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14. The nexus between CFSP and the Area of Freedom, Security and Justice

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Abstract

The interactions between AFSJ and CFSP have become increasingly pronounced. They are also dynamic and subject to adjustment, and must be viewed in the context of the prevailing political climate in the EU. The intensity of these interactions has already had an impact on the character of the CFSP: the latter has moved closer to the soft end of the security spectrum and is being instrumentalized in order to enable the EU to achieve objectives of other policies. Whilst it prevents the scope of CFSP from being impinged upon by other policies, the limited, so far, case law of the Court of Justice on the relationship between CFSP and AFSJ does not provide a clear yardstick that would enable the institutions to address legal basis questions with confidence.

Keywords: AFSJ; CFSP; CSDP; coherence; migration; refugees

1. Introduction

The Area of Freedom, Security and Justice (AFSJ) has a set of objectives that is startlingly broad. It includes the following: the absence of internal border controls for persons; the development of a common policy on asylum, immigration, and external border controls; a high level of security through measures to prevent and combat crime, racism and xenophobia; increased cooperation between police, judicial and other competent authorities; the mutual recognition of judgments in criminal matters and, if necessary, the approximation of criminal laws; the mutual recognition of judicial and extrajudicial decisions in civil matters.¹

It is not, however, only this broad sweep that makes the AFSJ well-suited for interacting with the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP). It is also the security focus of these policies. Whilst focusing on EU citizens,² AFSJ owes its genesis and development to the need to ensure the internal security of the European Union.³ Given the increasing multiplication of security challenges and the porous nature of physical borders, the development of the external aspects of AFSJ was hardly surprising.⁴ And given the broad scope of CFSP (it covers 'all areas of foreign policy and all questions relating to

¹ Art. 67(2)-(4) TFEU. The AFSJ is governed by Title V TFEU, and covers immigration (Article 77 TFEU), asylum (Article 78 TFEU), judicial cooperation in civil (Article 81 TFEU) and criminal matters (Articles 82-6 TFEU), and police cooperation (Articles 87-9 TFEU).

² Art. 3(2) TEU provides that the EU 'shall offer *its citizens* an area of freedom, security and justice without internal frontiers' (emphasis added).

³ See, for instance, 'A Strategy on the External Dimension of the Area of Freedom, Security and Justice' COM(2005) 491 fin, adopted by the Council in December 2005.

⁴ See J Monar, 'The External Dimension of the EU's Area of Freedom, Security and Justice-Progress, potential and limitations after the Treaty of Lisbon' (SIEPS 2012:1) 13ff.

the Union's security'⁵), it was only a matter of time before the linkages between it and AFSJ would emerge.

The linkages between the two policy areas are more explicit in the revamped framework that has governed the EU's external action since the entry into force of the Treaty of Lisbon. The objective of 'contribut[ing] to the protection of its citizens' is viewed in Article 3(5) TEU as part of the Union's aims in its relations with the wider world. More specifically, primary law refers to safeguarding, amongst others, the Union's security as an objective not only of the EU's external action (Article 21 (2) TEU), but also of the external aspects of its other policies (Article 24(3) TEU).

On the other hand, CFSP and AFSJ are ill-suited in legal terms. The former is covered by a *sui generis* competence of the EU (Article 2(4) TFEU) and 'is subject to specific rules and procedures' (Article 24(1) TEU), in the context of which unanimity prevails, the role of the European Parliament is marginal at best, and the jurisdiction of the Court of Justice of the European Union is limited.⁶ As for the AFSJ, it is covered by shared competence (Article 4(2)(j) TFEU), the ordinary legislative procedure applies, the Parliament is acting as co-legislator, and the conduct of the policy is subject to the jurisdiction of the Court of Justice.

In the light of the above, the CFSP-AFSJ nexus provides a good snapshot of the complexities that characterize the Union's effort to bring together different stands of its external action in order to become a relevant actor on the international scene. This chapter will explore these complexities from three different angles. The first is about policy: it will focus on the increasingly prominent linkages that emerge from the current conception of CFSP/CSDP and AFSJ by the Union's decision-makers. The second angle is about practice: it will explore how the nexus between the two policies works in CFSP practice, by focusing on its most direct and prominent illustration, that is Operation Sophia in the Southern Central Mediterranean. The third angle is about the approach of the Court of Justice to the CFSP-AFSJ nexus and its implications for both the Union's institutions and the place of CFSP in the Union's constitutional order.

2. The policy angle

The external dimension of AFSJ is, ostensibly, about the development of relationships between the EU and third countries and organizations in order to achieve the objectives relating to the Union's internal security. This dimension was acknowledged as early as in 1999 by the European Council⁷ and has emerged clearly over the years on the basis of various policy documents.⁸ In fact, there is a plethora of policy

⁵ Art. 24(1) TEU.

⁶ Art. 24(2) TEU and Art. 275 TFEU. On this issue, see the chapter by Hillion and Wessel. On the procedural aspects of CFSP/CSDP, see the chapter by Marquardt.

⁷ Tampere European Council, Presidency Conclusions on the Area of Freedom, Security, and Justice (15-6 October 1999).

⁸ For the foundational documents, see The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C 53/01, and *The Stockholm Programme – An open and secure Europe serving and protecting the citizens* (Brussels, 2 December 2009) adopted by the European Council (11-12 December 2009). See the analysis in T Balzacq (ed.), *The External Dimension of EU Justice and Home Affairs – Governance, Neighbours, Security* (Palgrave Macmillan 2009); M Cremona, J Monar and S Poli (eds), *The External Dimensions of the European Union's Area of Freedom, Security and Justice* (P.I.E. Peter

documents in the area, and they are by no means immune to the empty rhetoric, triteness and hyperbole that one is accustomed to find in this type of work produced by the EU's bureaucracies and politicians. Taken together, nonetheless, these documents convey the prevailing understanding of the institutions about the increasing relevance of CFSP and AFSJ to each other.

