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THE NEXUS BETWEEN THE EUROPEAN UNION'S COMMON SECURITY AND DEFENCE POLICY AND DEVELOPMENT

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I Introduction

The functioning of the Union as a constitutional order of States entails a balancing exercise between the Member States and the Union, between what the former may do, either individually or collectively, and what the Union is endowed with the competence to do. This exercise is constant, intense, and continuously redefined by a number of factors, not least the assertiveness of the Union institutions, the approach of the Court of Justice, and the political will of the Member States.

The relationship between the Common Security and Defence Policy (CSDP), on the one hand, and development, on the other, provides a useful and topical microcosm of the coexistence between the Union and the Member States, and the management of the two policies illustrates clearly the various issues to which the ensuing balancing exercise gives rise. The CSDP is about civilian and military assets used 'on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter'.¹ Organised on the basis of purely intergovernmental principles, the CSDP has been at the centre of both legal and political developments in the recent years. The developments which have shaped the Union's current constitutional structure, from the drafting, ratification process and death of the Treaty Establishing a Constitution for Europe to the inception and tumultuous ratification process of the Lisbon Treaty, have centred on the international role of the Union in general and its security and defence policy in particular. Furthermore, the Union has carried out a significant number of missions in Europe, Asia and Africa, and has been steadily trying to raise its profile as a security actor.

On the other hand, development cooperation is about the reduction and, in the long term, the eradication of poverty.² Organised on the basis of the so-called Community method, involving very substantial funds and endowing the Commission with considerable powers, its prominence in the Union's external relations armoury renders it at the centre of any debate about the Union's external action. Furthermore, the parallel nature of the competence with which the Union is

¹ Art. 42(1) TEU.

² Art. 208 (1) TFEU). Art. 21(2)(d) TFEU, which sets out the objectives of the Union's overall external action, refers to fostering the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.

endowed in the area³ ensures the continuous existence of Union action with national measures.

In recent years, there has been an increasing link between CSDP and development: the objectives of the latter constitute a precondition for security, and missions carried out by the former have a distinct development dimension. However, this linkage may raise important legal and policy questions: on the one hand, it may blur the boundaries between the distinct sets of rules which govern CSDP and development; on the other hand, it has repercussions for the subject-matter and direction of these policies, hence raising questions about the securitisation of development, and the developmentalisation of security.

This Chapter examines the implications of this relationship and the impact which its management may have for both policies, as well as for the Union actors and the Member States. It is structured as follows. First, it sets out the approach of the Union institutions and the Member States to the relationship between security and defence and development policies. Second, it outlines the development dimension in certain CSDP missions, and examines the issues which these missions raise about their conduct. Third, it examines the approach of the Court of Justice to the definition of the demarcation line between the two policies.

II The nexus between CSDP and development

Primary law defines the scope of security and defence policy in broad terms. The Common Foreign and Security Policy encompasses 'all areas of foreign policy and all questions relating to the Union's security'.⁴ As for the CSDP, which is 'an integral part of the common foreign and security policy',⁵ it provides the Union 'with the operational capacity to act on missions outside its territory for peace-keeping, conflict prevention, and strengthening international security in accordance with the principles of the United Nations Charter'.⁶

Furthermore, the re-organisation of external relations by the Lisbon Treaty highlights what has been recognised as a matter of policy, namely that the CSDP and development are both significant components of the Union's external relations. Article 21 TEU sets out the principles and objectives which guide the entire spectrum of the Union's external action, that is including both the CSDP and development. Article 21(1) TEU refers to democracy, the rule of law, human rights and fundamental freedoms, human dignity, equality and solidarity, and the principles of the United Nations Charter and international law. Article 21(2) TEU sets out the objectives of the Union's external action which include, amongst others,

³ Art. 4(4) TFEU. See also Joined Cases C-181/91 and C-248/91 *European Parliament v Council and Commission* [1993] ECR I-3685, and Case C-316/91 *European Parliament v Council* [1994] ECR I-625.

⁴ Art. 24(1) TEU.

⁵ Art. 42(1) TEU.

⁶ Art. 42(1) TEU.

the safeguarding of the Union's fundamental interests and security, the preservation of peace, the prevention of conflicts and the strengthening of international security, as well as the fostering of sustainable development. These principles and objectives are to be respected and pursued by the Union 'in the development and implementation of the different areas of the Union's external action ..., and of the external aspects of its other policies'.⁷

Therefore, the Lisbon Treaty defines a distinct link which binds, amongst others, security, defence and development policies and renders them an organic part of the indissoluble whole which the Union's external action is designed to be. In doing so, primary law expresses a position which has been acknowledged by the Union actors for some time. On the one hand, the European Security Strategy, endorsed by the European Council in December 2003, clearly states that security 'is a precondition of development'⁸ and defines the instruments for crisis management and conflict prevention at the Union's disposal as including political, diplomatic, military and civilian, trade and development activities.⁹

On the other hand, *The European Consensus on Development*, a policy document drawn up by the Council, the Commission and the European Parliament, as well as the representatives of the governments of the Member States meeting within the Council,¹⁰ sets out the main parameters of the development policy and places it within the broader context of the Union's other policies. It acknowledges that security and development 'are important and complementary aspects of EU relations with third countries' and points out that '[w]ithin their respective actions, they contribute to creating a secure environment and breaking the vicious cycle of poverty, war, environmental degradation and failing economic, social and political structures'.¹¹ It refers specifically to non-proliferation, and highlights, amongst others, the multidimensional aspects of poverty eradication, viewing conflict prevention and State fragility as central aspects of development policy.¹² Therefore, the EU institutions and Member States construe both security and defence and development policies broadly and set out a relationship which works both ways: security is a precondition for development, and development is essential for security.

