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Joining the dots: external norms, AFSJ directives and the EU's role in the global legal order

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Joining the Dots: External Norms, AFSJ Directives and the EU's Role in Global Legal Order

Forthcoming in the European Law Review

Dr. Elaine Fahey*

Abstract

This article considers how external norms, i.e. instruments of public international law, including but not limited to Conventions, agreements and treaties qua norms 'internalise' into 17 proposed and adopted Area of Freedom, Security and Justice (AFSJ) Directives of the last legislative cycle of the EU, from 2009-2014. The article considers select Directives, namely (i) the first EU criminal law directive, (ii) the first AFSJ directive struck down by the Court, (iii) a Directive employing a norm common to internal and external rule-making, (iv) UN Conventions in AFSJ Directives and (v) Directives omitting the promotion of any external norms. The study of the promotion of external norms is argued to reveal much about the relationship between the 'external' and 'internal' of EU law and policy and the evolution of its AFSJ. The EU's participation in these external norms is also relevant for the study of the EU's role in the world.

Introduction

While the Area of Freedom, Security and Justice (AFSJ) is now a fully regularised area of EU law post-Lisbon,¹ its subject area is a complex one because it spans many diverse areas close to Member State sovereignty, for example, criminal and migration law. It also now comprises highly diverse areas where the European Union wishes to autonomously set and lead policy at an international level.² Precisely where its norms emanate from and how the European Union develops its own norms here are of significance in understanding its evolution. Certain former Third Pillar law took external norms as its inspiration.³ Nowadays the European Union wants to join many international organisations or to lead as an organisation in the international context.⁴ It thus forms a very different climate for the use of external norms in the AFSJ. External norms are deployed in most of the 17 AFSJ Directives of the last legislative cycle of the EU, from 2009-2014. The relationship between external norms, European Union legislative practice and the EU in the world is argued to be far from transparent or explicit in EU law itself and is thus worthy of development. Accordingly, this article considers how *external* norms, i.e. understood predominantly as instruments of public international law, including but not limited to Conventions,

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¹ The general regime of legal acts mentioned in arts. 288-294 TFEU applies to measures adopted in the AFSJ. See the regularisation of the AFSJ in Title IV TFEU of the Consolidated Treaties of the European Union. See R. Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2013) pp. 309 onwards.

² E.g. See S. Blockmans, B. van Vooren and J. Wouters (eds), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, 2012); R. Wessel, L. Marin, and C. Matera, "The external dimension of the EU's area of freedom, security and justice" in C. Eckes and T. Konstadinides (eds) *Crime within the area of freedom security and justice—a European Public Order* (Cambridge: Cambridge University Press, 2012), 272, 272-278.

³ For example, Framework Decision 2008/919/JHA amending the 2002 Framework Decision on combating terrorism [2008] OJ L330/21, which copies verbatim the Council of Europe Convention on the Prevention of Terrorism of 2005, CETS No.196: see V. Mitseligas "The third wave of third pillar law: which direction for EU criminal justice?" (2009) 34 E.L.R. 523, 525.

⁴ In line with Article 21 TFEU: see Communication to the Commission from the President in Agreement with Vice-President Ashton: Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon, COM(2012) 9420 final. See, for a perspective prior to the changes in the Treaty of Lisbon, M. Cremona, "The Union as a Global Actor: Roles, Models and Identity" (2004) 41 C.M.L.R 553.

agreements and treaties qua norms 'internalise' into 17 proposed and adopted AFSJ Directives. It also explores the links between internal rule-making practices with the EU's external action. As the object of scrutiny, the promotion of external norms in AFSJ rule-making reveals much about the relationship between the 'external' and 'internal' of EU law and policy and the evolution of AFSJ rule-making.⁵ As a secondary objective, the study of norm promotion is also argued here to be shown to be relevant for the study of the EU's role in the world, looking outwards-in, through the examination of the EU's participation in those same external norms. This study is argued to bring transparency to the nexus between the 'internal' and the 'external' in the AFSJ.

The most usual or dominant form of norm promotion that is evident in the Directives is the assertion of their compatibility with an *internal* legal source, most usually the Charter of Fundamental Rights (Charter hereafter).⁶ In the 17 Directives examined here, *external* norms also played a role in 15 Directives where they are invoked to justify, explain and support new rule-making. The external norms referred to include the General agreement on trade in services (GATT), Economic Partnership Agreement with the Cariforum countries, UN Convention on the Rights of the Child, Second Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure, United Nations Convention on the Rights of Persons with Disabilities, UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, ILO Convention concerning forced or compulsory labour, Convention relating to the status of refugees/ Geneva Convention 1951, UN Convention on the Rights of the Child Optional Protocol, Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, the UN Convention on the Elimination of all forms of discrimination against women, the Council of Europe Convention on Cybercrime and the Vienna Convention on Road Traffic, UN Convention on Transnational Organised Crime and the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.⁷ The vast majority form instruments where the EU is not a party but where most but not necessarily all the Member States are.

The AFSJ Directives of the legislative cycle examined here can be collected into five distinct themes- namely, accused and victims' rights, fighting serious crime /terrorism, third country nationals/ asylum and immigration and other crime-related fields. Matters related to third country nationals comprise the most numerous of these proposals,⁸ whilst the accused and victims' rights

⁵ The legal dimension to which has been asserted to be understudied: F. Trauner and H. Carrapiço, "The External Dimension of European Union Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification" (2012) 17 Eur. For. Aff. Rev. 1. See also E. Fahey and E. Herlin-Karnell, "Special issue: EU law qua Global Governance" (2012) 13 G.L.J. 1147 and contributions therein.

⁶ I.e. it is on the same level as the treaties and is legally binding: see art. 6(1) TEU. See *Kucukdeveci v Swedex GmbH & Co* (C-555/07) [2010] E.C.R. I-00365.

⁷ For further references and the specific role of the European Union and its Member States in the membership of these norms is considered in Section I(i).

⁸ This includes: Directive 2014/36 on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment [2014] OJ L 94/375; Proposal for a Directive on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer 2010/0209 (COD); Directive 2011/98 on a single application procedure for a single permit for third-country nationals to

agenda forms a close second thereto.⁹ This account proposes to consider the output of these AFSJ Directives through Finnemore and Sikkink's formula of the 'life of norms' in order to gain insights as to the journey taken by external norms in recent rule-making practice. It is now a means or formula increasingly used by legal scholars studying rule-making practices beyond the Nation State.¹⁰ As to the specific stages of the life of norms, Stage 1, so-called norm emergence, results from 'persuasion' by a 'norm entrepreneur' or generator, whereby a critical mass of what are termed as 'norm leaders' embrace new norms. Stage 2 involves specific actions in the form of 'norm cascades' predominantly through what is termed as 'socialisation', for reasons of legitimacy, conformity and esteem. Stage 3 involves their internalisation, whereby actors specifically conform to those norms and processes through further adoption. In each of these stages, this framework is conducted through law in all of its stages as distinct processes of change and evolution. As a result, the 'life of norms' arguably offers an attractive analytical framework for those seeking to study methodologies for understanding rule-making. This account specifically focuses upon Stage 2 and the process of 'socialisation' of external norms internally within the in the AFSJ.¹¹ It thus considers the concept of socialisation and how it applies to external norms in AFSJ rule-making in two ways. It considers two specific questions, as follows. Firstly, what is the place of the European Union and the Member States in a specific external norm (*what* norms)? Secondly, how should we assess its impact within the EU legislative process (*what* they actually mean)? The paper thus considers both the 'inwards' and 'outwards' meaning of the use of external norms in AFSJ rule-making practice.