The main priorities of the external dimension of AFSJ were defined early on as migration policy, the fight against organized crime and terrorism, the fight against crimes such as money laundering, corruption and trafficking in human beings, the fight against drug trafficking, and the development and consolidation of the rule of law in countries on the path to democracy.⁹ These issues also featured prominently in the main strategic documents on CFSP. The 2003 European Security Strategy, for instance, included organized crime in the Union's major challenges, and referred specifically to cross-border trafficking in drugs, women, and illegal migrants, as well as their potential link to terrorism.¹⁰

In fact, the nexus between AFSJ and CFSP has been shaped by three interlinked aspects of the Union's external relations in general and its foreign and security policy in particular. The first is the wide terms in which the EU has construed the notion of security. This characteristic has been prevalent in the efforts of the Union to articulate its international role. The tone was set in the 2003 European Security Strategy which referred to terrorism, proliferation of weapons of mass destruction, regional conflicts, state failure, as well as organised crime as the main global challenges for the EU.¹¹ The policies covered by the AFSJ pertained to all them, and their role was affirmed in a 2008 review of the European Security Strategy¹² where, for instance, organized crime assumed central importance, alongside terrorism. This approach is also illustrated by the 2016 Global Strategy which stresses, in the context of CSDP, operations and missions aiming to fight cross-border crime and disrupt smuggling networks,¹³ a point that will be explored further in the following section.

The second characteristic, following from the above, pertains to the Union's armoury to tackle global security challenges, and is about the wide range of instruments upon which the EU is prepared to rely. As the Global Strategy puts it, '[a] stronger Union requires investing in all dimensions of foreign policy, from research and climate to infrastructure and mobility, from trade and sanctions to diplomacy and development'.¹⁴ To that effect, it promotes an approach which would be 'integrated', 'multi-dimensional ... through the use of all available policies and instruments aimed at conflict prevention, management and resolution', 'multi-phased', that is involving

Lang 2011); C Flaesch-Mougin and L.S. Rossi (eds), *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union* (Bruylant 2012); and R Wessel and C Matera, 'The External Dimension of the EU's Area of Freedom, Security and Security' in C Eckes and T Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (CUP 2011) 272.

⁹ Santa Marie de Feira European Council, 19-20 June 2000, Presidency Conclusions.

¹⁰ 'A Secure Europe in a Better World - European Security Strategy' (Brussels, 12 December 2003) 4-5

¹¹ *ibid*, 3-5.

¹² 'Report on the Implementation of the European Security Strategy - Providing Security in a Changing World' (S407/08, Brussels, 11 December 2008).

¹³ 'Shared Vision, Common Action: A Stronger Europe - A Global Strategy for the European Union's Foreign and Security Policy' (European External Action Service 2016).

¹⁴ *ibid*, 44.

all stages of the conflict cycle, and 'multi-level', covering the local, national, regional and global levels.¹⁵ There are, in other words, inherent linkages between, amongst others, CFSP/CSDP and AFSJ. This is articulated clearly in the 2017 implementation report on the Global Strategy, which states the following:

Security and defence are essential components for a credible EU role in the world. But the full strength and value of such instruments are fulfilled only when they are deployed alongside other external policies – such as enlargement, development and trade – or policies with external aspects, including on migration, energy, climate, environment, culture and more. This unique mix of actions is the European way to foreign and security policy.¹⁶

The third characteristic of the Union's international role is the osmotic relationship between internal and external policies. Again, this is not a new development. The European Security Strategy referred to the internal and external aspects of security as 'indissolubly linked'¹⁷ and the 2008 Report on the Implementation of the European Security Strategy pointed out the 'need to improve the way in which we bring together internal and external dimensions'.¹⁸ There is greater emphasis on the internal-external linkages in the Global Strategy too, both generally and in relation to CFSP/CSDP in particular.¹⁹

The above three features of the Union's security policy (broad definition, wide range of EU instruments, internal-external linkages) have shaped the nexus between CFSP/CSDP and AFSJ over the years. In fact, they have gone farther: so central to the Union's external relations have they become that they are now viewed as emblematic of 'the European way to foreign and security policy'.²⁰ At a high policy level, we see the increasingly explicit articulation of the nexus between these policies and CFSP/CSDP. The Global Strategy, for instance, states that '[w]e will also make different external policies and instruments migration-sensitive – from diplomacy and CSDP to development and climate – and ensure their coherence with internal ones regarding border management, homeland security, asylum, employment, culture and education'.²¹

¹⁵ *ibid*, 28-9.

¹⁶ 'From Shared Vision to Common Action: Implementing the EU Global Strategy - Year 1' (European External Action Service 2017) 12.

¹⁷ 'A Secure Europe in a Better World' (n 10) 2.

¹⁸ 'Report on the Implementation of the European Security Strategy' (n 12) 4.

¹⁹ For instance: 'through a coherent use of internal and external policies, the EU must counter the spill-over of insecurity that may stem from . . . conflicts [where no peace agreements are reached], ranging from trafficking and smuggling to terrorism': 'Shared Vision, Common Action' (n 13) 30.

²⁰ 'Shared Vision, Common Action' (n 13) 12. The same rhetoric was also apparent in previous strategic documents: the ESS had pointed out that the EU was 'particularly well equipped to respond to such multi-faceted situations' (7), and the 2008 Report referred to 'a distinctive European approach to foreign and security policy' (2). This rhetoric is not confined to strategic documents on CFSP: references to a 'European Security Model' are made in the 2010 Internal Security Strategy time and again, whereas 'The European Agenda on Security' (Communication) COM (2015) 185 fin also refers to the EU's added value in the area.

²¹ 'Shared Vision, Common Action' (n 13) 50.