This link has become more prominent in recent years. The *Report on the Implementation of the European Security Strategy*, adopted in 2008, includes a distinct section entitled 'Security and development nexus' in which it is pointed out

⁷ Art. 21(3) TEU.

⁸ *A Secure Europe in a Better World-European Security Strategy* (Brussels, 12 December 2003), 2. This is reinforced further below where it is stated that security 'is the first condition for development' (13).

⁹ *Ibid*, 11.

¹⁰ [2006] OJ C 46/1.

¹¹ *Ibid*, para 37.

¹² See also COM (2005) 489 fin *EU Strategy for Africa: Towards a Euro-African Pact to accelerate Africa's development* (Brussels, 12 October 2005) [reference to SSR and ESDP],

that 'there cannot be sustainable development without peace and security, and without development and poverty eradication there will be no sustainable peace'.¹³ It then goes on to refer to the various dimensions of development which have an impact on the Union's security and defence policy, including public health, human rights and sexual violence, state fragility, and natural resources.

The increasing prominence of the nexus between security and defence and development policies must be viewed in the light of two considerations. First, security has been defined in increasingly broad terms, a phenomenon by no means confined to the European Union.¹⁴ The terrorists attacks of 11 September 2001 and the renewed focus of international politics on anti-terrorism, the ensuing emphasis on failed states and the ways in which they breed terrorism and instability, and the various technological advances provide some explanation of the broad construction of security which prevails in international relations.¹⁵ Second, rather than originating in the core of the policies which defined the genesis of European integration, the CSDP emerged gradually over the years and as a consequence of both internal factors (such as the success of economic integration and its inevitable spill-over effects,¹⁶ and the steady enlargement process), and external developments (such as the growing expectations of third countries and the wars in the Balkans in the 1990s).¹⁷ Therefore, it was inevitable that it should have drawn on the existing policies of the Union legal order from the development of which it emerged, and to which it was linked organically, albeit in a legally distinct manner.

III Development dimensions in CSDP missions

It is recalled that, in relation to state fragility, both the *European Consensus on Development* and the *Report on the European Security Strategy* refer specifically to, amongst others, governance reforms, rule of law, anti-corruption measures and the building of viable state institutions.¹⁸ In relation to the CSDP, the Union has carried out over twenty missions in Europe, Asia, and Africa. Whilst the nature of these

¹³ *Providing Security in a Changing World* (Brussels, 11 December 2008) at 8.

¹⁴ It is interesting that US President Obama has appointed a Cyber Security Coordinator who reports to the National Security Council (*New York Times*, 21 December 2009). See also WK Clark and PL Levin, 'Securing the Information Highway', (2009) 88/6 *Foreign Affairs* 2.

¹⁵ In the last few years, issues such as food security and environmental change have been brought gradually to the centre of our understanding about security. On the former, the US Secretary of State Hillary Clinton wrote that food security is not only about food, but it is all about security' (*The Guardian*, 16 October 2009). On the latter, see S Dalby, *Security and Environmental Change* (Cambridge: Polity Press, 2009).

¹⁶ The Laeken Declaration asks: 'Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?' (European Council, December 14-15, 2001, p2).

¹⁷ For the development of the EU security and defence policy, see M Trybus, *European Union Law and Defence Integration* (Oxford: Hart Publishing 2005) 9 et seq.

¹⁸ See n8 above at 4, and n13 above at para. 37.

missions has varied considerably,¹⁹ a number of them pursue these objectives. This section will focus on two types of missions, namely rule of law and security sector reform. As the former is a civilian mission and the latter military, they provide a snapshot of the ways in which CSDP practice reflects the nexus between security and development.

A central theme of development policy,²⁰ rule of law reform has been pursued by the Union on the basis of a number of CSDP operations. EUJUST THEMIS was launched in Georgia in July 2004 and lasted for a year.²¹ It was the smallest CSDP mission and expired on 14 July 2005. Its objective was to assist the Georgian authorities to develop a strategy for reforming the criminal justice system. In effect, it dispatched a number of senior legal experts who, along with Georgian legal assistants, were located within a number of Georgian authorities.

Furthermore, EUJUST LEX (Iraq) was launched on July 2005²² and focuses on the Iraqi criminal justice system by providing training for the Iraqi police, judiciary, and prison authorities. It aims 'to improve the capacity, coordination and collaboration of the different components of the Iraqi criminal justice system'²³ 'in full respect for the rule of law and human rights'.²⁴ In practical terms, it achieves this by drawing up courses for judges, investigating magistrates, senior police and prison officers, and by organising work secondments for such officials.

Finally, and more recently, EULEX KOSOVO, the biggest civilian mission undertaken so far, was established in February 2008 in order to 'assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices'.²⁵ In

¹⁹ For an analysis of the missions, see G Grevi, D Helly, and D Keohane (eds), *ESDP: The First Ten Years* (Paris: ISS, 2009), S Blockmans (ed.), *The European Union and Crisis Management-Policy and Legal Aspects* (The Hague: T.M.C. Asser Press 2008), and id (ed.), *The European Union and Peace Building: Policy and Legal Aspects* (The Hague: TMC Asser Press 2010).

²⁰ See M J Trebilcock and R J Daniels, *Rule of Law Reform and Development-Charting the Fragile Path of Progress* (Cheltenham: Edward Elgar, 2008).

²¹ Joint Action 2004/523/CFSP [2003] OJ L 228/21, amended by Joint Action 2004/638/CFSP [2004] OJ L 291/7.

