TFEU)²¹ and for granting asylum and subsidiary protection (art. 78.2 g TFEU)²². On the other hand, pursuant to classic jurisprudence from the Court of Justice on implicit competences, which has now been “legalised” by the founding treaties (art. 216.1 TFEU)²³, the Union also has competences to enter into international agreements with other countries or international organisations to achieve the objectives established in the policy to establish the AFSJ, when this is provided for in a legally binding Union act entered into in the context of the AFSJ or when it is likely to affect common rules or alter the scope provided for in a binding legal act²⁴. This form of external action has become more relevant following the Treaty of Lisbon coming into effect, with the disappearance of the express attribution of competences for police and judicial cooperation that formed what was known as the third pillar (previous articles 24 and 38 TEU); this will also be the implicit competence on which future international agreements in this important area will be based.

Having reached this point, it is worth examining the actual scope of the Union's external action based on these possibilities for action.

21 This is specifically the possibility to “conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States”. This competence base is not in reality an innovation of the Treaty of Lisbon as it was introduced by the Treaty of Amsterdam (previous art. 63.3 b TEC).

22 The Union likewise has competence to adopt “measures for a common European asylum system” including “partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection”.

23 This jurisprudence construction condenses into the doctrine of parallelism between internal and external competences or *in foro interno in foro externo* that was formulated in the ruling of 31 March 1971, *Commission c. Council* (22/70, *Rec.*, p. 273), section. 16; ruling of 14 July 1976, *Kramer* (3, 4 and 6/76, *Rec.*, p. 1279), sections. 20 and 33. This doctrine was subsequently supplemented by decisions 1/76, of 26 April 1977, section. 3 and 1/94, of 15 December 1994, section. 95.

24 This is not the time to get sidetracked on a doctrinal discussion about whether this type of implicit external Union competence for the AFSJ is shared or exclusive in nature. It should be sufficient here that the thesis of exclusive competence in the sphere of the AFSJ have clearly been eroded by Protocol 23 on external relations of Member States with respect to the crossing of external borders, and by Declaration 36 relating to article 218 on the negotiation and agreement of international agreements by Member States in relation to the AFSJ.

IV. THE UNION'S RECENT ACTIONS RELATING TO THE EXTERNAL DIMENSION OF THE AREA OF FREEDOM, SECURITY AND JUSTICE: CONCERNS ABOUT CONTROLLING ILLEGAL IMMIGRATION AND THE FIGHT AGAINST TERRORISM

1. The external dimension of border control, immigration and asylum issues: the role of readmission agreements and FRONTEX

The Union's external action in this area has related mostly to the fight against illegal immigration and what are termed *readmission agreements*, which form the backbone of this²⁵. Initially, where there was no *ad hoc* competence for agreeing these, they simply consisted of a clause addressing the issue inserted into an international agreement on some other issue, usually a mixed cooperation agreement²⁶. Subsequently there was an intermediary stage when, despite the existence of an *ad hoc* competence, such clauses continued to be included in international agreements, although making an explicit reference to the future negotiation of a specific agreement on this issue. Today, more than a dozen specific readmission agreements have been signed²⁷, and the Commission currently has a negotiating mandate in at least half-a-dozen more cases²⁸.

In practice, these agreements have given rise to a deep doctrinal dispute. From a political point of view, the political strategy behind the choice of countries with which to reach agreements has not always been clear. It is also difficult to understand how the Council has been able to approve a negotiating mandate with certain countries without having confirmation that, as a minimum, it would be possible to begin negotiations²⁹. There are also serious questions from a legal perspective. These include, for example, the

25 Cf. for example, ARENAS HIDALGO, Nuria: “Los acuerdos de readmisión de inmigrantes en situación irregular. Diez años de política europea de readmisión a debate”, *Cuadernos Europeos de Deusto* 2010, num. 43, pp. 53-90.

26 The latter was basically the form used in the agreements at the end of the 1990s with a number of countries in eastern European and the Caucasus. This was the case with the clauses in international agreements with Russia (*OJ L* 327 of 28.11.1997), Ukraine (*OJ L* 49 of 19.12.1998), Moldavia (*OJ L* 181 of 24.6.1998), Armenia (*OJ L* 239 of 9.9.1999), Azerbaijan (*OJ L* 246 of 17.9.1999), Georgia (*OJ L* 205 de 4.8.1999) and Uzbekistan (*OJ L* 352 of 30.12.2002).