This point is also stressed in CFSP/CSDP-specific documents. In relation to one of the strategic priorities of the Global Strategy, that is protecting the Union and its citizens, the Council has recently elaborated on the significance of the nexus between AFSJ and CFSP/CSDP:

Protecting the Union and its citizens covers the contribution that the EU and its Member States can make from a security and defence perspective, notably through CSDP in line with the Treaty, to tackle challenges and threats that have an impact on the security of the Union and its citizens, along the nexus of internal and external security, in cooperation with Freedom, Security and Justice (FSJ) actors. Respecting that CSDP missions and operations are deployed outside the Union, the EU can contribute from a security and defence perspective to strengthening the protection and resilience of its networks and critical infrastructure; the security of its external borders as well as building partners' capacity to manage their borders; civil protection and disaster response; ensuring stable access to and use of the global commons, including the high seas and space; countering hybrid threats; cyber security; preventing and countering terrorism and radicalisation; combatting people smuggling and trafficking; complementing, within the scope of CSDP, other EU efforts concerning irregular migration flows, in line with the October 2016 European Council Conclusions; promoting compliance with non-proliferation regimes and countering arms trafficking and organised crime. Existing EU policies in these areas should be taken forward in a comprehensive manner.²²

To be sure, the overview provided in this section relates to policy documents that, as mentioned above, are high on rhetoric and may not avoid being formulaic or trite in their language. They do, however, illustrate a central point: a fundamental congruence has emerged between CFSP and AFSJ objectives and is shaping the Union's understanding of its foreign and security policy. In effect, the Treaty of Lisbon reflects this, as it defines more broadly the tasks to be carried out by the Union and draws upon the tasks undertaken under the AFSJ, a case in point being Article 43(1) TEU and its reference to the fight against terrorism. This point will be explored further in section 4 of this chapter.

The congruence of objectives between CFSP/CSDP and AFSJ is also reflected by practice. A case in point is provided by the active role of High Representative Mogherini in the negotiation of migration compacts with African states.²³ Another example on the CSDP side is security sector reform (SSR), that is the process of transforming a third country's security system in order to enable it to provide individuals and the state with effective and accountable security, consistent with respect for human rights, democracy, the rule of law and the principles of good governance. SSR features prominently as part of the external dimension of AFSJ,²⁴ whilst objectives of the latter are also addressed by a number of the CSDP civilian

²² Council Conclusions on implementing the EU Global Strategy in the area of Security and Defence (14149/16, Brussels, 14 November 2016) 5.

²³ See, more generally, for a recent assessment: Commission, 'Fourth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration' COM (2017) 350 fin.

²⁴ See recently: 'Elements for an EU-wide strategic framework to support security sector reform' JOIN (2016) 31 fin and, previously, 'A concept for European Community support for security sector reform' COM (2006) 253 fin.

missions which aim to reform the security sector of the host country in order to tackle, amongst others, smuggling, trafficking, and organised crime.²⁵

The overall approach of such missions illustrates their linkages with the external aspects of AFSJ: it reflects a policy choice to tackle the issues that undermine, directly or potentially, the security of European citizens. The civilian mission in Niger (EUCAP Sahel Niger), for instance, was designed as 'the intensification of terrorist actions and the consequences of the conflict in Libya have increased the urgency of protecting Union citizens and interests in the region and preventing the extension of those threats to the Union'.²⁶ What we see, therefore, is the gradual anchoring of CSDP missions to AFSJ policies not only in relation to their objectives but also policy choices about where these missions are to be carried out. A considerable proportion of the CSDP civilian missions are launched in Africa, a region which is central to the Union's AFSJ interests.²⁷

A process, therefore, of interweaving policies and objectives emerges: whilst conceived of in different contexts originally, they develop gradually in an osmotic relationship with each other. This process has shaped the overall character of both the AFSJ and CFSP/CSDP. As far as the former is concerned, it is becoming increasingly difficult to envisage an autonomous, readily defined and legally contained external policy on AFSJ. A look at the 2015 Strategic Guidelines on AFSJ, for instance, suggests an ever greater emphasis on the external aspects of the policy, on the synergies with other policies, and on the ever present requirement for a comprehensive approach.²⁸

Put differently, the external dimension of AFSJ can only be designed properly and carried out in conjunction with other external policies, including CFSP and CSDP. On the other hand, the increasing interactions with other policies, including AFSJ and development cooperation,²⁹ have had a profound impact on the shape of CFSP and CSDP: they have shifted the policy farther away from the hard end of the security spectrum set out in the Treaties,³⁰ and have underlined its instrumental dimension, as they have rendered it an essential element for achieving the objectives of other policies.³¹ While this section suggested that this development has emerged as a matter

²⁵ See G Mournier, 'Civilian Crisis Management and the External Dimension of JHA: Inceptive, Functional and Institutional Similarities' (2009) 31 *Journal of European Integration* 45. For an overview of the civilian missions, see the chapter by Juncos. See also the analysis in P Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013) ch 6.

²⁶ Council Decision 2012/392/CFSP [2012] OJ L187/47, recital 1, last amended by Council Decision 2017/1253 [2017] OJ L179/15.

²⁷ See 'EU Strategy for Africa: Towards a Euro-African pact to accelerate Africa's development' COM (2005) 489 fin.

²⁸ European Council Conclusions, *Strategic Guidelines for the area of freedom, security and justice* (EUCO 79/4, Brussels, 27 June 2014).

²⁹ See H Merket, *The EU and the Security-Development Nexus – Bridging the Legal Divide* (Brill/Nijhoff 2016), and the chapter by Broberg in this book.

³⁰ Art. 42(1) TEU refers to 'missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter', whereas Article 43(1) TEU defines these tasks by reference to joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.

³¹ For an analysis of the CSDP record that supports this argument, see Koutrakos (n 25), Chs 5-6.

of policy, the following section will show that it is also prevalent as a matter of practice.