²² See Joint Action 2005/190/CFSP [2005] OJ L 62/37 which has been amended a number of times (by Joint Action 2006/413/CFSP [2006] OJ L 163/17, Joint Action 2006/708/CFSP [2006] OJ L 291/43, Joint Action 2007/760/CFSP [2007] OJ L 305/58, Joint Action 2008/304/CFSP [2008] OJ L 105/10, Joint Action 2008/480/CFSP [2008] OJ L 163/50, Joint Action 2009/475/CFSP [2009] OJ L 156/57, and Joint Action 2010/330/CFSP [2010] OJ L 140/12, the latter extending its duration until 30 June 2012)

²³ Art. 2(1) Joint Action 2005/190/CFSP (n22 above).

²⁴ Art. 2(2) Joint Action 2005/190/CFSP (ibid).

²⁵ Art. 2 of Joint Action 2008/124/CFSP [2008] OJ L 42/92. This measure was amended by Joint Action 2009/445/CFSP [2009] OJ L 148/33, and Council Dec 2010/322/CFSP [2010] OJ L 145/13 which extended the duration of the mission until 14 June 2012.

practical terms, the mission monitors, mentors and advises the police, judiciary and customs authorities, and is entrusted with executive responsibilities, in effect enjoying the power to investigate and prosecute serious and sensitive crimes.²⁶

Security sector reform is prominent in the *European Security Strategy* in the context of support for fragile states.²⁷ So far, the Union has undertaken missions in the Democratic Republic of Congo (EUSEC RD Congo) and in Guinea-Bissau (EU SSR Guinea-Bissau). The former was launched in 2005 and aimed to provide practical support for the integration of the Congolese army and good governance in the field of security,²⁸ and, later on, to support the restructuring and rebuilding of the Congolese.²⁹ The mission in Guinea-Bissau was launched in June 2008 and aims to support the local authorities in implementing a National Security Sector Reform Strategy.³⁰ This is a small mission which entails officials from Member States being located with the local military, police and prosecution authorities and assisting them in the development of detailed implementation plans for downsizing/restructuring the Armed Forces and security forces, as well as advising them on the definition of their capacity-building needs (such as training and equipment, facilitating subsequent mobilisation of, and engagement by, donors).

The development dimension of these missions is easily apparent. Joint Action 2008/112/CFSP, for instance, on the security sector reform in Guinea-Bissau, states in its second recital that 'security sector reform in Guinea-Bissau is essential for the stability and sustainable development of that country'.³¹ A clear indication of how it straddles CSDP and development policy is that both the Council Secretariat and the Commission have put forward their own understanding of what security sector reform entails for these respective spheres of activity.³² Both documents stress the multifarious dimensions of SSR, and articulate principles for its conduct which are quite similar (such as respect for local ownership, democratic norms and

²⁶ For an assessment of the mission so far, see S Keukeleire, A Kalaja and A Çollaku, 'The European Union's Policy on Kosovo' in P Koutrakos (ed.), *European Foreign Policy-Legal and Political Aspects* (Cheltenham: Edward Elgar, 2011) (forthcoming), and M Spornbauer, 'EULEX Kosovo-Mandate, Structure and implementation: Essential clarifications for an unprecedented EU mission', CLEER Working Papers 2010/5.

²⁷ See also Council Doc. 12566/4/05 *EU Concept for ESDP support to Security Sector Reform (SSR)* (Brussels, 13 October 2005), para. 17.

²⁸ Council Joint Action 2005/355/CFSP [2005] OJ L 112/20, amended by Council Joint Action 2005/868/CFSP [2005] OJ L 318/29, Council Joint Action 2006/303/CFSP [2006] OJ L 112/18, Council Joint Action 2007/192/CFSP [2007] OJ L 87/22, and replaced by Joint Action 2007/406/CFSP [2007] OJ L 151/52 which was then amended by Joint Action 2008/491/CFSP [2008] OJ L 168/42, Joint Action 2009/509/CFSP [2009] OJ L 172/36, and replaced by Joint Action 2009/709/CFSP [2009] OJ L 246/33.

²⁹ Art. 1 of Joint Action 2007/406/CFSP (n28 above).

³⁰ Council Joint Action 2008/112/CFSP [2008] OJ L 40/11, amended by Council Joint Action 2009/405/CFSP [2009] OJ L 128/60, Council Joint Action 2009/841/CFSP [2009] OJ L 303/70, and Joint Action 2009/841/CFSP [2009] OJ L 303/70.

³¹ *Ibid.*

³² n27 above, and COM(2006) 253 fin *A Concept for European Community Support for Security Sector Reform* (Brussels, 24 May 2006).

internationally accepted human rights and the rule of law, coherence within the overall framework of EU policy). Drawing on them, the Council then went on to articulate a policy framework for Security sector reform, a brief document the starting point of which is the dual character of SSR:³³ 'Together the two concepts [that is about EC and ESDP support] constitute a policy framework for engagement in Security Sector Reform, stressing the importance for the EU to take a comprehensive and cross-pillar approach to SSR recognizing the fact that SSR is a holistic, multi-sector, and long-term process encompassing the overall functioning of the security system as part of governance reforms'.