27 Such agreements have been signed with Hong Kong (*OJ L* 17 of 24.1.2004), Macao (*OJ L* 143 of 30.4.2004), Sri Lanka (*OJ L* 124 of 17.5.2005), Albania (*OJ L* 124 of 17.5.2005), Russia (*OJ L* 129 of 17.5.2007), Ukraine (*OJ L* 332 of 18.12.2007), Moldova (*OJ L* 334 of 19.12.2007), Macedonia (*OJ L* 334 of 19.12.2007), Montenegro (*OJ L* 334 of 19.12.2007), Serbia (*OJ L* 334 of 19.12.2007), Bosnia and Herzegovina (*OJ L* 334 of 19.12.2007), Pakistan (*OJ L* 287 of 4.11.2010) and Georgia (*OJ L* 52 of 25.2.2011).

28 This includes the negotiating mandates with Morocco, Turkey, Cape Verde, Belarus, China and Algeria.

29 There have been cases in which the Council has entrusted such tasks to the Commission but it was subsequently not even possible to open negotiations with these countries. This has happened with China and Algeria.

lack of confirmation of compliance with the requirements of the subsidiarity principle (art. 5.3 TEU and Protocol 2) and possible violations of the requirements of the principle of cooperation in good faith (art. 4.3 TFEU) in cases in which Member States continue negotiating their own agreements with countries with which the Commission already has a negotiating mandate. However, the most serious legal problems probably derive from the compatibility of such agreements with the international commitments undertaken by the Union and the Member States in relating to asylum and human rights³⁰.

Moreover, the FRONTEX, agency was set up in 2007 to manage operational cooperation over the external borders of the Union's Member States³¹. FRONTEX has agreed a number of international agreements with various states³² and international organisations³³ to improve the Union's external border control and fight the arrival of illegal immigrants in the Union. These agreements -known in practice as 'working arrangements'— also raise serious legal questions that even affect whether a Union agency can in reality have competence to enter into such agreements. Nevertheless, from an operational point of view, these arrangements provide coverage for a range of actions that have demonstrated their usefulness in practice.

2. The external dimension of police and judicial cooperation in criminal matters: the problems of some international agreements relating to terrorism

With regard to police and judicial cooperation in criminal matters, prior to the entry into force of the Treaty of Lisbon, intensive external efforts had been made based on *ad hoc* attribution of competences in the intergovernmental framework of the old third pillar³⁴. For example, international agreements were signed on extradition and judicial assistance on criminal matters with other countries, such as the United

30 In this context, the following are particularly relevant: the European Convention for the Protection of Human Rights and Fundamental Freedom (1950), the Geneva Convention relating to the Status of Refugees (1951) and its New York Protocol (1967), together with the Charter of Fundamental Rights of the European Union, which has been legally binding since the entry into force of the Treaty of Lisbon (art. 6.1 TEU).

31 Regulation (EC) n° 2007/2004, of the Council, of 26 October 2004, *OJ/L* 349 of 25.II.2004.

32 Such agreements, known as "working arrangements", have been reached with countries in Eastern Union (Russia, Ukraine, Croatia, Georgia, Belarus, Serbia, Albania, Montenegro and Macedonia), Africa (Cape Verde) and North America (USA and Canada).

33 This is the case with agreements with external international organisations (the International Organization for Migration) and other European Union agencies (Europol, Human Rights Agency, European Maritime Safety Agency, etc.).

34 In our doctrine, for all of these refer to MARTÍNEZ CAPDEVILA, Carmen: *Los acuerdos internacionales de la Unión Europea en el tercer pilar*, Thomson-Civitas, Madrid, 2009. For a more political than legal perspective, MISILEGAS, Valsamis: "The External Dimension of EU Action in Criminal Matters", *European Foreign Affairs Review* 2997, num. 12, pp. 457-487.

States³⁵; agreements to extend Schengen to Norway, Iceland, Sweden and Liechtenstein³⁶; agreements on security procedures for the exchange of classified information with around a dozen other countries;³⁷ and agreements on the transfer and processing of passenger number record (PNR) data by airlines³⁸. There were not many such agreements, but they affected very sensitive areas for states and individuals.

Following the Treaty of Lisbon, this activity has obviously been based on a new legal basis, with a number of international treaties in this area being agreed with, in general, no particular difficulties. For example, these have served to continue expanding Schengen to non-EU members³⁹ and to regulate questions of criminal judicial cooperation⁴⁰. However, the most difficult of these agreements has been that with the United States for the transfer of financial messaging data⁴¹, the SWIFT agreement (*Society for Worldwide Interbank Financial*). The European Parliament has expressed some very serious criticisms (well founded, in our opinion) about this in relation to its compatibility with certain fundamental European human rights requirements⁴². These criticisms have also been levelled at the internal dimension of the struggle against terrorism in the EU, even despite these being the most robust in the world⁴³.