At this juncture, suffice it to say that it is not one-dimensional: it is not only the CFSP/CSDP and AFSJ whose direction has changed due to their interactions. The widening of the notion of security has enhanced the interactions between other external policies of the Union, and has had implications for their direction too. There is, for instance, a healthy debate about the securitization of development cooperation³² and the increasing emphasis in the EU's development cooperation on serving objectives related to the Union's own interests.³³

3. The practice angle

Given the focus of this book, this section will approach the practice of the CFSP-AFSJ nexus from the CFSP point of view. As an overview of the CSDP civilian and military operations is provided elsewhere in this book,³⁴ the aim of this section will be selective, namely to tease out the issues raised by the interactions with AFSJ in practice. The starting point for this exercise will be Operation EUNAVFOR MED Sophia in the Southern Central Mediterranean. There are various reasons for this. From a wider CSDP perspective, the operation consolidates the maritime dimension of the policy, as it follows from Operation Atalanta in the Gulf of Aden.³⁵ It also provides a clear example of the nexus between CSDP and AFSJ, both in terms of its objectives as well as its conduct. Finally, it is an ongoing operation that is carried out in the Union's neighbourhood³⁶ and deals with an issue of profound political significance for the EU and sensitivity for the Member States.

The decision to carry out the operation was taken in May 2015, following the growing number of migrants drowning in the Mediterranean in their effort to reach an EU Member State (mainly from Libya to Italy). In the first 4.5 months of 2015, almost 1800 deaths had been reported, according to the International Organization for Migration.³⁷ The stream of terrible news and pictures from the Mediterranean made the EU institutions react. The European Council, at an extraordinary meeting,

³² See, amongst others, M Duffield, 'The Liberal Way of Development and the Development-Security Impasse: Exploring the Global Life-Chance Divide' (2010) 41 *Security Dialogue* 53; B Hettne, 'Development and Security: Origins and Future' (2010) 41 *Security Dialogue* 31; S Keukeleire and K Raube, 'The security-development nexus and securitization in the EU's policies towards developing countries' (2013) 26 *Cambridge Review of International Affairs* 556; J Orbie and K Del Biondo, 'The European Union's "Comprehensive Approach" in Chad: Securitisation and/or Compartmentalisation?' (2015) 29 *Global Society: Journal of Interdisciplinary International Relations* 243.

³³ This point is made by Broberg in his contribution to this volume. Whilst this emphasis emerges most clearly in *The New European Consensus on Development – Our World, Our Dignity, Our Future* (Brussels, 7 June 2017), he suggests that it has characterized the EU's development cooperation policy for some time.

³⁴ See the chapters in this volume by Fiott on military operations and Juncos on civilian missions.

³⁵ For the legal issues related to Operation Atalanta, see R Gosalbo Bono and S Boelaert, 'Piracy and the European Union's Common Security and Defence Policy' in P Koutrakos and A Skordas (eds), *The Law and Practice of Piracy at Sea* (Hart Publishing 2014).

³⁶ See the chapter by Blockmans in this book.

³⁷ <<http://www.iom.int/news/iom-monitors-migrant-arrivals-deaths-mediterranean>> (last checked on 2 August 2017).

expressed its indignation,³⁸ the Commission proposed a revamped system of managing migration flows whilst seeking to avert disasters at sea,³⁹ and the Council decided to carry out EUNAVFOR MED in the context of the EU's CSDP.⁴⁰

The operation was launched in June 2015,⁴¹ and its core task is to 'contribut[e] to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean ... by undertaking systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers'.⁴² The operation is designed to cover three sequential sets of activities. The first lasted for a few months and was about information gathering and patrolling on the high seas in order to support the detection and monitoring of migration networks. The second is more substantial and is about boarding, search, seizure, and diversion of vessels suspected of being used for human smuggling or trafficking. This was envisaged to take place, first, on high seas and, subsequently, in the territorial and internal waters of the coastal state. It has only been on the high seas that Operation Sophia has extended so far, since September 2015.⁴³ The third phase will be about 'all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking' in the territory of the coastal state.⁴⁴

A year after Operation Sophia had been launched, two supporting tasks were added: capacity building and training of, and information sharing with, the Libyan coastguard and navy, and contributing to the implementation of the United Nations arms embargo on the high seas off the coast of Libya by information-sharing and implementation.⁴⁵ The Union started engaging in them in September 2016.⁴⁶ The training of the Libyan coastguard takes place at sea, in EU Member States training facilities or in Libya, and on board Libyan coastguard and navy patrol boats.

The objectives of Operation Sophia could not illustrate the linkages between CFSP/CSDP and AFSJ any more clearly. On the one hand, setting out the policy context within which the Operation would be launched, Decision 2015/778 refers prominently to the European Council's commitment 'to strengthening the Union's presence at sea, to preventing illegal migration flows and to reinforcing internal solidarity and responsibility'.⁴⁷ On the other hand, the operation is viewed as a case-study of the CFSP-AFSJ nexus in strategic documents on migration: this was the case

³⁸ European Council, special meeting, 23 April 2015, Statement, para 2.

³⁹ Commission, 'A European Agenda for Migration' COM (2015) 24 final.

⁴⁰ Council Decision 2015/778 [2015] OJ L122/31. The operation has been extended until the end of 2018 (Council Dec. 2017/1385 [2017] OJ L194/61. The operation was named Sophia pursuant to Council Dec. 2015/1926 [2015] OJ L281/13.

⁴¹ Council Dec. 2015/972 [2015] OJ L157/51.

⁴² Art. 1(1), Council Decision 2015/778 (n 37).

⁴³ PSC Dec. 2015/1772 [2015] OJ L258/5, enhanced by PSC Dec. 2016/118 [2016] OJ L26/63.

⁴⁴ Article 2(2)(c), Council Decision 2015/778 (n 37).

⁴⁵ Council Dec. 2016/993 [2016] OJ L162/18.

⁴⁶ PSC Dec. 2016/1635 [2016] OJ L243/11 and PSC Dec. 2016/1637 [2016] OJ L243/14.