The bifurcated nature of SSR is not confined to policy statements. In parallel to the CSDP missions, there have been considerable initiatives in the context of the Union's external financial instruments.³⁴ For instance, the Financing Instrument for Development Cooperation focuses, amongst others, on cooperation in the area of governance, democracy, human rights and support for institutional reforms, and refers specifically to fostering cooperation and policy reform in the fields of security and justice, especially as regards asylum and migration, the fight against drugs and other trafficking including trafficking in human beings, corruption and money laundering.³⁵ More specifically, the Commission has funded programmes in Congo involving the organisation of seminars and studies on reconciliation and security sector reform, the improvement of living conditions and security for the families of the newly integrated brigades and their host communities, and the establishment of an integrated system for human resources management within the Congolese National Police. Similarly, it launched a programme in Guinea-Bissau nine months prior to the CSDP mission, providing technical assistance for the security sector reform through a team of three experts tasked to advise the national Defence Ministry and the Committee for Technical Cooperation on the institutional framework of Security Sector Reform, on legal reforms needed, on definition of the instruments for compensation and reintegration and on pension schemes for former security personnel, as well as the preparation of censuses and the effective coordination between donors and the government. The Commission noted that its initiative helped introducing the SSR CSDP mission to local authorities.³⁶

Therefore, the CSDP-development nexus has given rise to sets of initiatives which are carried out in parallel and are viewed as mutually reinforcing.³⁷ This raises certain substantive, structural, and constitutional issues. In addition to giving rise to a rapprochement of objectives, the management of the nexus is underpinned by

³³ Council Conclusions of 12 June 2006.

³⁴ See P Doelle and A Gouzée de Harven, 'Security Sector Reform: a Challenging Concept at the Nexus between Security and Development' in D Spence and P Fluri (eds), *The European Union and Security Sector Reform* (London: John Harper Publishing, 2008) 38.

³⁵ Council Reg. 1905/2006 [2006] OJ L 378/41.

³⁶ See SEC (2009) 932 Commission Staff Working Paper Accompanying Annual report from the European Commission on the Instrument for Stability in 2008 {COM(2009) 341}, p18.

³⁷ It is interesting that the EU Concept for ESDP support to Security Sector Reform was written by the Council Secretariat 'in close consultation with the Commission'.

similar substantive principles. The principle of local ownership is a case in point. It has become one of the main guiding principles of the EU's development policy. According to the *European Consensus on Development*,

'[t]he EU is committed to the principle of ownership of development strategies and programmes by partner countries. Developing countries have the primary responsibility for creating an enabling domestic environment for mobilising their own resources, including conducting coherent and effective policies. These principles will allow an adapted assistance, responding to the specific needs of the beneficiary country'.³⁸

This has also been a central tenet of the CSDP rule of law and security sector reform missions.³⁹ And yet, the osmosis between distinct policies does not necessarily justify the application of the same principles. On the one hand, the application of the principle of local ownership has given rise to considerable problems in the conduct of CSDP missions. For instance, the EUJUST THEMIS staff found it difficult to cooperate with the Georgian authorities tasked with policy reform, so much so that they found it necessary to get the Georgian Justice Minister invited by the Political Security Committee in Brussels in order to make some progress.⁴⁰ And in Guinea-Bissau, the small mission staff were met with such internal upheaval and disagreements that they found it difficult to even identify their interlocutors.⁴¹ On the other hand, the conditions which a CSDP mission faces on the ground may be such as to raise the intensity of its intervention to levels which the principle of local ownership can hardly envisage, the mission in Kosovo being a case in point.⁴²

Furthermore, the management of the nexus between CSDP and development needs to meet the challenges of coherence and consistency. In accordance with Article 21(3) TEU, the Union 'shall ensure consistency between the different areas of its external action and between these and its other policies'. This task is assigned to the Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy. And the broader the concepts of security and development have been construed and the higher the intensity of their interactions, the greater the emphasis on the coherence of the Union's external action. This is stressed in both the *European Security Strategy* and the *European Consensus on Development*. In fact, eight years prior to the adoption of the latter, the Council had

³⁸ n10 above, para. 14.

³⁹ See n27 above, above, para. 27, and the Council Conclusions, n33 above at para. 3.

⁴⁰ See X Kurowska, 'EUJUST THEMIS (Georgia)' in Grevi, Helly, and Keohane (eds), n19 above, 201, 206

⁴¹ See D Helly, 'EU SSR Guinea-Bissay' in *ibid*, 369, 373.

⁴² See Keukeleire, Kalaja and Çollaku in Koutrakos (ed.), n26 above. However, this leap between the choices made by the EU in the context of its CSDP operations and the local wishes is not confined to the missions referred to in this Chapter: see, for instance, 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* (Boca Raton: Universal Publishers, 2009) 47.

adopted a Resolution on Coherence between the Community development cooperation and its other policies.⁴³

Quite apart from this institutional preoccupation with it, the challenge which coherence presents for the management of the nexus of CSDP and development is indicative of the greater challenge which coherence presents for the EU external action as whole. This has been at the centre of the group therapy process which the Union has undergone since the adoption of the Laeken Declaration on the Future of the European Union⁴⁴ which initiated the process of reform of the Union's Treaties in December 2001 and which has led to the entry into force of the Lisbon Treaty. This is clearly illustrated by the mandate of the 2007 Intergovernmental Conference which mentions coherence in its very first paragraph. An assessment of whether the grand objectives about the coherence of the Union's international role have been met is beyond the scope of the Chapter.⁴⁵ However, it is interesting to note the recent complications which the nexus between development and security policy has caused in relation to the introduction of one of the most widely acclaimed innovations introduced by the Lisbon Treaty, namely the European External Action Service (EEAS).

It is recalled that the Service shall assist the High Representative in fulfilling her mandate, and shall comprise officials from relevant departments of the Council General Secretariat and the Commission, as well as diplomats seconded from the Member States (Art. 27 (3) TEU). The High Representative is responsible for representing the Union for matters relating to the common foreign and security policy (Art. 27(2) TEU), and for assisting the Council and the Commission to ensure the consistency between the different areas of the Union's external action and between these and its other policies (Art. 21(3) TEU). Where does this leave development cooperation? Should it be integrated in the task entrusted to the EEAS, or should it become a distinct and autonomous policy within the Union's external action? The Commission was hostile to the former, as it felt that it would undermine its powers as set out in Article 17(1) TEU: these include the Union's external representation, with the exception of the common foreign and security policy, the execution of the budget and the management of programmes, and the exercise of coordinating, executive and management functions as laid down in primary law.