35 OJ L 181 of 19.7.2003. Cf. BUJOSA VADELL, Lorenzo: “Acuerdos de extradición entre la Unión Europea y los Estados Unidos de América sobre extradición y asistencia judicial en materia penal”, *Revista General de Derecho Europeo* 2004, num. 3 (<http://www.iustel.com>).

36 OJ L 26 of 29.1.2004, OJ L 292 of 21.10.2006, OJ L 53 of 27.2.2008 y OJ L 83 of 26.3.2008.

37 These have been agreed with Norway (OJ L 362 of 9.12.2004), Macedonia (OJ L 94 of 13.4.2005), Bosnia (OJ L 324 of 27.10.2004), Ukraine (OJ L 172 of 5.7.2005), Rumania (OJ L 118 of 5.5.2005), Bulgaria (OJ L 118 of 5.5.2005), Croatia (OJ L 116 of 29.4.2006), Iceland (OJ L 184 of 6.7.2006), the United States (OJ L 115 of 3.5.2007) and Switzerland (OJ L 181 of 10.7.2008).

38 OJ L 204 of 4.8.2007. Cf. ZAPATER DUQUE, Esther: “La cooperación entre la Unión Europea y los Estados Unidos en materia de terrorismo: El acuerdo sobre el tratamiento y transferencia de datos de pasajeros de la Unión Europea en vuelos con origen o destino a EEUU”, *Revista General de Derecho Europeo* 2004, num. 5 (<http://www.iustel.com>).

39 This also occurred with Iceland and Norway (OJ L 353 of 31.12.1009) and Switzerland and Liechtenstein (OJ L 160 of 18.6.2011).

40 This is the case with the international agreement signed with Japan (OJ L 39 of 12.2.2010).

41 OJ L 195 of 27.7.2010.

42 European Parliament Resolutions of 2006 (OJ C 303E of 13.12.2006) and 2007 (OJ C 287E of 29.11.2007). Cf. MONAR, Jörg: “The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications”, *European Foreign Affairs Review* 2010, pp. 143-151. Reading these European Parliament resolutions reminds us of the equally belligerent position that this Union institution also experienced years ago with PNR agreements for the transfer of passenger data for flights to the United States (*see above*). It is worth remembering that the Parliament managed to have the Court of Justice annul that agreement, obliging the Union to renegotiate it: ruling of 30 May 2006, *European Parliament v. Commission and Council* (C-317/04 and C-318/04, *Rec.*, p. I-47221). An overview of the EU's relations with the USA in this area is given in LIRORA DELGADO, Isabel: “Terrorismo y cooperación penal: ¿un contexto más favorable para los derechos humanos en las relaciones transatlánticas?” in *International Law and International Relations Course at Vitoria-Gasteiz 2009*, UPV, Bilbao, 2010, pp. 363-394.

43 On this issue, refer to MARTÍN MARTÍNEZ, Magdalena: “Terrorismo y derechos humanos en

As seen in the previous section, some European Union agencies with competence in the subject have signed international agreements of various sorts. Some examples of this include the operating agreements of *Europol* with other countries⁴⁴ and with *Interpol*,⁴⁵ and *Eurojust* agreements with various other countries both in Europe and outside⁴⁶.

The EU's participation in the 2010 Review Conference of the International Criminal Court is probably a milestone in its relations with international organisations, and should not be overlooked⁴⁷.

V. FINAL CONSIDERATIONS: POTENTIAL AND DEFICIENCIES

When we assess progress in this area, there can be no doubt that the coming into force of the Treaty of Lisbon brings with it substantial advances on AFSJ issues. These are far superior to those existing in the CFSP. The Treaty of Lisbon has rechanneled treatment of police and judicial cooperation on criminal matters to community institutions, rather than leaving it within the scope of mere intergovernmental cooperation. In other words, it has reinforced the position of the Commission (legislation initiation and oversight powers), the European Parliament (a decisive role in decision making) and the Court of Justice (control of legality and compliance), in detriment to the Council (representation of Member States). It has also substantially increased the competences of the Union in this area (the possibility of adopting a true *common policy* on immigration and asylum). It has made the decision-making process more democratic (introduction of the ordinary legislative procedure with shared decision-making powers for the European Parliament and the Council), whilst also making decision making easier (qualified majority rather than unanimity). We could also mention many other aspects, including strengthening of fundamental rights through the legally binding character of the Charter of Fundamental Rights of the European Union (art. 6.1 TEU) and the Union's planned signing up to the European Court of Human Rights (art. 6.2 TEU), currently at an advanced stage of negotiation.

la Unión Europea y en el Consejo de Europa: ¿marcos de referencia mundial?" in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2009*, UPV, Bilbao, 2010, pp. 395-426.