⁴⁷ Recital 2, Art. 1(1), Council Decision 2015/778 (n 37). It has been argued that the legal basis for the Decision should have included an AFSJ legal basis too: M Estrada-Canameres, 'Operation Sophia before and after UN Security Council Resolution No 2240(2015)' (2016) *European Papers* 185, 190.

not only at the time of its inception,⁴⁸ but also in the more recent documents.⁴⁹ In other words, Operation Sophia appears emerges as a CSDP military operation with AFSJ aims.

The legal acts governing EUNAVFOR MED Sophia stress its anchoring in international law, in terms of the design and the conduct of the operation. Both the core task (for instance operating on the high seas) and the supporting tasks (for instance contributing to the implementation of the arms embargo) are linked to resolutions of the United Nations Security Council.⁵⁰ The conduct of the operation is also framed closely in terms of various international law instruments, including the United Nations Convention on the Law of the Sea.⁵¹ It is also on international law grounds that the operation has not been carried out yet in the territorial or internal waters of Libya, given the absence of an authorization to that effect by the United Nations or of Libya's consent.⁵²

In practical terms, the impact of Operation Sophia has been seriously contested. In terms of its core task, it appears to have had little effect in deterring migrant flows,⁵³ as the people smugglers have adjusted their business model. A report by the respected European Union Committee of the House of Lords in the United Kingdom has referred to Operation Sophia as 'a failed mission'.⁵⁴

There are two main considerations in assessing the role of the operation. The first is the policy context within which it is designed and carried out. The area covered by the operation vessels is used for migrants from a range of source and transit African countries, including Gambia, Chad, Niger and Mali.⁵⁵ The conditions that have given rise to and the size of this migration movement have created a policy challenge which the limited resources and narrow mandate of the operation are manifestly unsuited to tackle.⁵⁶ The deep roots of the problem have been acknowledged by the High

⁴⁸ See Commission, 'A European Agenda for Migration' (n 39).

⁴⁹ See 'Joint Communication on Migration on the Central Mediterranean route - Managing flows, saving lives' JOIN (2017) 04 fin, and the Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route (3 February 2017).

⁵⁰ See, for instance, UNSCR 2240 (2015) for the former and UNSCR 2292 (2016) for the latter.

⁵¹ Along with the 2000 Protocols against the Smuggling of Migrants by Land, Sea and Air, and to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, the 1974 International Convention for the Safety of Life and Sea, the 1979 international Convention on Maritime Search and Rescue (SAR), the 1976 Convention for the Protection of the Marine International Convention on Marine Environment and Coastal Region of the Mediterranean (Barcelona Convention), and the 1951 Geneva Convention relating to the Status of Refugees.

⁵² When the decision to carry out Operation Sophia was taken, a spokesman for the Libyan Government characterized it as 'not ... humane' and stated that the 'government will not accept any violation of Libyan sovereignty' and 'will not accept the plan unless it's co-ordinated' with his government (<https://euobserver.com/justice/1287540>) (last accessed on 3 August 2017).

⁵³ The number of migrants arriving in Italy by sea in the first half of 2017 was 17% higher than that over the same period in 2016: *The Economist*, July 22nd, 2017, p29.

⁵⁴ House of Lords European Union Committee 2nd Report of Session 2017-19 *Operation Sophia: a failed mission* (12 July 2017).

⁵⁵ *The Financial Times*, 1 August 2017 p (J Politi, 'Migration opens the door to Italy's populists').

⁵⁶ The Operation currently has access to six ships, three helicopters, and four aircraft: https://eeas.europa.eu/sites/eeas/files/eunavfor_med_-_mission_19_june_2017_en.pdf (last accessed on 3 August 2017).

Representative and the Commission themselves: '[although migration has always taken place, this appears to be a structural movement from Sub-Saharan Africa and there is no indication these trends could change until the economic and political/security situation in the countries of origin improves'.⁵⁷ This is not the only issue that renders the situation in Libya so difficult, given security concerns about the country becoming a central hub for terrorists, and energy security concerns considering its oil and gas resources.

Viewed from this angle, Operation Sophia appears to be making, at best, quite a small contribution to addressing a big and complex problem the causes of which are both long-standing and multifarious. In doing so, it is not alone, as most other CSDP operations have had similar effects.⁵⁸ To be sure, as it is but a part of a comprehensive approach, the operation and its effectiveness need to be assessed in the light of the broader contribution of the Union in the area. On that front too, however, we find the pathologies of the EU's foreign and security policy in evidence. For instance, the civil war and the ensuing instability in Libya have been an inherent cause of the problem that the operation has been seeking to tackle as well as an inherent constraint on the impact of the EU's intervention in the area.⁵⁹ In July 2017, the French President Emmanuel Macron brokered a deal between the Head of the UN-recognised Libyan Government and the leader of the so-called Libyan National Army that controls large tracts of Libyan territory. At the same time, the Italian Government discussed with the UN-recognized Government a plan about an operation in Libyan waters by the Italian navy aiming to help intercept migrant ships. The absence of an EU role in these initiatives was striking. Again, this is entirely consistent with the overall pattern of the CFSP in the area, as the Member States act at will on issues that matter to them, and the EU follows by relying upon limited resources in order to pursue a narrow mandate. It is recalled, for instance, that the 2011 military operation against Libya was carried out by a coalition of states, led by the United Kingdom and France, whilst the EU was absent.

The second issue raised by the operation is about protection of fundamental human rights. On the one hand, there are grave concerns about the extent to which the Libyan coastguard and navy comply with such rights in the exercise of their duties.⁶⁰ On the other hand, there are well-documented reports, including by the UN High Commissioner for Refugees, about the treatment of migrants in Libya according to which there is a high risk of serious human rights violations.⁶¹ These issues have

⁵⁷ JOIN (2017) 04 fin *Joint Communication on Migration on the Central Mediterranean route – Managing flows, saving lives* (Brussels, 25 January 2017) p4.