The account here focusses upon the recitals of 17 AFSJ Directives of the 2009-2014 legislative cycle, so as to understand transparency, origins and influences upon rule-making. It focusses also upon the broader objectives and context in EU law and policy of the Directives. Directives in the AFSJ provide room for manoeuvre for the Member States in this field. They often bear heavily upon sovereignty, especially in implementation.¹² Conventionally, a Directive is understood as being more suited for having a coordinating rather than a consolidating role as a

reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1; Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9; Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing COM(2013) 151 final; Directive 2013/32 on common procedures for granting and withdrawing international protection [2013] OJ L180/60; Directive 2013/33 laying down standards for the reception of applicants for international protection [2013] OJ L180/96.

⁹ This includes: Directive 2010/64 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1, **Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57**; Directive 2012/13 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2011/99 on the European protection order [2011] OJ L338/2. A Regulation in the Road Map legislative is omitted in this account which only considers Directives: i.e. Regulation (European Union) No 606/2013 on mutual recognition of protection measures in civil matters [2013] OJ L 181/4.

¹⁰ "Norm promotion" as a search term appears in approx. 600 hits in Westlaw International, "world legal journals" search (last accessed May 1, 2015). See J. Ellis, "Shades of grey: soft law and the validity of public international law" (2012) 25 *Leiden Journal of International Law* 313; at note 5: "Finnemore and Sikkink do not focus on legal norms; nevertheless, their discussion of the life cycle of international norms, at 895 ff., is highly illuminating for discussions of the emergence of international legal norms".

¹¹ M. Finnemore and K. Sikkink, "International Norm Dynamics and Political Change" (1998) 52 *International Organization* 887, 893; M. Finnemore "Norms, Culture and world politics: insights from sociology's institutionalism" (1996) 50 *International Organization* 325.

¹² See art. 67(1), 69 and 72 TFEU for highly variable expressions of Member State autonomy and competence *vis a vis* AFSJ rule-making. See P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford: Oxford University Press, 2010) p. 372.

regulatory instrument.¹³ However, a feature of contemporary AFSJ rule-making is that a Directive may as a single instrument unite a broad range of substantive and procedural issues for the AFSJ in ways not previously possible. It may still also permit, at least theoretically, Member State autonomy, e.g., through implementation or enforcement.¹⁴ AFSJ Directives may thus have a ‘norm unifying’ effect if it can incorporate a patchwork of existing instruments.¹⁵ The meaning of cascading and ‘internalisation’ of norms is a specific one in the case of Directives in the AFSJ because of the sensitivities of enforcement and compliance in this field.¹⁶ Thus, the exercise of tracing rule-making and disentangling the life of norms within this process can also improve our understanding of norm interaction in EU law. ‘Bottom up’ research on implementation in the AFSJ in the Member States is thus beyond the scope of the present work. By examining Directives, the account here is a nevertheless a distinctive one for understanding AFSJ rule-making ‘top down’.

Section I outlines the participation of the European Union and the Member States in specific external norms used in AFSJ directives and frames the issues arising for the study of this participation. Section II considers the EU’s goal as to specific external norms in select Directives, including (i) the first European Union criminal law directive, (ii) the first AFSJ directive struck down by the Court of Justice, (iii) a Directive centrally employing a norm common to EU internal and external AFSJ rule-making, (iv) the use of UN Conventions in AFSJ Directives and (v) AFSJ Directives omitting the promotion of any external norms. This is followed in Section III by analysis of the practices of external norm promotion.

The participation of the European Union and the Member States in specific external norms

(i) Overview

The second stage of the theorisation of the life of norms, ‘norm cascade’ involves the broader process of the ‘socialisation’ or actual acceptance of a norm into, for example, a legal order. There is no single or agreed definition of socialisation across disciplines save that it is a key concept to understand how states and non-state actors change their behaviour and embrace new ideas.¹⁷ At its broadest definition, it is a process of learning.¹⁸ It encompasses a process of change e.g. changing beliefs at sub-national level, demands for political change and institutionalisation.¹⁹ For some, socialisation is an outcome of changing beliefs whereas for others socialisation leads to a change in behaviour.²⁰ Socialisation is defined by some as a

¹³See A. Hinerajos, *Judicial Control in the European Union Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford: Oxford University Press, 2009) p. 51.

¹⁴ Art. 67 TFEU, for example, emphasises respect for the differing legal systems and traditions of the Member States.

¹⁵ E.g. the European Investigative Order (**Directive 2014/41**) on the transfer of evidence between Member States purports to unify the rules drawn from a Council of Europe convention on mutual assistance in criminal matters and two protocols, the European Union Convention on Mutual Assistance, the Framework Decision on the European arrest warrant and the Framework Decision on the execution of orders and freezing of property or evidence [2014] OJ L130/1. See Section II, iv.

¹⁶ For example, it may relate more to enforcement and compliance rather than standard-setting.

¹⁷ Finnemore, above, fn.11.

¹⁸ Finnemore and Kikkink above, fn.11; K. Waltz *The Theory of International Politics* (Reading, Mass.: Addison Wesley Publications, 1979).

¹⁹ S. Park, “Socialisation and the liberal order” (2014) *International Politics* 334.

²⁰ Above fn. 19, 339.

process of inducing actors into the norms and rule to a given society,²¹ or a process through which social interaction leads novices to endorse expected ways of thinking, feeling and acting.²² The integration of norms as socialisation may thus be theoretical, institutional or operational. As Koops states, socialisation is integral to understanding the Europeanisation of Member State policies.²³ Member States become exposed to common norms, procedures and a way of doing things, whereby they incorporate them. When others are persuaded to support normative change and there is an inducement to adhere to a norm then a norm cascade occurs. Europeanisation of Member State policy is not the only means to consider socialisation.

It is argued that socialisation helps to explain change at EU level in the development of the autonomy of its *legal* order with its own norms. It is thus argued here to have specific relevance in the supranational legal context. Where a complex field of law-making is evolving, with both internal and external dimensions, as in the case of the AFSJ, there are significant shifts in norms, procedures and a way of doing things. How ‘apart’ or separate external norms are or how integrated they are, formally or informally or how institutionalised they are in this context may vary considerably and may impact significantly upon the evolution of EU law. The processes, changes and inducements required for ‘change’ are arguably more complex and multilevel in the evolving AFSJ, as a context of EU law which warrants further and more particularised study through a prism such as socialisation.

The practice of the European Union and the Member States as to external norms, i.e. their participation therein is considered next, framing the issues arising from this participation so as to understand socialisation with respect to AFSJ Directives.

(i) *European Union and Member State Participation in External Norms in the 2009-2014 AFSJ Legislative Cycle*

The instruments promoted in the 17 Directives considered here include two specific ‘internal’ norms and the remainder are analysed here as ‘external’ norms: thus the Convention on Mutual Assistance in criminal matters between the Member States of the European Union is an European Union specific instruments and are thus classifiable as an ‘internal’ instrument.²⁴ The European Convention for the Protection of Human Rights and Fundamental Freedoms may arguably be classified similarly also.²⁵ ‘External’ norms found in AFSJ Directives mostly have a

²¹ See J. Checkel “International institutions and socialization in Europe: Introduction and Framework” (2005) 59 *International Organisation* 801, 804. See also J. Checkel (ed), *International Institutions and Socialisation in Europe* (Cambridge: Cambridge University Press, 2007)

²² See A. Johnston, *Social States: China in International Institutions 1980-2000* (Princeton: Princeton University Press, 2007). Others criticise socialisation literature for its unidirectional focus, which makes it hard to explain new patterns of behaviour as to emerging powers: see P. Xiaoyu, “Socialisation as Two-way Process: Emerging powers and the diffusion of international norms” (2012) *Chinese Journal of international Politics* 341.