⁴³ It was adopted by the Development Council on 5 June 1997. This was followed by the European Parliament (B5-0117/2000 Resolution on the coherence of the various policies with development policy [2000] OJ C 339/208), and the Commission (COM (2005) 134 fin. *Policy Coherence for Development*). Furthermore, and following a request by the Council, on November 19, 2002, the Commission refers specifically to progress in terms of coherence in its annual report on development policy.

⁴⁴ European Council, December 14-15, 2001. The focus on the international role of the Union was apparent in it: 'Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?' (2).

⁴⁵ See S Duke, 'Consistency, coherence and EU external action: the path to Lisbon and beyond' in Koutrakos (ed.), n26 above, and P Koutrakos, 'Primary law and policy in EU external relations – moving away from the big picture?', (2008) 33 ELRev 666

These are sensitive matters in so far as their resolution touches upon issues of efficiency and effectiveness, as well as institutional powers deeply entrenched through successive rounds of Treaty amendments. Indeed, the proposal made by the High Representative in March 2010 which relied upon the requirement of consistency and suggested the integration of development policy in the functions of the EEAS, referring specifically to the EU external cooperation programmes such as the Development Cooperation Instrument and the European Development Fund, turned out to be controversial. Most non-governmental organisations viewed it as a Trojan horse which would undermine both the integrity of development policy and the powers of the Commission.⁴⁶ The Parliament, on the other hand, was keen not only to avoid the contamination of the Community [now Union] method which governs development cooperation by the intergovernmental features of the EEAS, but was also to increase its leverage on the conduct of the EU's external action by intervening directly on the funding of the Service, and the appointment of Heads of Delegation.

Following intense inter-institutional haggling, the final outcome, set out in Decision 2010/427/EU establishing the organisation and functioning of EEAS,⁴⁷ followed the logic of integrating development in the EEAS functions. However, it does so by seeking to square the circle and engaging in a very delicate balancing exercise. The High Representative is responsible for the coordination between all the EU financial instruments, but the management of these programmes remain under the responsibility of the Commission,⁴⁸ and the EEAS shall 'contribute to the programming and management cycle' of these instruments, and shall be responsible for 'preparing Commission decisions on the strategic, multi-annual steps within the programming cycle'.⁴⁹ All proposals are to be prepared following Commission procedures, and the role of the Commissioner responsible for development is pronounced; for instance, in relation to the European Development Fund and the Development Cooperation Instrument in particular, that is the programmes involving the majority of the development policy budget, both the EEAS and the Commission are to make any proposals under the supervision of the Development Commissioner.⁵⁰

⁴⁶ See, for instance the press statement of 26 April 2010 issued by CIDSE, Oxfam International, APRODEV, CONCORD, EUROSTEP and One International (http://www.concordeurope.org/Files/media/0_internetdocumentsENG/5_Press/1_Press_releases/5_Press_releases_2010/MEDIA-STATEMENT-on-EEAS--26-04-2010---EN.pdf) (last accessed on 1 August 2010).

⁴⁷ [2010] OJ L 201/30. This Decision is accompanied by a Declaration by the High Representative on political accountability ([2010] OJ C 210/1, and [2010] OJ C 217/12) which sets out the practicalities of the interactions between the High Representative and the European Parliament.

⁴⁸ Ibid, Art. 9(1) and (2).

⁴⁹ Ibid, Art. 9(3).

⁵⁰ Ibid, Art. (4).

Whether the compromise outlined above is workable remains to be seen.⁵⁷ For the purposes of this analysis, suffice it to point that it shares the vague language and the keen commitment to square the circle which is apparent in other strands of the security-development nexus.⁵⁸ For instance, the Council Conclusions on a Policy framework for Security sector reform are striking in their generality: 'The EU has a broad range of civilian and military instruments which are able to support SSR activities. A case-by-case analysis is based on a situation specific approach is always needed to assess whether any proposed activities are most appropriately carried out through ESDP or Community action or a combination of both with the objectives of ensuring effective and coherent EU external action in this area'.⁵⁹

Whilst understood for practical reasons and political expediency, the lofty language and complex arrangements which govern the management of the security-development nexus cannot hide two problems. On the one hand, to turn the policy statements about the intrinsic link between security, defence and development policies into tangible action requires a leap of faith which the pre-occupations of the Union institutions with their own powers renders exceedingly difficult for them to take. On the other hand, once this leap has been taken, the compromises which it entails and the vague language in which these are couched render the effectiveness of the agreed system of rules and procedures subject to the personality of the relevant post holders, and the willingness of the institutions to cooperate. Not only is such an arrangement hardly conducive to the certainty and stability required for any effective administration, but also the energy and time wasted in turf wars about the legal basis of external measures in other areas (such as trade and environment) bode ill for its success.⁶⁰ The following section will elaborate on this in relation to two cases brought before the Court of Justice which highlight the problem of delineating between, and managing, the relationship of security, defence and development policies.

IV The CSDP-development nexus before the Court of Justice

The Court of Justice has had the opportunity to rule on the relationship between security and development in two judgments. In the first one, the *Philippines Borders* case,⁶¹ it does so indirectly. This concerned a Commission decision financing a project relating to the security of the borders of the Philippines. That decision was adopted in implementation of Council Regulation 443/93 on financial and technical

⁵⁷ See the scepticism expressed in Editorial, 'Habemus European External Action Service', (2010) 35 ELRev 607.

⁵⁸ See European Parliament legislative resolution of 8 July 2010 on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service (A7-02278/2010).

⁵⁹ N33 above, para. 4.