⁵⁸ See P Koutrakos, n25 above, Ch. 5. See also the analysis in the chapter by Fiott in this book.

⁵⁹ See EEAS, Strategic Review on EUBAM Libya, EUNAVFOR MED Op Sophia & EU Liaison and Planning Cell (9202/17, Brussels, 15 May 2017).

⁶⁰ See UN Support Mission in Libya and UN Human Rights Office of the High Commissioner, 'Detained and Dehumanised' Report on human rights abuse against migrants in Libya (13 December 2016) <http://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> accessed 3 August 2017.

⁶¹ See UNHCR Position on Returns to Libya - Update I (October 2015): <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&docid=561cd8804&skip=0&publisher=UNHCR&querysi=libya&searchin=title&sort=date>> accessed 3 August 2017. See also, more recently <<http://www.dw.com/en/un-slams-eu-over-brutality-migrants-face-in-libya/a-40426092>> accessed 17 September 2017.

been acknowledged by High Representative Mogherini herself.⁶² As the capacity-building and training of the Libyan coastguard and navy are about enabling them to carry out interceptions and then return to Libyan soil, the question arises as to whether the ultimate protection of fundamental human rights is secondary to the central aim of Operation Sophia, namely to buttress the EU from the current influx of migrants.⁶³

Given the various references to international law in the Council and Political Security Committee's documents governing the Operation, and the legal issues raised above, it is no surprise that law features prominently in the six-monthly reports by the EU Commander.⁶⁴ This is not just in terms of the mandate of the operation, i.e. the legal conditions that would need to be met for its staff to be able to operate in the Libyan territorial waters. In fact, these documents suggest an acute awareness of the international and human rights issues raised by the conduct of both by the mission staff and the Libyan officers trained by them. They also suggest an awareness of the situation in Libya and the legal problems that these raise for the mission staff in terms of the application of the principle of non-refoulement.⁶⁵ Given the important and open questions that pertain to the everyday conduct of the Operation, it is somewhat ironic that the EUNAVFOR Commander would have had to remind the EU and its Member States of the urgent need to have the post of a legal assistant filled.⁶⁶

Operation Sophia provides a snapshot of the intensity with which AFSJ objectives have penetrated CSDP and the policy and legal issues that this development raises in the design and conduct of the policy. It also illustrates in practical terms the point made above in Section 3 about the impact that the interactions with AFSJ have on the character of CSDP: the needle has been moved away from the hard end of the security spectrum, and CSDP has been instrumentalized in order to carry out objectives of other EU policies. In fact, we see this development in other aspects of CSDP which are not related to migration. For instance, in the context of the rule of law mission in Georgia (EUJUST THEMIS), quite early on in the life of CSDP, the security contribution that the Union made was at odds with the Georgian Government's

⁶² Speech by HR/VP Federica Mogherini at the European Parliament plenary session on the recent developments in migration (Brussels, 12 September 2017) <https://eeas.europa.eu/headquarters/headquarters-homepage/32002/speech-hrvp-federica-mogherini-european-parliament-plenary-session-recent-developments_en> accessed 17 September 2017.

⁶³ This is a point is also raised about the core task of Operation Sophia in Libya's territorial waters: see P Strauch, 'When Stopping the Smuggler Means Repelling the Refugee: International Human Rights Law and the European Union's Operation To Combat Smuggling in Libya's Territorial Sea' (2016) 126 *Yale Law Journal* 2421. For the broader issues, see V Moreno-Lax and E Papastavridis (eds), *Boat Refugees and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill/Nijhoff 2017).

⁶⁴ These have been leaked and are available online (for instance, on statewatch.org).

⁶⁵ See the reports by the Operation Commander covering the period between 1 January and 31 October 2016, dated 15 November 2016, 23 <<http://statewatch.org/news/2016/dec/eu-council-eunavformed-jan-oct-2016-report-restricted.pdf>> accessed 3 August 2017, and the period between 22 June-31 December 2015, dated 25 January 2016, 29 <<https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>> accessed 3 August 2017.

⁶⁶ See the report covering the period between 22 June-31 December 2015, dated 25 January 2016, 9 <<https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>> accessed 3 August 2017.

expectations about more traditional and hard security.⁶⁷ The position of organized crime at the centre of the Union's understanding of order in its missions in Bosnia was received in a similar manner.⁶⁸ And it is not only the CFSP that has found its character affected by interacting with AFSJ. In fact, the impact of the CFSP-AFSJ nexus works both ways. A case in the point is the operation of the European Border and Coast Guard Agency (Frontex) in the eastern Mediterranean in order to stave off migration mainly from Syria, Afghanistan, and Somalia. It is this blurring of operational mandates and objectives that have given rise to a healthy debate about the increasingly prominent security dimension of the external aspects of AFSJ.⁶⁹

4. The judicial approach

The analysis so far has focused on the development of the linkages between CFSP and AFSJ as a matter of policy and their impact in practice. The intensity of these linkages raises questions about the legal basis of EU measures whose objectives straddle the policy areas. Given the distinct characteristics of the sets of rules and procedures governing these policy areas, the legal basis disputes are significant not only for the regulation of the activities undertaken by the Union, but also for the overall constitutional order of the EU. After all, the choice of legal basis is of constitutional significance, given that it indicates compliance with the principle of limited powers, enshrined in Article 5 TEU, and determines the nature and extent of the Union's competence.⁷⁰

As far as international agreements are concerned, the legal basis question about CFSP and AFSJ have been raised in two cases. In the first case, it was raised indirectly. This was in Case C-658/11 *European Parliament v Council* about the conclusion of the agreement between the EU and Mauritius on the transfer of individuals suspected of piracy at sea to Mauritius authorities by EU personnel.⁷¹ The agreement was concluded in the context of the anti-piracy Operation Atalanta. Rather than challenging the substantive legal basis of the conclusion of the agreement, the Parliament accepted that the latter was predominantly about CFSP. It argued, however, that, in the light of the incidental implications of the agreement for judicial cooperation in criminal matters, police cooperation, and development cooperation, its consent was required pursuant to Article 218(6)(a)(v) TFEU. The Grand Chamber of

⁶⁷ See L di Poppo, 'The Externalization of JHA Policies in Georgia: Partner or Hotbed of Threats?' (2009) 31 *European Integration* 103.