²³ J. Koops, *The European Union as an Integrative Power: Assessing the European Union’s Effective Multilateralism towards NATO and the United Nations* (Brussels: VU Press, 2011), p. 215.

²⁴ 28 parties, all European Union Member States (MS): Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union 2000/C 197/01.

²⁵ The governments signatory hereto, being members of the Council of Europe, 28 European Union Member States (MS), <http://conventions.coe.int/treaty/en/treaties/html/005.htm> [Accessed August 17, 2015]. As amended by the Lisbon Treaty, art. 6(2) TEU provides that the European Union “shall accede” to the Convention for the Protection of Human Rights. See Opinion 2/13 on EU Accession to

much broader membership than EU Member states in all but two instances.²⁶ These norms include the European Social Charter of 1961,²⁷ General Agreement on Trade in Services (GATT),²⁸ Economic Partnership Agreement with the Cariforum countries of 2008,²⁹ the UN Convention on the Rights of the Child,³⁰ First Optional Protocol on the Involvement of Children in Armed Conflict,³¹ Second Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography,³² Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure,³³ UN Convention on the Rights of Persons with Disabilities,³⁴ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons,³⁵ ILO Convention concerning forced or compulsory labour,³⁶ Convention relating to the status of refugees (Geneva Convention),³⁷ Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse,³⁸ the UN Convention on the Elimination of all forms of discrimination against women,³⁹ the Council of Europe Cybercrime Convention,⁴⁰ the Vienna Convention on Road Traffic,⁴¹ the UN Convention against Transnational Organised Crime⁴² and the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism.⁴³ The Economic Partnership Agreement with the Cariforum countries and Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure are the external norms used which have the smallest membership and demonstrate preference for the use of broadly accepted norms. The vast

the ECHR, December 28, 2014, confirming its place as an external norm. However, its place as part of the general principles of EU law for some time and its relationship to the Charter of Fundamental Rights suggest that it is a de facto internal norm.

²⁶ I.e. the Economic Partnership Agreement with the Cariforum countries and Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure: see below further in the following footnotes for references.

²⁷ 47 parties, 28 European Union MS are parties: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp [Accessed August 17, 2015].

²⁸ 159 members, all 28 European Union MS members, European Union a member, All members of the WTO are signatories to the GATS 1869 UNTS 183; 33 ILM 1167 (1994); https://www.wto.org/english/docs_e/legal_e/legal_e.htm [Accessed August 17, 2015].

²⁹ 43 parties, 27 European Union MS except Croatia, European Union a member <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=7407> [Accessed August 17, 2015].

³⁰ UN General Assembly, November 20, 1989, United Nations, Treaty Series, vol. 1577, p. 3. 194 Parties, all European Union MS are parties: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-11-d&article=4&lang=en [Accessed August 17, 2015].

³¹ UN General Assembly, May 25, 2000. 155 parties, all European Union MS are parties https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-11-b&article=4&lang=en [Accessed August 17, 2015].

³² UN General Assembly, March 16, 2001. 167 parties, all European Union MS are parties https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=iv-11-c&article=4&lang=en [Accessed August 17, 2015].

³³ UN General Assembly, December 17, 2011. 17 parties, 6 European Union MS are parties https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11-d&article=4&lang=en [Accessed August 17, 2015].

³⁴ UN General Assembly, January 24, 2007. 147 parties, all European Union MS are parties, European Union has signed and ratified it https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&article=4&lang=en [Accessed August 17, 2015].

³⁵ UN General Assembly, November 15, 2000. 159 parties, 27 European Union MS are parties, except Czech Republic, European Community has signed and ratified it https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&article=18&lang=en [Accessed August 17, 2015].

³⁶ No. 29, 39 UNTS 55. 177 parties, all European Union MS are parties http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174 [Accessed August 17, 2015].

³⁷ July 28, 1951, United Nations, Treaty Series, vol. 189, p. 137. 145 parties, all European Union MS are parties https://treaties.un.org/Pages/ViewDetailsII.aspx?&src=UNTSOnline&mtdsg_no=v~2&article=5&Temp=mtdsq2&lang=en#Participants [Accessed August 17, 2015].

³⁸ July 12, 2007, CETS No. 201. 31 parties, 18 European Union MS are parties: <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=1&DF=&CL=ENG> [Accessed August 17, 2015].

³⁹ December 18, 1979, United Nations, Treaty Series, vol. 1249, p. 13. 188 parties, all European Union MS are parties: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-8&article=4&lang=en [Accessed August 17, 2015].

⁴⁰ November 23, 2001, CETS No. 185. 66 parties, 28 European Union MS are parties: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG> [Accessed August 17, 2015].

⁴¹ UN General Assembly, November 8, 1968. 73 parties, 23 European Union MS are parties: http://www.unece.org/fileadmin/DAM/trans/conventn/CP_Vienna_convention.pdf. Its membership is broader than the Geneva Convention on Road Traffic of 1949 (96 parties, 22 MS) [Accessed August 17, 2015].

⁴² UN General Assembly, January 8, 2001, A/RES/55/25. 185 parties, European Union is a signatory, 26 MS are parties https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12&chapter=18&lang=en [Accessed August 17, 2015].

⁴³ May 15, 2005, CETS No. 198. 28 European Union MS are parties; European Union is a signatory: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=198&CM=8&DF=11/10/2013&CL=ENG> [Accessed August 17, 2015].

majority of external norms in AFSJ directives involve all Member States as parties. Contrariwise, the European Union is not a party itself to most of the instruments used. A small number of the agreements, treaties or conventions used by the European Union in AFSJ Directives have not been ratified by all of the Member States themselves.⁴⁴

The next step is then to frame legal issues arising from these statuses that are relevant for understanding socialisation and internal rule-making practice.

(ii) *Understanding socialisation in the AFSJ legislation process*

Three distinct issues are argued to arise from these statuses as a means to understand socialisation warranting consideration here, broadly conceived as time, space and place. Specifically, these include the place of participation, the robustness of external norms and the temporal context. Thus firstly, there is a body of scholarship in non-legal scholarship on the coherence of EU and Member State voices participating in international organisations and their influence.⁴⁵ Legal scholars tend to focus more upon either the legal framework *for* participation itself or the internal impact in European Union and Member State caselaw of external norms.⁴⁶ This account thus bridges these perspectives and considers the place of participation and the influence of norm promotion in the context of the AFSJ. Secondly, non-legal scholars specifically argue that EU law frequently reaches for external norms because of their asserted “robustness,” rather than participation issues.⁴⁷ While robustness is clearly relevant here as a criterion, from a legal perspective how much external norms change, institutionalise or evolve rule-making practice arguably requires more nuanced and holistic reflection. Whether external norms have a pivotal impact as legal tools is thus considered here also, where the flexibility and malleability of external norms is assessed. Thirdly, certain external norms such as specific UN Conventions may have a historic influence upon both primary EU law as well as more recently upon secondary EU law (i.e. AFSJ Directives). Can we distinguish short-term and longer-term European Union and Member State participation in external norms in AFSJ directives? This account thus considers whether temporal contexts matter in a broader sense, so as to reflect on socialisation as a process.