⁶⁰ 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* (Oxford: Hart Publishing, 2008) 171.

⁶¹ Case C-403/05 *European Parliament v Commission* [2007] ECR I-9045.

assistance to, and economic co-operation with, the developing countries in Asia and Latin America.⁶² Its aim was to contribute to the fight against terrorism and international crime and enhance the internal security and stability of the Philippines. However, the European Parliament argued that these objectives were beyond the scope of the economic co-operation provided for by the Council Regulation and, in pursuing them, the Commission did not have the authority to approve the financing of that project.

The Court accepts that conclusion and annuls the Commission decision. Although it acknowledges the broad objectives of development policy as laid down in ex Articles 177–81 EC (Articles 208-211-TFEU), it rules that the Council Regulation, which set out the framework within which assistance to developing countries would be provided, makes no reference either to the fight against terrorism and international crime or to the internal stability and security of the Philippines. It also points out that there is nothing in the contested decision to indicate how the objective pursued by the project could contribute effectively to making the environment more conducive to investment and economic development which was the proper objective of the Regulation.

The judgment appears to require a specific link between the external relations activity and development objectives in order to justify the conduct of the former within the framework set out by the latter. However, the temptation to consider it as suggesting a restrictive interpretation of development policy altogether should be resisted. Instead, it should be recalled that the ruling was rendered in a very specific context which was defined by a secondary measure and the acceptable scope of the Commission's implementing powers.⁶³

It is in the second case where the Court's understanding of the delineation between security and development emerges clearly. This is Case C-91/05 *Commission v Council (re: ECOWAS)*,⁶⁴ about non-proliferation of small arms and light weapons in Africa. The European Union has been an active player in the field of non-proliferation of weapons in general, as well as the small arms and light weapons in particular.⁶⁵ In Joint Action 2002/589/CFSP,⁶⁶ it sets out a number of principles and measures in order to prevent the further destabilising accumulation of small arms. In particular, it provides for financial and technical assistance by the Union to various programmes and projects which make a direct contribution to this objective.

⁶² [1992] OJ L52/1.

⁶³ See M Cremona, Annotation on Case C-403/05 *European Parliament v Commission*, (2008) 45 CMLRev 1727, 1739-40.

⁶⁴ [2008] ECR I-3651.

⁶⁵ See P Koutrakos, 'The Non-Proliferation Policy of the European Union' in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders - Policy Interconnections Between the European Union and the Rest of the World* (Oxford: Hart Publishing, 2010).

⁶⁶ [2002] OJ L 191/1.

In this context, the Council adopted Decision 2004/833/CFSP⁶⁷ in which it implements the above Joint Action by contributing to the Economic Organisation of West African States (ECOWAS). This contribution consisted of providing financial and technical assistance to ECOWAS in order to set up the Light Weapons Unit within its structure, and convert the Moratorium on Small Arms and Light Weapons into a binding Convention between the ECOWAS States.

The Commission challenged both the Joint Action and the Decision as violating the Community's competence: it argued that they pursued development objectives and, therefore, ought to have been adopted under ex Article 177 EC (now Article 208 TFEU). It put forward three main arguments. First, the Union should not do what the Community could do, even if the competence of the latter was shared and has not been exercised. This was based on ex Article 47 TEU which provided that 'nothing in [the TEU] shall affect the Treaties establishing the European Communities' and which the Commission viewed as defining a fixed boundary between CFSP and EC competence. Second, development policy necessarily encompasses the combating of the proliferation of small arms and light weapons, as cooperation in this area presupposes a minimum degree of stability. Therefore, the decommissioning of small arms and light weapons is essential to achieving the objectives of development cooperation.⁶⁸ Third, the Commission argues that both the objective and substantive content of Decision 2004/833/CFSP suggested that they could have been adopted in the context of development policy: one of its objectives was the improvement of the prospects for sustainable development in West Africa, while the provision of financial and technical assistance constitutes a typical form of assistance in the context of development cooperation.

On the other hand, the Council argued that ex Article 47 TEU could not be interpreted in a way which would be detrimental to the competences enjoyed by the Union in the area of foreign and security policy. Second, it argued that both non-proliferation of small arms and light weapons, and the more general objective of preserving peace and strengthening, were CFSP objectives which may only incidentally affect the prospects for sustainable development; otherwise, a broader interpretation of development cooperation would render the Community's competence unlimited, and deprive the CFSP of any practical effect. Finally, the Council suggested that the objective of the contested Decision was part of the fundamental objective of the CFSP, namely the preservation of peace and the strengthening of international security, and argued that the scope of CFSP activities may not be limited by precluding the Union from using the same instruments as those employed in the area of development cooperation.

⁶⁷ [2004] OJ L 359/65.

⁶⁸ To that effect, the Commission relies upon the Cotonou Agreement, Article 11(3) of which refers specifically to activities addressing an excessive and uncontrolled spread, illegal trafficking and accumulation of small arms and light weapons.

In its ruling, the Court makes three main points. First, it accepts that ex Article 47 TEU should be interpreted strictly, and held that 'a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of [ex] Article 47 EU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences'.⁶⁹ In other words, it suggests a very strict reading of the autonomy of development policy under the previous constitutional arrangements.

Second, it suggests a broad interpretation of development policy as, in addition to the sustainable economic and social development, the smooth and gradual integration into the world economy and the campaign against poverty, it encompasses the development and consolidation of democracy and the rule of law, respect for human rights and fundamental freedoms, and compliance with UN and other international commitments. However, it points out that it is necessary that any measure adopted under development cooperation contributes to the pursuit of this policy's economic and social development objectives.