⁶⁸ See A Juncos, 'Of Cops and Robbers: the EU and the Problem of Organized Crime in Bosnia' in B Balamir-Coskun and B Demirtas-Coskun (eds), *Neighborhood Challenge: The European Union and its Neighbours* (Universal Publishers 2009).

⁶⁹ In relation to, for instance, the Mobility Partnerships, see P Seeberg, 'Mobility Partnerships and Security Subcomplexes in the Mediterranean: The Strategic Role of Migration and the European Union's Foreign and Security Policies Towards the MENA Region' (2017) 22 *European Foreign Affairs Review* 91. More generally, see C Matera, 'An external dimension of the AFSJ? Some reflections on the nature and scope of the externalisation of the AFSJ domain' in M Fletcher, E Herlin-Karnell and C Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2017).

⁷⁰ Opinion 2/00 EU:C:2001:664, para. 5. On legal basis disputes, see P Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in M Cremona and B De Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing 2008).

⁷¹ ECLI:EU:C:2014:2025.

the Court rejected this argument: without questioning Article 37 TEU as the proper legal basis for the conclusion of the Agreement, it held that it is the substantive legal basis that determines the type of procedure applicable under Article 218 TFEU.

The legal basis question was raised directly in Case C-263/14 *European Parliament v Council* about the EU-Tanzania transfer agreement, also concluded in the context of Operation Atalanta.⁷² In addition to the CFSP legal basis (Article 37 TEU), should it have been concluded under Article 82 TFEU (judicial cooperation in criminal matters) and Article 87 TFEU (police cooperation) too? The Grand Chamber of the Court answered in the negative. It held that the agreement was ‘intimately linked’ to Operation Atalanta, as it set up a mechanism which constituted ‘an essential element in the effective realisation of the objectives’ of the operation.⁷³ The agreement would be devoid of purpose, were it not for the operation. The agreement, therefore, pursued the objectives of the CSDP operation, namely to preserve international peace and security and, therefore, fell predominantly within the scope of the CFSP.

In the *EU-Tanzania* judgment, the Court did not attempt to provide an abstract definition of either security and defence policy or judicial cooperation in criminal matters and police cooperation. Instead, its line of reasoning was firmly anchored in the intrinsic linkages between the contested measure and the specific policy context within which it was adopted. In doing so, the Court did not follow the approach articulated by Advocate General Kokott in her Opinion,⁷⁴ and which had also been set out earlier by Advocate General Bot in the *EU-Mauritius* case.⁷⁵ That approach had distinguished between international security (outside the territory of the EU) and internal security (within the EU): the former was covered by CFSP/CSDP, whereas the latter by AFSJ. By focusing, instead, on the links between the Agreement and the CSDP Operation in the context of which it was concluded, the Court avoided the complex task of distinguishing between international and EU security and defining the scope of both.

It is instructive to see how the Court has dealt with the legal basis issues raised by the CFSP-AFSJ nexus in another context, that is sanctions.⁷⁶ On the one hand, following a CFSP measure that determines the need for the EU to impose sanctions, Article 215 TFEU provides for their imposition on natural or legal persons by means of a Council measure adopted by qualified majority. On the other hand, the Council also has the power under Article 75 TFEU to restrict capital movements, for instance by freezing assets of private or legal persons, in order to pursue the AFSJ objectives laid down in Article 67 TFEU. This power is exercised on the basis of the ordinary legislative procedure. In Case C-130/10 *Parliament v Council (Smart sanctions)*, the question arose whether freezing financial assets of individuals suspected of financing international terrorism was an AFSJ matter or one that fell within the scope of CFSP and, subsequently, Article 215 TFEU.⁷⁷

⁷² ECLI:EU:C:2016:435.

⁷³ *ibid*, para 51.

⁷⁴ ECLI:EU:C:2015:729, paras 63ff.

⁷⁵ EU:C:2014:41, paras 80ff.

⁷⁶ On the practice of EU sanctions, see the chapter by Eckes in this book.

⁷⁷ EU:C:2012:472.

The Grand Chamber decided that it was the latter. Having pointed out that the procedural differences governing the relevant rules prevented the adoption of anti-terrorist sanctions pursuant to both Article 216 TFEU and AFSJ provisions, the Court focused on the objectives of such measures:

While admittedly the combating of terrorism and its financing may well be among the objectives of the area of freedom, security and justice, as they appear in Article 3(2) TEU, the objective of combating international terrorism and its financing in order to preserve international peace and security corresponds, nevertheless, to the objectives of the Treaty provisions on external action by the Union.⁷⁸

This conclusion was backed up by reference not only to the general objectives of what the EU does in the world (Article 21(2)(c) TEU includes the strengthening international security in the Union's external action objectives), but also to the specific scope of CFSP (Article 24(1) TEU brings 'all areas of foreign policy and all questions relating to the Union's security' within CFSP competence). The Court accepts that terrorism constitutes a threat to peace and international security and that, therefore, combating it may well be the object of CFSP action, especially given the reference to the fight against terrorism in Article 43(1) TFEU.