44 This has happened with countries on our continent, such as Iceland, Norway, Switzerland, Croatia, Bosnia Herzegovina, Albania and Serbia, and also non-European countries, such as the United States, Canada and Australia.

45 Not published in the Official Journal of the European Union.

46 Signed with European countries such as Norway, Iceland, Croatia and Switzerland. Also with other non-European countries, such as the United States.

47 Cf. JIMÉNEZ CORTÉS, Claudia: "La participación de la UE en la Conferencia de Revisión de la Corte Penal Internacional de 2010: un ejemplo de sus limitaciones a la hora de luchar contra la impunidad de los crímenes internacionales", in PI LLORENS, Montserrat and ZAPATER DUQUE, Esther: *op. cit. (¿Hacia una Europa de las personas...)*, pp. 187-210.

However, the results are not quite as satisfactory when we examine the Union's specific external action in the context of the AFSJ. In reality, the appearance depends on the prism through which we choose to observe the Union's agreements. As a result, the overall assessment will vary considerably depending on whether the approach taken focuses on efficiency and opportunity or on scrupulous respect for human rights and the principles of the *rule of law*. It seems clear that from the former perspective, the Union's external action in the context of the AFSJ has great potential and, as we noted at the start of this paper, is an essential tool for achieving the AFSJ's *internal* objectives. It will be difficult to achieve a common Union policy on immigration and asylum, or an effective response to international terrorism and cross-border crime, without correlating the Union's external action. Moreover, it will be difficult to understand “collective security” within the EU without considering the external dimension of the AFSJ. The actions taken also have the recommended flexibility in this strange external area, both in terms of form and basis. For example, it has been accepted without much discussion that the Union's agencies should be able to enter into international agreements with third parties when it is very difficult to accept that they should have such international capacities. Likewise, the significant restrictions on rights and freedoms in some agreements to achieve greater security have been no obstacle. For example, international commitments have been made with other countries, such as the United States, that are really stretching (at least) the limits of some fundamental rights that the Union is legally obliged to respect, with protection of personal data being one of the most noteworthy.

However, we consider that this external actions still suffers from at least two major deficiencies. Firstly, the objective of achieving a “global approach” to external action on immigration, enabling a certain balance between the fight against illegal immigration and the objective of effective cooperation on development with the countries of origin and consistency in the Union's development policy, has been a resounding failure; this has also been the case with pompously-named “mobility partnerships”. Furthermore, we cannot consider that the age-old aspiration of the *rule of law* to achieve a balance between the two poles that are referred to (not by accident) as Freedom *and* Security within the AFSJ has been achieved; it is worth remembering that the *rule of law* is one of the basic values on which the Union is based (art. 2 TEU). Security has (almost entirely) consumed freedom. In other words, the vast majority of AFSJ actions -particularly external actions- are based on security considerations⁴⁸. In reality, the AFSJ's external agenda has been almost entirely based on security considerations, pushing freedom and justice into the back-

48 Confirmation of this statement is provided in our work “El desequilibrio entre libertad y seguridad”, in *Informe sobre el estado del proceso de integración europeo*, Marcial Pons- Fundación Alternativas, Madrid, 2011, pp. 89-100. In this work we analyse in detail the specific actions taken by the Union in this area in 2010 and 2011.

ground⁴⁹. It is certainly true that extreme threats may make a certain increase in security requirements necessary. But it is now 10 years since September 11 (or March 11 in the case of Spain), and the Member States and the Union still have in place regulations that clearly restrict aspects intimately linked to freedom, and that are also of extremely doubtful effectiveness. This is demonstrated every time that you go to an airport. In reality, security and a commitment to the essential principles of the *rule of law* are not contradictory objectives. Quite the contrary. Respect for these principles creates the most suitable conditions for effective long-term security. And the Treaty of Lisbon provides sufficient instruments to make this a reality, if the political will really exists for this.

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49 There is no shortage of doctrinal studies that, from a clearly political perspective, rechannel external action in the context of the ELSJ to a European agenda evidently based on security: BALZACQ, Thierry (ed.), *The External Dimension of EU Justice and Home Affairs — Governance, Neighbours, Security*, Palgrave MacMillan, Basingstoke, 2010 (numerous doctrinal references in pp. 249-276); and WOLFF, Sarah, WICHMANN, Nicole and MOUNIER, Gregory (eds.), *The External Dimension of Justice and Home Affairs — A Different Security Agenda for the European Union?*, Routledge, London, 2010.

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