Third, the Court suggests that, whilst measures aimed at combatting the proliferation of small arms and light weapons can contribute to the elimination or reduction of obstacles to the economic and social development of developing countries, they fall within the scope of development policy only if, in the light of their aim and content, their main purpose is the implementation of that policy. Relying on its earlier case-law on legal basis, the Court then points out that, if a measure pursues both CFSP and development cooperation objectives, it should be ascertained which is the main objective and which is incidental, as the former would dictate the appropriate legal basis.⁷⁰ If, however, the measure pursues both development and CFSP objectives simultaneously without either being incidental to the other, a joint legal basis is precluded under ex Article 47 TEU. It is for this reason that 'the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community'.⁷¹

Focusing on the contested Decision, the Court concludes that it pursues both the CFSP objective of tackling a threat to peace and security, and the development objective of eliminating or reducing obstacles to the sustainable development of cooperating developing countries. It, then, rules that neither objective is incidental to the other: the preamble mentions sustainable development in its first paragraph; and the provision of technical and financial assistance is a typical development cooperation measure.⁷²

⁶⁹ N 61 above, para. 60.

⁷⁰ Ibid, para 73

⁷¹ Ibid, para. 77.

⁷² It is pointed out that, '[w]hile there may be some measures, such as the grant of political support for a moratorium or even the collection and destruction of weapons, which fall rather within action to preserve peace and strengthen international security or to promote international cooperation,

The judgment in *ECOWAS* must be examined in the light of the Lisbon Treaty which has redefined the constitutional balance of powers between CFSP, and therefore CSDP, and development. Whilst ex Article 47 TEU gave precedence to preserving the integrity of the Community legal order, the new provision of Article 40 TEU adds another dimension: 'Similarly, the implementation of the policies listed in [Articles 3-6 TFEU] shall not affect the implication of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under [Chapter 2 TEU which deals with CFSP and CSDP]'. In addition to being given this elevated constitutional status, the specificity of CFSP rules is expressly acknowledged.⁷³

The *ECOWAS* judgment has been analysed in detail and well.⁷⁴ This section will focus on the light it sheds on our understanding of the ways in which security and development objectives may be served by Union measures, as well as the principles governing the choice of the appropriate legal basis.

A main tenet of the judgment is the broad construction of both security and defence, and development cooperation policies. This is suggested by the ample reference to policy documents adopted by the Union institutions, and the Member States. As suggested above in this Chapter, the *European Consensus on Development*,⁷⁵ for instance, is a document firmly based on an understanding of development cooperation as a policy with economic, political, social, and security dimensions, all of which intrinsically linked. The Court referred to it at length, and twice: to acknowledge that measures aiming to prevent fragility in developing countries, including the non-proliferation of small arms and light weapons, can contribute to tackling the economic and social development problems of those countries; second, to argue that the objective of a security and defence policy instrument to tackle the non-proliferation of small arms and light weapons may be served by development cooperation, as well as security and defence policy measures.⁷⁶ In effect, the above propositions are two sides of the same coin: in the context of EU external relations, the economic and social, and the security and defence are intertwined because each is achieved by a wider range of policy responses than might have originally been envisaged. In this part of the judgment, the Court gives voice to one of the main

being CFSP objectives stated in Article 11(1) EU, the decision to make funds available and to give technical assistance to a group of developing countries in order to draft a convention is capable of falling both under development cooperation policy and the CFSP' (para. 105).

⁷³ See Art. 2(4) TFEU.

⁷⁴ See A Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge: CUP, 2008) 70, J Heliskoski, 'Small arms and light weapons within the Union's pillar structure: an analysis of Article 47 TEU', (2008) 33 *ELRev* 898, C Hillion and R Wessel, 'Competence distribution in EU external relations after *ECOWAS*: clarification or continued fuzziness?', (2009) 46 *CMLRev* 551.

⁷⁵ See n10 above.

⁷⁶ Reference is also made to the Development Council Resolution on small arms, adopted on 21 May 1999, at paras 69 and 89 of the judgment (n61 above).

tenets of the Union's international role as defined after the terrorist attacks of September 11, 2001.

However, to construe development and security and defence policy in broad terms is one thing, to allow this understanding to obscure the dividing line between these policies is quite another. The Court's conclusion that neither the security nor the development objectives of the provision of financial and technical assistance for the non-proliferation of small arms and light weapons is incidental to the other is problematic. The analysis of the content of the contested Decision is confined to presenting the provision of technical and financial assistance as a typical development cooperation measure. However, this overly instrumental logic confines security and defence policy to a core of the most fundamental security actions, easily recognisable and categorised as such. The Court refers expressly to the grant of political support for a moratorium, or the collection and destruction of weapons, as measures which would aim, primarily, to preserve peace and strengthen international security.⁷⁷ However, this type of categorisation is too tidy and schematic, and fails to engage with the intricacies of the multifarious dimensions of security and defence policy. What makes it even more problematic is the extent to which the Court substantiates its decision on the basis of policy documents adopted by the Union institutions and the Member States. These are policy documents drafted in vague language and aimed at articulating political objectives as to how best to position the Union on the world stage. In doing so, they also seek to strike the balance between competing claims to power made by the Union's actors. One wonders what is their appropriate role in judicial reasoning which seeks to define the demarcation line between different sets of rules which entail different constellations of power between the Union and the Member States, as well as between the Union institutions.⁷⁸

The above approach is all the more serious as it bears on the choice of legal basis. Far from being an exact science, the identification of the weight which a Union measure attaches to the various objectives it pursues is bound to be fraught with ambiguities. This is so even in areas which are not as constitutionally charged as the demarcation line between security and defence and development policies. In the light of the broad construction of these areas, to ascertain whether a given objective is the main component of a measure, or whether it is incidental, or whether it is indissolubly linked to other objectives, is more often than not far from clear. The case-law on the legal basis of the measures with trade and environmental objectives illustrate this clearly: the Court's conclusions that the Cartagena Protocol is mainly an environmental measure with incidental trade implications,⁷⁹ the Energy Star Agreement is a trade measure with incidental environmental implications,⁸⁰ and

⁷⁷ Ibid, para. 105.