There is a thread that brings together the judgments in the *Smart sanctions* and the *EU-Tanzania* cases, and it suggests a reluctance by the Court to impinge upon the CFSP policy in order to enhance other EU policies. In both cases, the scope of CFSP is protected and the competence of the Union safeguarded. To that effect, the reference in the *Smart Sanctions* judgment to Article 24(1) TEU and the almost unlimited scope of the policy is noteworthy. This approach is in contrast to the pre-Lisbon judgment in *ECOWAS* where the Court had enhanced the scope of development cooperation policy at the expense of CFSP.⁷⁹ Given the new constitutional configuration of the EU legal order and the amendment of Article 40 TEU which places the CFSP on an equal footing to the other EU policies,⁸⁰ this approach is welcome. In fact, Cremona argues that the case law examined in this section illustrates the Court's acceptance of the integration of CFSP/CSDP within the EU's constitutional order.⁸¹

Whilst the *EU-Tanzania* and *Smart sanctions* judgments illustrate the same overall approach to CFSP, their line of reasoning differs. The former is based on the firm anchoring of the contested act (the transfer agreement) in its specific policy context (the CSDP operation which it was designed to facilitate). The latter, however, is more obscure. It appears to focus on the international dimension and genesis of the contested measures. As the Court put it in *Smart sanctions*, the objectives of Article 215 TFEU, as a bridge with CFSP, and AFSJ, 'although complementary, do not have the same scope'.⁸² The judgment, however, does not rely expressly on a distinction

⁷⁸ *ibid*, para 61.

⁷⁹ Case C-91/05 *Commission v Council* EU:C:2008:288. See the comments in C Hillion and R Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness' (2009) 46 *CML Rev* 551 and the criticism in Koutrakos (n 25) 231-244.

⁸⁰ This provision is mentioned expressly by AG Bot in his Opinion in Case C-130/10 *Parliament v Council (Anti-Terrorism Sanctions)* EU:C:2012:50, para 67, though, curiously, not by the Court.

⁸¹ See her chapter in this volume.

⁸² EU:C:2012:472, para 66.

between internal and external security which would assign the former to AFSJ and the latter to CFSP. Instead, it appears to suggest that, from a substantive point of view, once the EU institutions chose to tackle terrorism by relying upon CFSP, the broad scope of the latter and the external action objectives set out in Article 21 TEU would render recourse to AFSJ redundant.

Where does this all leave us? Whilst carrying the authority of the Grand Chamber, the case law on the CFSP-AFSJ nexus is of limited volume and has been rendered in a narrow legal context. In the *Smart sanctions* case, the contested measures amended previous sanctions that had been adopted in the light of United Nations Security Council resolutions, a factor that highlighted the international security dimension of the measures. In the *EU-Tanzania* case, the intrinsic linkages between the contested agreement and the CSDP operation which it was designed to facilitate made general pronouncements about the AFSJ-CFSP objectives and their constitutional ramifications unnecessary. Put differently, the narrow legal and policy context of the case provided the Court with sufficient grounds to address the specific dispute.⁸³

Viewed from this angle, the case law examined in this section safeguards the scope and role of CFSP within the Union's constitutional order, but does not take us much farther. We are not much clearer as to how to determine, as a matter of principle, the appropriate legal basis of an EU measure in the light of the complementary objectives of CFSP and AFSJ. The greater the osmosis between the two policies, the greater the ambiguity that surrounds the legal choices that the institutions would have to make.

This is, of course, not a problem confined to these two policies. The relationship between development cooperation and CFSP is another example of interacting policies the conduct of which raises similar questions for the Union's institutions.⁸⁴ It is also not explained solely due to the inherent characteristics of CFSP and AFSJ. After all, the revamping of the external action framework at Lisbon and the provision of a set of horizontal objectives in Article 21(2) TEU for all external policies have added another layer of complexity to the legal organization of the EU's external action.⁸⁵ In a different context, the post-Lisbon changes are reflected in the richer conception of the Common Commercial Policy articulated in Opinion 2/15 on the Free Trade Agreement between the European Union and Singapore.⁸⁶ The intensity, however, of the CFSP-AFSJ nexus highlights further the difficulties that we face in navigating the complex legal landscape of the Union's external action.

5. Conclusion

This chapter has made three main arguments. First, the interactions between CFSP and AFSJ have become increasingly pronounced and their nexus central to the EU's understanding of how best to tackle the main policy challenges that it faces. Second,

⁸³ See also S Sánchez-Tabernero, 'The choice of legal basis and the principle of consistency in the procedure for conclusion of international agreements in CFSP contexts: *Parliament v Council (Pirate Transfer Agreement with Tanzania)*' (2017) 54 *CML Rev* 899, 910.

⁸⁴ See the chapter by Broberg in this book.

⁸⁵ See J Larik, *Foreign Policy Objectives in European Constitutional Law* (OUP 2016).

⁸⁶ EU:C:2016:992. See the chapter in this volume by Ott and Van Der Loo.

the intensity of these interactions has had an impact on the character of the policies. The CFSP, in particular, has moved closer to the soft end of the security spectrum and is being instrumentalized in order to enable the EU to achieve objectives of other policies. Third, whilst it prevents the scope of CFSP from being impinged upon by other policies, the limited, so far, case law of the Court of Justice on the relationship between CFSP and AFSJ does not provide a clear yardstick that would enable the institutions to address legal basis questions with confidence.

There is also another, broader, point to make about the CFSP-AFSJ nexus: whilst it has had an impact on the character and conduct of both policies, the nature of the nexus itself is dynamic and subject to adjustment. After all, the objectives of the AFSJ are about ongoing problems that have assumed almost existential dimensions for the EU.⁸⁷ Similarly, and following the decision of the United Kingdom to leave the European Union, there has been movement about the pace of the development of CSDP, regarding, in particular, the issue of capabilities.⁸⁸ The shape of the relationship, therefore, between CFSP and AFSJ may not be viewed in isolation from the prevailing political climate in the EU. In fact, it is bound to be affected by the ensuing policy adjustments in which the decision-making institutions would decide to engage.

⁸⁷ The Global Strategy starts off by pointing out that '[w]e live in times of existential crisis, within and beyond the European Union' (n 12) 13.

⁸⁸ See the chapter in this volume by Duke.