Section II next considers these specific themes (participation, robustness and temporal questions) as to the promotion of external norms in five select genres of AFSJ directives. The Directives selected reflect a range of instances by considering significant new practices and/ or

⁴⁴ E.g. the Vienna Convention on Road Traffic.

⁴⁵ E.g. K. Smith "The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence" (2010) 17(2) *Journal of European Public Policy*, 224; O. Costa and K. Jørgensen (eds) *The Influence of International Institutions on the EU* (London: Palgrave, 2012).

⁴⁶ E.g. R. Wessel "The Legal Framework for the Participation of the European Union in International Institutions" (2011) 33(6) *European Integration* 621.

⁴⁷ See C. Roos and N. Zaun, "Norms Matter! The Role of International Norms in European Union Policies on Asylum and Immigration" (2014) 16 *Eur. J. Mig. Law*, 45, 61-62. In order to measure the *impact* of international norms, they have argued that their robustness can be measured, as to their specific, definition, binding force, coherence under domestic law and international law and understanding among actors. However, to measure such impact from a legal perspective would arguable amount to a much larger study of domestic case-law, legislation and policy beyond the scope of the exercise conducted here, which is confined to a small sample of directives.

acts of *both* the EU legislature and the EU judiciary in the AFSJ: for example, (i) *the first EU criminal law directive* and (ii) *the first AFSJ directive struck down by the Court*. Next, the sample considered concern Directives which provide *explicit evidence* of the link between internal and external rule-making practices across the AFSJ: (iii) *a Directive employing a norm common to internal and external rule-making*. They further include Directives where external norms have ‘primacy’ as a norm in the Directive and conversely they include Directives where there is only minimalist reference or ‘weak’ usage of external norms: (iv) UN Conventions in AFSJ Directives. The selection finally includes Directives without any indicators or references to any norms whatsoever: (v) AFSJ Directives omitting the promotion of any external norms.

Section II: External Norms in Select AFSJ Directives

(i) *The First EU Criminal law Directive*

The first and earliest European Union directive in the area of Criminal law enacted post-Lisbon was the Trafficking Directive (Directive 2011/36), which drew from seven external norms (UN Convention on the Rights of the Child, UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Council of Europe Convention on Action against Trafficking in Human Beings, the Geneva Convention, the International Labour Organisation (ILO) Convention concerning forced or compulsory labour, the UN Convention on Transnational Organised Crime and the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime) and one internal norm, the Charter of Fundamental Rights.⁴⁸ Although a purely numerical calculation, this numerical formulation tends to be excess of most subsequent directives.

The first international definition of trafficking in human beings was agreed in the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (the Palermo Protocol).⁴⁹ The Palermo Protocol is said to serve as a broad model in a variety of contexts.⁵⁰ The European Union has previously adopted the values of the UN Palermo Protocol within its treaties and the European Community had signed and ratified it, as have 27 Member States.⁵¹ The EU approach to the trafficking in human beings has explicitly sought to differentiate itself as ‘holistic’, ‘multifaceted’ and even multidisciplinary.⁵² However, the European Union was previously perceived as favouring the limitation of irregular migration and not ameliorating the situation of the trafficked. Nonetheless, at both international and European level, opposition has

⁴⁸ Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1, Recitals 8, 9, i.e. UN Convention on the Rights of the Child and the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children Supplementing the UN Convention against Transnational Organised Crime, the 1930 ILO Convention No. 29, concerning Forced or Compulsory Labour and the 1951 Convention relating to the Status of Refugees, i.e. Geneva Convention and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings.

⁴⁹ It is one of 3 Protocols supplementing the UN Convention against Transnational Organised Crime adopted by UN GA Resolution 55/25 of 15 November 2000 (UN Doc A/Res/55/25 (2000)).

⁵⁰ S. Krieg, “Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights” (2009) 15 E.L.J. 775.

⁵¹ See fn. 40. See former Title XX EC (development) cooperation) and Title IV EC (immigration policy); see V. Mitsilegas, “The Coherence of the Adopted Measures by the EU with regard to Organised Crime, namely the Fight against Human Trafficking and the UN Convention on Organised Crime – the Palermo Convention 6 and its 3 Protocols”, in D. Bigo and A. Tsoukala (eds), *Controlling Security* (Paris: L’Harmattan, 2008), 65.

⁵² Krieg, above fn. 50, 790; see Report of the European Expert Group on Trafficking in Human Beings (2004).

long-existed between a rights-based and law enforcement approach.

The new Directive was the culmination of more than a decade of developing a European Union strategy to combat illegal migration.⁵³ It is notably perceived as an innovative instrument because of its character as a criminal law rather than migration law instrument.⁵⁴ The Directive also contains provisions which are largely similar to the Council of Europe Convention on Action against Trafficking in Human Beings and thus provides a concrete study of manifold norm cascades at several levels (UN, Council of Europe), beginning in the EU treaties and culminating in the Directive as a clear process of socialisation.⁵⁵ The Directive repealed the heavily criticised 2002 Council Framework Decision of 17 July 2002 on combatting trafficking in human beings 2002/629/JHA.⁵⁶ By the end of its transposition deadline in 2013 only 6 of the 27 Member States had transposed the Directive.⁵⁷ It demonstrated the challenges of developing uniform norms in the AFSJ prior to the Commission obtaining powers to pursue infringement actions against the Member States in the area of the AFSJ prior to the expiry of the Protocol No. 36 on the transitional provisions.

As Chaudry states, the Directive moves away from a previous approach in EU law of subordinating protection measures to investigating and prosecuting human traffickers for acts already committed.⁵⁸ The new Directive adopts measures to support the principle of non-punishment of victims and the prevention of further secondary victimisation. The Directive is perceived as making very explicit and specific use of the Trafficking Convention (e.g. in recital 9) in providing a 'solid' legal base upon which to successfully advance a trafficking case.⁵⁹ However, some have argued that the Directive was considerably watered down in the end so as to allow national preferences to be exercised.⁶⁰ It has also been argued that the Directive lent itself towards implementing security maintenance rather than victim protection and rehabilitation.⁶¹ An even more holistic approach is still anticipated by the European Union institutions, through the development of the controversial concept of 'circular migration.'⁶²

⁵³ See M-H. Chou, "The European Union and the fight against human trafficking: Comprehensive or Contradicting" (2008) 4(1) *Stair* 76; S. Chaudary, "Trafficking in Europe: An Analysis of the Effectiveness of European Law" (2011) 33 *Mich. J. Int'l L.* 77; See S. Peers "Immigration and Asylum law" in C. Barnard and S. Peers (eds), *European Union Law* (Oxford: Oxford University Press, 2014) Ch. 26.

⁵⁴ E.g. "Trafficking victims too often treated as immigration cases, say campaigners" *The Guardian* (October 31, 2013).

⁵⁵ The Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197 http://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos_en.asp [Accessed August 17, 2015].

⁵⁶ As Krieg states, the Framework Decision did not take an explicit stand on whom or what was responsible for the problem in human trafficking and for whose benefit the instrument was established: above, fn. 50, 776.

⁵⁷ See http://europa.eu/rapid/press-release_IP-13-322_en.htm [Accessed August 17, 2015].

⁵⁸ See Chaudary, above fn. 53, 98-99.

⁵⁹ Chaudary, fn. 53, 99.

⁶⁰ See Chou, fn. 53, 79.

⁶¹ Chou, fn. 53, 76.