⁷⁸ It is interesting, though, that neither the *European Security Strategy* (n8 above), nor its 2008 Implementation Report (n13 above) are mentioned in the judgment.

⁷⁹ *Opinion 2/00 (re: Cartagena Protocol)* [2001] ECR I-9713.

⁸⁰ Case C-281/01 *Commission v Council (re: Energy Star Agreement)* [2002] ECR I-12049.

that the Rotterdam Convention serves equally trade and environmental objectives⁸¹ have created a body of case-law difficult to follow, and applied principles in a way which is even more difficult to predict.⁸² In the area of security and defence and development policies, rather than clarifying it, the Court's approach in *ECOWAS* makes the choice of legal basis even more complex and less predictable.

Furthermore, the difficulties inherent in the strict monitoring of the choice of legal basis suggested by the Court are bound to whet the already healthy appetite of the Union institutions for legal disputes. This slows down the decision-making process, and takes away energy and time which the EU institutions would put to much better use if focused on the effectiveness of the Union's international action, and the monitoring of the consistency of its activities. This author has made this point in relation to the legal basis disputes involving trade and environmental policies.⁸³ This is even more apt in relation to the areas discussed in this Chapter, not only because of the profound constitutional implications for the functioning of the Union as a constitutional order of States, but also given the vital role which inter-institutional cooperation plays in order to enhance the coherence of the Union's external action. After all, for all the institutional innovations and procedural amendments introduced by the Lisbon Treaty, coherence will become a rhetorical imperative unless the Union's institutions develop functional synergies in order to give effect to it.

There is another message which the judgment in *ECOWAS* conveys, and it has to do with the Court of Justice. The difficult tests which govern the choice of legal basis, the ambiguous ways in which they are applied by the Court of Justice, the reliance upon policy documents couched in language difficult to guide judicial reasoning, the increasing number of inter-institutional disputes, all suggest that the role of the Court of Justice in this area is bound to become more pronounced. This in itself may not appear controversial, or surprising. After all, the case law of the Court of Justice has been pivotal in the genesis and development of the law of EU external relations., and the proliferation of judgments in the area of external relations in recent years leaves no doubt about it. However the implications of the increasing recourse to Europe's judges in order to address legal basis choices of the kind appearing in *ECOWAS* should not be underestimated: on the one hand, it politicises further a matter with inherent political repercussions, and renders the Court of Justice directly at the centre of a most controversial arena; on the other hand, and given the emphasis on the synergy between the wide range of policies and instruments available for the Union's international role, it introduces an element of uncertainty in an area which, due to its centrality and political sensitivity, least requires it.

⁸¹ Case C-94/03 *Commission v Council (re: Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade)* [2006] ECR I- 1:

⁸² M Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', *EUI Working Papers LAW* No 206/22, n 50, P Koutrakos, 'Annotation on Case C-94/03 *Commission v Council* and Case C-178/03 *Commission v Parliament and Council*', (2007) 44 *CMLRev* 171.

⁸³ See Koutrakos, n60 above.

V Conclusion

The CSDP-development nexus has emerged strongly at various initiatives pursuant to which the Union seeks to define its international role. From the security policy point of view, it follows from the increasingly broad definition which security has been given in the last ten years, both within the Union and beyond. This chapter outlined the impact which the management of this nexus has on the functioning of the Union as a constitutional order of States.

This has raised a question about the nature of the main principles governing the conduct of CSDP. As far as development policy is concerned, its increasing interactions with security policy have given rise to a lively debate about its securitisation.⁸⁴ The broad understanding of security which prevails in international relations, the timid steps of the Member States in the area of Union's defence policy, the emphasis of the missions on the soft end of the security and defence spectrum, all raise the question whether CSDP has been 'developmentalised' to a certain extent. It is interesting that both the *European Security Strategy* and the *2008 Implementation Report* should refer to the unique range of instruments at its disposal as the main asset of the Union's international role. Given its experience on development cooperation and the prominent role of the latter in the Union's international relations, the 'developmentalisation' of CSDP would be hardly surprising. Whether this would enhance its effectiveness and visibility, though, and, if so, under what conditions, is another matter altogether.

Another important issue is the role of the Union's institutions. The intrinsic links between CSDP and development which emerge as a matter of practice require the Union's institutions to dedicate less time and energy on legal basis squabbles, and approach the conduct of the policies with imagination and in a spirit of cooperation. Unfortunately, their record so far provides little ground for optimism, and raises the prospect of the management of the CSDP-development nexus becoming more dependent on the intervention of the Court of Justice. This would be consistent with the latter's increasingly prominent role in the area of the Union's external relations. However, the higher the intensity of the interactions between the two policies, and more prominent their position in the Union's international action, the more politicised the management of the CSDP-development would become. In this context, the institutions should think hard as to how best to tackle the ensuing challenges. Should they decide to test the limits of their powers by increasing recourse to Europe's judges, they would do so at their peril.

⁸⁴ See, for instance, A Hadfield, 'Janus Advances? An Analysis of EC Development Policy and the 2005 Amended Cotonou Partnership Agreement', (2007) 12 EFA Rev 39, R Picciotto, 'Aid and conflict: the policy coherence challenge', (2004) 4 *Conflict, Security and Development* 543, and N Woods et al, 'Reconciling Effective Aid and Global Security: Implications for the Emerging International Development Architecture', (2005) *Global Economic Governance Working Paper* 19.