⁶² See the EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016 COM(2012) 286 final; Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings SWD(2014) 318 final; On circular migration, see Chou, above fn. 53, 86-90; The UNHCR has regarded EU primary law on human trafficking to be highly progressive: e.g. as to references to in the EU Charter to trafficking (in art 5(3): UNHCR Comments on the proposal for a Directive of the European Parliament and of the Council on preventing and combatting trafficking in human beings, and protecting victims COM(2010)95.

The Directive demonstrates the primacy of external norms as a rule-making principle in the AFSJ for some time. Nevertheless, the robustness of the norms themselves appears open to some reflection as does the margin for their individual Europeanisation.⁶³ The extent to which a major change in thinking is evident from the use of external norms is difficult to assert here, where external norms had a longer pedigree within EU law rule-making processes but also were not necessarily 'robust'. Instead, arguably external norms do not contribute here to a positive rule-making tale.

The next section analyses the impact of the first AFSJ Directive struck down by the Court post-Lisbon for the place of external norms and its relationship to the EU's role in the global legal order. It is an example of the weak use of external norms.

(ii) The first AFSJ Directive post-Lisbon struck down by the Court

A European Road Safety Area is a strategy of the new European Commission for 2011 to 2020 which aims to cut road traffic accidents by 50% and develop the concept of a European Road Safety Area.⁶⁴ It forms part of the EU's effort to closely participate and align its policies with the UN Decade of Action on Road Safety 2011-2020.⁶⁵ Directive 2011/82/EU is a related new directive of the last legislative cycle, motivated by a desire to facilitate cross-border exchange of information on road safety related traffic offences represented a desire on the part of the European Union to develop common standards.⁶⁶ The Directive had as its specific goal the financial punishment of non-resident drivers, supported by considerable national data, practice and longitudinal European Union monitoring. The Directive purported to take into account international cooperation in the area of road safety, specifically the Vienna Convention on Road Traffic of 8 November 1968.⁶⁷ It had been advocated by the European Transport Safety Council as a means to prevent multiple bilateral regimes and also to raise international road safety standards.⁶⁸ Road safety is an area where homogenous practice and standardisation may have a significant impact. While 23 Member States are parties to the Vienna Convention but not the European Union, EU Member States with significant global car manufacturers have been prominent recently in proposing an amendment to the Vienna Convention in 2014 for 'autonomous' cars (i.e. driverless cars).⁶⁹ The Directive as an AFSJ measure was subject to an opt-out from the UK, Ireland and Denmark which was perceived as a blow to a homogenous and coherent development of EU policy internally but also possibly externally.

⁶³ Roos and Zaun, above, fn. 47.

⁶⁴ See Communication Towards a European road safety area: Policy orientations on Road Safety 2011-2020 COM(2010) 389 final.

⁶⁵ UN Decade of Action 2011-2020: Resolution adopted by the General Assembly on 10 April 2014, 68/269 'Improving global road safety'.

⁶⁶ Directive 2011/82/EU of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences [2011] OJ L288/ 1.

⁶⁷ See recital 15.

⁶⁸ See <http://etsc.eu/faq-eu-cross-border-enforcement-directive/> [Accessed August 17, 2015].

⁶⁹ See Report of the 68th session on 68th Working Party Session Road Traffic Safety (March 24-26, 2014) <http://www.unece.org/fileadmin/DAM/trans/doc/2014/wp1/ECE-TRANS-WP1-145e.pdf> [Accessed August 17, 2015]. See International Encyclopaedia for Transport Law (The Hague: Kluwer Law, 2015)

In 2014, the directive was struck down by the Court of Justice for reasons of its legal base. As the first post-Lisbon criminal law directive to be struck down by the Court, it warrants attention.⁷⁰ The Directive had been proposed by the Commission on the basis of what is now art. 91 (1)(c) TFEU, permitting measures to be enacted for the purposes of improving transport safety. However, it was adopted by the Parliament and Council in 2011 on the basis of art. 87(2) TFEU, the latter pertaining to police cooperation as to the prevention, detection and investigation of criminal offences. The Commission argued in proceedings initiated shortly after its adoption that the link to a criminal offence could not merely be inferred, an argument which the Court upheld. It held that a higher and more particularised standard was required to invoke Art. 87(2) TFEU, namely that the measure be ‘directly linked’ to the objectives of art. 87(2) TFEU in order to be used.⁷¹ Notably, Advocate General Bot had decided the matter differently, who found the formalist reading by the Commission of the boundaries of art. 87 TFEU to be unworkable and contrary to the wording of the article, which emphasised cooperation between all relevant authorities.⁷² The Directive was swiftly amended to change the legal base. The amendment had the effect that provisions as to opt outs for the UK, Ireland and Denmark became unnecessary.⁷³

The decision is remark-worthy in so far as the Court of Justice is conventionally perceived as ‘light-touch’ in the domain of reviewing legal competence, especially as to criminal law measures.⁷⁴ The Directive was perceived by some as a highly ‘expansionist’ piece of legislation.⁷⁵ The decision has also been argued to be notable for how readily the Commission wished to litigate the use of legal competence.⁷⁶ One may note how external norms have ostensibly no bearing either upon the reasoning of the Court or the Advocate General. Nevertheless, the change of legal base so as to obviate the need for opt-outs in fact renders multiple bilateral regimes less likely and thus has a possibly positive impact upon the effectiveness of the European Union in the international domain. It is prima facie a ‘weaker’ example of the place of external norms in the AFSJ on one level:- i.e. there is limited norm cascade. However, it is also a useful example of how internal competence may readily facilitate socialisation on the part of the European Union, i.e. stronger engagement with external norms.

(iii) *A Directive centrally employing a norm common to EU internal and external AFSJ rule-making*

A recent AFSJ directive in the area of cybercrime is worthy of consideration as to the place of

⁷⁰ *Commission v. Parliament* (43/12), May 6, 2014.

⁷¹ Above, at para. 49.

⁷² Opinion of the Advocate General, September 10, 2013, para. 56.

⁷³ In recitals 22 and 23 of the original directive: see fn. 66. See the revised directive: COM(2014) 476 final.

⁷⁴ Prior to its explicit introduction as a legal competence after the Treaty of Lisbon in art. 82 and 3 TFEU. See R. Schütze, “Lisbon and the Federal Order of Competences: A Prospective Analysis” (2008) 33 E.L.R. 709; G. Corstens “Criminal Justice in the post-Lisbon era” (2011-2012) 13(1) C.Y.E.L.S. 23.

⁷⁵ See V. Mitsilegas, “EU Criminal Law Competence After Lisbon: From Securitised to Functional Criminalisation” in D. Acosta and C. Murphy (eds), *EU Security and Justice Law* (Oxford: Hart Publishing, 2014), 110 at p. 126, n. 65.

⁷⁶ Above, fn. 75.

one specific external norm there. The reduction of cybercrime has been prioritised as a future regulatory goal for the EU in the AFSJ.⁷⁷ It has also had a significant place in recent AFSJ rule-making of the last legislative cycle. The substantive legal content of EU cybercrime law has evolved in a piecemeal form beginning with the Framework Decision on attacks against information systems in 2005 and so it is not an entirely new phenomenon per se.⁷⁸ A comprehensive legal definition of ‘cybercrime’ for EU law is not yet found in secondary law. Instead, the content of the Council of Europe Convention on cybercrime forms the basis for recent EU law in this area for some time,⁷⁹ as well as externally for rule-making with the US.⁸⁰ In this regard, the EU along with the US seeks to have most countries in the world ratify the Convention as one of the objects of the EU-US Working Group on Cybercrime and Cyber Security (EU-US WGCC).⁸¹ However, the Convention is far from an optimal norm. It is criticised for its overbroad content, for excessively reflecting law enforcement standards, for its inadequate provisions on data protection and for its lack of provision for cross-border enforcement.⁸² A draft additional Protocol to provide transborder access to data has proved to be contentious and is trenchantly opposed on civil liberties grounds by, for example, the European Parliament.⁸³ Full Member State ratification of the Convention is almost complete but considerably behind the EU-US WGCC goals for 2015, which otherwise has evolved considerably as a rule-making project.⁸⁴

Drawing significantly from the Convention, the Directive on attacks against information systems adopted in 2013 places emphasis upon fighting large scale ‘botnets’ i.e. networks of computers with a cross-border dimension.⁸⁵ An earlier version of the Cybercrime Directive had been criticised for its vague legal obligations and its over-criminalisation of ‘small-scale’ hackers.⁸⁶ The Directive promotes significantly the Convention in its recitals as part of the EU’s strategic direction.⁸⁷ It purports to criminalise access to systems, systems interferences and data interference, with penalties from two to five years. Pursuant to art. 12, a Member State must inform the Commission where it wishes to take jurisdiction over offences *outside* its territory, a

⁷⁷ Operational Action Plans 2015 related to the EU’s priorities for the fight against serious and organised crime between 2014 and 2017, Council doc. 15929/2/14 Rev 2.

⁷⁸ Council Framework Decision 2005/22/JHA of 24 February 2005 on attacks against information systems, [2005] OJ L69/67.

⁷⁹ European Treaty Series (ETS), No 185, Budapest, September 23, 2001.

⁸⁰ European Commission, ‘Cyber-security Strategy of the European Union: An Open, Safe and Secure Cyberspace’ JOIN(2013)1final, at 9; Council of the European Union, ‘EU-US Summit, Joint Statement’, Council doc. 16726/10, 3, which set up the EU-US Working Group on Cybercrime and Cyber Security, Concept Paper, April 13, 2011. See E. Fahey, “European Union’s Cybercrime and Cyber Security Rule-Making: Mapping the Internal and External Dimensions of European Union Security” (2014) 1 Eur. J. Risk Reg. 46, as to the place of this external norm in EU rule-making for some time.

⁸¹ Concept Paper, above fn. 80, 4. It is thus a temporally ‘recent’ objective in European Union external action.

⁸² Electronic Privacy Information Center, Statement on Council of Europe Cybercrime Convention Treaty 108-111, (July 26, 2013), <https://epic.org/privacy/intl/ccc.html>; Ian Brown ‘The feasibility of transatlantic privacy protective standards for surveillance’ (2014) 1 International Journal of Law and Information Technology 1, Section 3.3; However, see its prominent place in the post-NSA affair negotiations: Council of the European Union, ‘Report on the Findings by the EU Co-chairs of the Ad Hoc EU-US Working Group on Data Protection’ Council doc. 16987/13; European Commission, ‘Rebuilding Trust in EU-US Data Flows’ COM(2013) 846 final, 9.

⁸³It purports to relax constraints on the requesting Party, now bound by the computer system location “in its territory”. Cybercrime Convention Committee (T-CY) (Draft) elements of an Additional Protocol to the Budapest Convention on Cybercrime regarding transborder access to data T-CY (2013)14; www.coe.int/TCY. See Committee on Civil Liberties, Justice and Home Affairs 2013/2188(INI) on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens’ fundamental rights and on transatlantic cooperation in Justice and Home Affairs.

⁸⁴ See ratification table, fn. 40. See Fahey, fn. 80 further on the post-NSA developments

⁸⁵ See Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA 2013, [2013] OJ L218/8, recital 15.

⁸⁶ See European Parliament, LIBE briefing, June 2012 2010/0273; Opinion of the European Data Protection Supervisor of June 14, 2013 on the Cyber Security Strategy and Directive <<https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/OpinionsC> [Accessed August 17, 2015].

⁸⁷ See Recital 15.

provision that appears likely to give rise to future litigation. More generally, an EU 'Cybercrime Centre' (the so-called 'EC3') was also launched in 2013 and so effectuates the institutionalization of cybercrime policy.⁸⁸ It further demonstrates the form of socialisation taking place.

The place of the Cybercrime Convention here is significant for its centrality to internal and external rule-making process, despite its shortcomings and provide concrete evidence of a dual-faceted norm cascade. While the EU gives primacy to external norms in both its current internal and external rule-making, it appears to produce very different regulatory results.⁸⁹ In this way, the lead place of an external norm even if not so robust appears distinctive in comparison with others considered in this account.

The place of specific UN Conventions in AFSJ directives is considered next, as norms of some historic significance.

(iv) UN Conventions in AFSJ directives

United Nations (UN) Conventions constitute the most cited external norm in recent AFSJ Directives and warrant consideration as a result. Despite the wording of Art. 21 TEU mandating the European Union the entitlement to participate in the global legal order, in general, the external environment is perceived to be less hospitable to the EU's ambitions in international relations.⁹⁰ The adoption of UN General Assembly Resolution 65/276 on 3 May 2011 purported to implement the Treaty of Lisbon provisions at the United Nations so as to afford the EU enhanced participation rights.⁹¹ The European Union enjoys a varied range of statuses in UN bodies, statuses that generally appear 'privileged' compared to its place in other international organisations.⁹² As a result, the evolution of its place within the UN system is perceived to be a constant battle between formalism and flexibility. The European Union has obtained a hotchpotch of victories:- it has obtained observer status in most fora, been given enhanced participation rights in some and only granted status as a member organisation in a few exceptional cases.⁹³ More positively, some accounts outline the success of the EU in exporting its governance to UN Conventions, for example, the negotiations of UN Convention on Disabilities.⁹⁴ This context, however, does not necessarily give any indicator as to how UN Conventions operate in the internal legal context, for example, in AFSJ Directives and thus

⁸⁸See European Commission, 'Tackling Crime in our Digital Age: Establishing a European Cybercrime Centre' COM(2012).

⁸⁹ See Fahey, above fn. 80.

⁹⁰ See G. De Baere and E. Passivirta, "Identity and Difference: The EU and the UN as Part of Each Other" in H. de Waele and J.J. Kuijper (eds) *The Emergence of the European Union's International Identity – Views from the Global Arena* (Leiden: Brill, 2013), 21-42, 26.

⁹¹ Giving effect to the aspirations in Art. 21 TFEU.

⁹² F. Hoffmeister, "Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies" (2007) C.M.L.R. 41.

⁹³ The Food and Agriculture Organization (FAO) is the only example of a UN specialized agency in which the EU holds membership status As Wouters et al observe, the EU struggles for more effective participation in the UN framework in the face of stumbling blocks that are both internal and external and frequently illogical or not obvious. They give the example of the United Nations Educational, Scientific and Cultural Organization (UNESCO), as a UN specialized agency in a policy field of 'weak' EU powers but where the EU has nevertheless been granted an 'ad hoc' upgraded status for a specific purpose. Conversely, the International Maritime Organization (IMO) is a UN agency where the EU holds no status despite its prolific legislative and policy initiatives in maritime affairs: J. Wouters, A. Chané, J. Odermatt and T. Ramopoulos 'The European Union: A Shadowy Global Actor? The UN System as an Example' in E. Fahey (ed), *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (Routledge, 2015).

⁹⁴ G. De Búrca, "The European Union in the Negotiation of the UN Disability Convention" (2010) 35 E.L.R. 174.

warrants further reflection. Their use *prima facie* indicates their relevance as regards informing and also legitimising rule-making practice, de facto and de jure. UN Conventions are the most cited norms in AFSJ Directives as to migration and human protection. In these domains, the EU itself is only a signatory to a minority of UN Conventions arising in Directives unlike the Member States.

At least five UN Conventions feature prominently in recent AFSJ Directives. Firstly, the UN Convention on the Protection of the Rights of the Child forms the main external norm or source for maximum harmonisation in Directive 2011/92 on combating sexual abuse and sexual exploitation of children and child pornography, which the European Union is not party to.⁹⁵ The Convention is the most widely ratified of all human rights treaties and explicitly seeks full and direct incorporation so as to maximise its full legal effect.⁹⁶ The European Union has the ratification of the Convention as a strategic agenda and places emphasis upon an internal and external interlinkage of policy.⁹⁷ It adopts a maximum harmonisation approach in Directive 2011/92, which deploys far-reaching criminal law penalties.⁹⁸ It may be said to raise certain questions as to subsidiarity given its character because it differs significantly from minimum harmonisation more usually found in AFSJ directives. Here the UN Convention used has an important legitimising effect and is a clear example of the operation of external norm primacy.

This same Convention is also deployed in Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims,⁹⁹ Directive 2013/32 on common procedures for granting and withdrawing international protection,¹⁰⁰ Directive 2013/33 laying down standards for the reception of applications for international protection¹⁰¹ and Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.¹⁰² Next, the Trafficking Directive discussed above also deploys the UN Convention on the Rights of the Child as well as three other UN Conventions, namely, the UN Convention on Transnational Organised Crime and Protocols thereto, the UN Convention relating to the Status of Refugees.¹⁰³ Finally, UN Convention on Elimination of all forms of Discrimination against Women is deployed in Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime.¹⁰⁴ This directive is part of the Road Map agenda on strengthening procedural rights,¹⁰⁵ one of several victims and accused

⁹⁵ [2011] OJ L335/1, recital 23.

⁹⁶ See <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> [Accessed August 17, 2015].

⁹⁷ Communication on an EU Agenda for the Rights of the Child COM (2011) 60 final, Communication Towards an Strategy on the rights of the child (2006) COM 367 final.

⁹⁸ For example, it proscribes penalties for up to 5 years for sexual exploitation offences: art. 4(5).

⁹⁹ [2011] OJ L 101/1, recital 8.

¹⁰⁰ [2013] OJ L 180/60, recital 33.

¹⁰¹ [2013] OJ L 180/96, recital 9.

¹⁰² [2011] OJ L 337/9, recital 18.

¹⁰³ Recitals 8, 9 and 13.

¹⁰⁴ [2012] OJ L 315/57, recital 6. Women are referenced in recitals 5,6, 17 and 18.

¹⁰⁵ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions *Strengthening victims' rights in the European Union* COM(2011) 274 final; Directive 2010/64 on the right to interpretation and

rights directives.¹⁰⁶ These Directives are heavily grounded in the caselaw of the European Court on Human Rights, which arguably displaces the significance of the Convention deployed here. Gender-based concerns appear informative rather than operate in this particular Directive, which also gives prominence to child-centred approaches in its articles (e.g. art. 1). It demonstrates a significantly weaker place for external norms here, where rule-making encompasses less robust norms.

In the case of UN Conventions, there is evidence of norm cascades taking place over a longer-term period. Migration and human protection may be said to form areas where the European Union awkwardly juggles its attempts to holistically evolve its practices, to follow best practice and to act as an autonomous standard-setter. While less than robust norms facilitate its own development of autonomous norms, UN Conventions are deployed here largely with less impact or significance in comparison with others considered here. The process of socialisation of the EU within the UN does not appear to have a strong link to rule-making practice, certainly not within AFSJ Directives.

The next section considers norm omission in AFSJ Directives in specific instruments.

(v) Norm omission and AFSJ Directives

In two AFSJ Directives of the last legislative cycle there are no references to external norms whatsoever. Firstly, striking is the omission of external norm promotion in the proposed Passenger Name Records (PNR) Directive,¹⁰⁷ a controversial AFSJ measure post-Lisbon, proposing surveillance of European Union citizen travel within the European Union which remains in stalemate in the European Union legislative process for several years. Notably, it references the infamous EU-US PNR Agreements and PNR agreements with other countries alone but not other external norms, for example, a relevant Council of Europe Convention.¹⁰⁸ In fact in this instrument, these policies and their values are expressed with striking brevity. One might say here then that there may be a failure of transparency in European Union rule-making as to its provenance, through the emasculation of its legislative history. Similarly, as regards legislative omissions, one might expect legislation on common set of rights for third country workers to include a wide array of external norms and sources because of its distinctive origins

translation in criminal proceedings [2010] OJ L280/1; Directive 2012/13 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2011/99 on the European protection order [2011] OJ L338/2.

¹⁰⁶ See previously: Framework Decision 2001/220 on the standing of victims in criminal proceedings [2001] OJ L82/1 and Directive 2004/80 relating to compensation to crime victims [2004] OJ L261/15. For a broader setting of these measures pre-Lisbon, see E. Baker and C. Harding "From Past Imperfect to Future Perfect? A Longitudinal Study of the Third Pillar" (2009) E.L.R. 34, pp. 25-54.

¹⁰⁷ Proposal for a Directive of the European Parliament and the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime 2011/23(COD). The European Council called on the Council and Parliament to finalise work on the European Union PNR proposal: EUCO163/14, p.6. At the time of writing, it was awaiting Committee decision in the European Parliament.

¹⁰⁸ E.g. on the Protection of Terrorism, above, fn. 3. These EU-US Agreements have generated serious fundamental rights and data protection concerns: see further E. Fahey, "Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress, and Remedies in European Union-US Passenger Name Records and the Terrorist Finance Tracking Program" (2013) 32 Ybk.Eur.Law 368.

in international law.¹⁰⁹ However, the limited reference to external norms in such instruments appears then all the more striking.¹¹⁰ A failure to expound the normative influences upon European Union rules can be inferred to emphasise its originality controversial origins, its stringency in its original format, its challenges for judicial review or its failure to balance fundamental rights concerns appropriately.¹¹¹ The work of the legislature as to PNR may rightfully generate concern, not least because of the strong objections of, for example, Fundamental Rights Agency or the Data Protection Supervisor to this particular instrument, yet appear eclipsed after the Charlie Hebdo attacks, which reignited a debate on the introduction of the Directive.¹¹²

Remaining on the theme of ‘norm omission’, one of the most politically controversial measures of the recent legislative cycle worthy of mention is the European Investigative Order (EIO).¹¹³ The EIO is a bold departure from traditional methods of evidence gathering, traditionally conducted through Mutual Legal Assistance. Even though this Directive operates ostensibly as a broad patchwork quilt of norms, the only norm referenced in its recitals therein is the Charter.¹¹⁴ Strikingly, the Member States curtailed the European Commission’s proposals on evidence gathering in favour of their own instrument through enhanced cooperation. It has received extensive critique for its scope, for example, through its permission of the investigation of ‘any matter’ in art. 3, with little judicial control. It is perceived to embody the difficulties associated with the evolution of mutual recognition.¹¹⁵ Its controversy might be said to be evident through its establishment through enhanced cooperation, which in turn might be said to necessitate very explicit subsidiary and proportionality commitments. On the contrary, what may be observed therein is a common and prosaic recitation of subsidiarity.¹¹⁶ This might be said to be a good example of where external norms could have provided a useful legitimisation template. Arguably, norm promotion should be particularly detailed in instruments of enhanced cooperation so as to

¹⁰⁹ See further on this Roos and Zaun, above fn. 47.

¹¹⁰ For example, Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State ([2011] OJ L343/1) refers only to the Charter of Fundamental Rights (third country workers’ rights).

¹¹¹ See also limited number of external norms deployed in Directive 2011/98, listing only the Charter in its recitals (31) rather than any labour or migrant-related instrument.

¹¹² Opinion of the European Union Agency for Fundamental Rights FRA Opinion – 1/2011 (14 June 2011); Opinion of the European Data Protection Supervisor 25 March 2011, https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2011/11-03-25_PNR_EN.pdf [Accessed August 17, 2015]; art. 29 Working Party on Data Protection Opinion 145 of 2007 (December 5, 2007). See Resolution of the European Parliament of 25 November 2014 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data (2014/2966 (RSP)).

¹¹³ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters OJ L130/1. See *EUObserver*, “New European Union police investigation co-operation alarms civil liberties watchdogs” <http://euobserver.com/justice/30553> [Accessed August 17, 2015].

¹¹⁴ Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (and its two additional protocols); the Schengen Convention; the 2000 European Union Convention on Mutual assistance in criminal matters (and its Protocol); 2008 Framework Decision on the European evidence warrant; the 2003 Framework Decision on the execution in the European Union of orders freezing property or evidence (as regards freezing of evidence).

¹¹⁵ See D. Sayers, “The European Investigative Order: travelling without a roadmap” (2011) Centre for European Policy Studies; S. Peers “The proposed European Investigation Order: Assault on human rights and national sovereignty” *Statewatch Analysis* (May 2010), <http://www.statewatch.org/analyses/no-96-european-investigation-order.pdf> [Accessed August 17, 2015]; J. Blackstock, “The European Investigation Order” (2010) 1 *New Journal of European Criminal Law* 481.

¹¹⁶ i.e.: “Since the objective of this Directive, namely the mutual recognition of decisions taken to obtain evidence, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in art. 5 of the TEU.”

gain legitimation, given their propensity to generate *inter alia* subsidiarity and proportionality concerns.¹¹⁷ Judicial practice in the post-Lisbon era appears to give less than subtle indications about the role of the legislator in this regard,¹¹⁸ and appears to create an impetus for more and better norm promotion.

The next section considers the rationale of the place of external norms in AFSJ rule-making in a broader context.

Section III: Assessing external norms in AFSJ rule-making: from form to rationale

The link between external norms, European Union internal legislative practice and EU external relations is not explicit within EU law itself. The study here has thus purported to bring ‘daylight’ to this relationship of the ‘internal’ with the ‘external’. In this regard, it reveals many varying practices. First, external norms may have a long pedigree within EU law but may not necessarily be so robust, which in turn may water down their own significance. Secondly, the example of the Council of Europe Cybercrime Convention considered here in Section II(iii) indicates prominence in rule-making for an external norm. Despite its shortcomings, in this instance, it is one which contributes greatly towards socialisation. Thirdly, internal competence may be of tremendous significance to the future engagement of the European Union with external norms as the casestudy here on the Road Traffic Directive demonstrates. Fourthly, practice indicates shorter and long-term term differences as to influence or impact of an external norm. For example, UN Conventions feature prominently as to migration and human protection for reasons of legitimacy and norm primacy that suggest longer-term socialisation. However, external norms may not be very robust yet may still impact upon de facto and de jure ‘legitimation’ of practice. Fifthly, the absence of external norms is also revealing of legislative practice in the recent AFSJ era. Such instances demonstrate the limited norm cascade that can be expected to occur when norms are simply not robust enough or permit significant local change. The study of socialisation in this instance is arguably complicated or hindered by a lack of transparency on the part of the legislator.

After the entry into force of the Treaty of Lisbon, the European Union Commission Treaties Office sought to systematise transparently all European Union agreements with a bilateral or multilateral dimension, by categorising the use by the European Union of human rights, evolution and territorial clauses.¹¹⁹ In doing so, it sought to bring transparency to the European Union’s external reach through law. Such categorisations, however imperfect, constitute useful tools so as to understand the nature of European Union rule-making practices. While there is much merit to such ‘transparency’ in its broadest sense, it appears more inspired by aesthetic transparency

¹¹⁷ And more recently, their propensity to be litigated: *Spain and Italy v Council* (Unitary patent) (C-274/11 and C-295/11) [2013] E.C.R. I-000; *United Kingdom v. Council* (C-209/13), June 6, 2014 (Financial Transaction Tax). See the 2013 Report on the application of the European Union Charter of Fundamental Rights from the European Commission, which is remarkably brief: COM(2014) 224 final.

¹¹⁸ For example, in *Digital Rights Ireland v. Minister for Communications, Marine and Natural Resources* (Case C-293/12) April 8, 2014.

¹¹⁹ Treaties Office, Database of the European External Action Service. <http://ec.europa.eu/world/agreements/viewCollection.do?fileID=67962> [Accessed August 17, 2015].

rather than more substantive openness.¹²⁰ Efforts on the part of the European Union to systematise the European Union's integration of internal and external norms may appear more cosmetic or aesthetic than substantive. The advent of Directives in the AFSJ surely raises manifold issues of discretion and even sovereignty. The provenance and objectives of Directives arguably requires more careful formulation in an era where norm specificity *and* transparency have become more essential as AFSJ rule-making begins to fall within more mainstream rule-making practices.

Returning to the three criteria outlined in Section I as to framing socialisation in rule-making (participation, robustness and temporal questions), the criteria may be said to be instructive. EU law appears to be extremely open to the integration of external norms as a process of socialisation of the European Union in the global legal order, irrespective of its own status in international organisations or participation. Practice sometimes even indicates the primacy of external norms in AFSJ rule-making as a legal standard but this is not wholly dispositive of their place. There is an inherent openness in rule-making to use external norms as a reason to set high standards, but this is not always the case. External norms may paradoxically enable a de facto and de jure 'reduction' of standards in EU law if not robust enough. For example, definitional standards, implementation and enforcement at local level may veer far away from the goals of the external norm if the latter is not robust enough. The temporal context of the influence of external norms reveals the evolution of the place of an external norm but is not dispositive alone as a criterion and demonstrates the necessity for holistic study of rule-making practices.

Conclusions

This study has sought to demonstrate that there is no mechanism or means to systematically or formally link external norms in AFSJ Directives with the role of the European Union in the global legal order. As a result, tracing the promotion of norms in AFSJ rule-making offers specific and even holistic insights into the contemporary legislative process. It also offers insights into the evolving relationship between the 'external' and 'internal' in the AFSJ as a broader process of socialisation of the European Union in the global legal order. It is one which has been argued here to warrant further transparency. The study of AFSJ Directives suggests that the use of external norms is in effect an internalisation of those norms but in a variety of ways. The perceived robustness of norms, participation and temporal questions are important factors in joining the dots between the internal and external. While norm cascades vary greatly within AFSJ Directives as they evolve, it is a study which provides clear evidence of the autonomous development of norms in the AFSJ. The account here thus demonstrates the usefulness of scrutinising internal and external practice *and* interrelating them.

¹²⁰ And it is notably not maintained or updated at the time of writing for the vast majority of Agreements considered here in Section 1.

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