

The EU and the Security-Development Nexus: Bridging the Legal Divide

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The need to enhance the coherence of EU security and development policies is stressed in numerous EU policy declarations. This article analyses this commitment against the background of the legal architecture of EU foreign policy. This demonstrates that the political simplicity with which this commitment is often put forward tends to hide the complexity of this undertaking in an external action system that submits the policy fields of development cooperation and the Common Foreign and Security Policy (CFSP) to different rules and procedures. While the EU institutions have increasingly targeted development and security policies at the mutual challenges of insecurity and poverty, the lack of a shared and comprehensive strategy leads to significant improvisation. On the one hand, the ad hoc replies to this commitment have resulted in the development of a particularly fragmented EU toolbox to deal with these challenges. On the other hand, this raises important questions regarding the choice of appropriate legal bases for the various policy initiatives that span the security-development nexus. It is argued that the Lisbon Treaty, by interlinking the CFSP and development cooperation both constitutionally and institutionally, creates significant opportunities that, combined with the necessary political will, allow the EU to move beyond its ad hoc approach.

1 INTRODUCTION

In the last decade European Union institutions and Member States have regularly recognized the destructive correlation between insecurity and underdevelopment in third countries and regions. With growing intensity EU policy documents have consequently expressed the need to enhance the coherence of the Common Foreign and Security Policy (CFSP) – that includes the Common Security and Defence Policy (CSDP) – and development cooperation. The integration rationale of this so-called security-development nexus collides however with the EU's delimitation of competences that firmly separates both policy areas. In spite of the obvious complexity which this involves, the many statements on the nexus remain very general and express a rather simplistic plea to enhance coherence. Besides hiding the many policy challenges of this commitment, the generality stands in the way of developing a shared and systematic approach to fine-tune EU security and development policies, and has led to significant improvisation.

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This article aims to look beyond the political statements on the nexus and analyse the legal complexity of their implementation, taking into account the Lisbon Treaty's changes to the EU's external action system. One of the main aims of the latter was to streamline and enhance coherence across the various external policies of the Union. The security-development nexus exemplifies the many challenges of developing an effective policy across institutional and procedural divides and therefore constitutes an important test-case for these recent Treaty changes.

After elaborating on the evolution and nature of the EU's commitment to the security-development nexus, this article will set out the relevant innovations of the Lisbon Treaty. A subsequent part will shed more light on how the policy improvisation has influenced the development of the EU's toolbox for approaching the nexus. Finally, it will be studied how this impacts the difficult issue of choosing an appropriate legal basis, particularly in the light of the fuzzy boundaries between EU development and security competences.

2 THE EU AND THE SECURITY-DEVELOPMENT NEXUS: ABOUT WORDS AND DEEDS

In the late 1990s the EU joined the rising international efforts to tackle the interrelated challenges of insecurity and underdevelopment. Because the EU disposes of an impressive mix of instruments that span the continuum between security and development, it holds great potential for living up to this commitment but at the same time faces considerable challenges to ensure that its various policies do not work at cross-purposes.

The EU Treaties provide the areas of development cooperation and CFSP with broad mandates. The former has the primary aim of eradicating poverty¹ and the latter covers 'all questions relating to the Union's security'.² Primary law, however, does not prescribe how to deal with policies in the 'grey area'³ between them. The EU's pledge to the security-development nexus has therefore entirely matured in policy statements and declarations based on these broad Treaty objectives as well as the Commission's and Council's responsibility for ensuring the consistency of 'external relations, security, economic and development policies'.⁴

¹ Article 208(1) Treaty on the Functioning of the European Union (further: 'TFEU').

² Article 24(1) Treaty on European Union (further 'TEU').

³ S. Duke, *Areas of Grey: Tensions in EU External Relations Competences*, 1 Eipascopie 21–27(2006).

⁴ As formulated in ex Article 3 TEU (current Article 21(3) TEU).

Among the impressive range of EU statements on the nexus⁵ it is, for the purposes of this article, important to look more closely at the related – and perhaps unnecessarily separated – Council Conclusions on ‘an EU Response to Situations of Fragility’⁶ and the Council Conclusions on ‘Security and Development’.⁷ These documents tackle the structural-operational interface at both the politico-strategic and operational planning level⁸ by calling on Council bodies, Commission services and Member States to fine-tune their short and longer-term actions in the areas of security and development. The two sets of Conclusions, both adopted in November 2007, require further concretization in the form of action plans. In view of the emerging negotiations on the set-up of the European External Action Service (EEAS), the Council decided to put this debate on hold until a decision on the scope and mandate of the latter was reached.⁹ Moreover, a decision was taken to merge the two plans into a single Action Plan on Security, Fragility and Development. Yet, at the time of writing this commitment had not yet been accomplished.

This stalemate is illustrative for the EU’s struggle to give effect to its well-developed lexicon on the security-development nexus. The main challenges arise from the EU’s constitutional architecture that strictly separates development and security competences. Even though they are formally no longer encapsulated in two separate pillars, development and security policies are still governed by distinct decision-making procedures with an essentially different institutional balance. Decisions on development issues are taken according to the ordinary legislative procedure, implying a formal proposal of the Commission and co-decision by the European Parliament (EP) and the Council, with full competence of the EU Court of Justice (ECJ).¹⁰ In the area of the CFSP, including the CSDP, the Council generally take decisions unanimously, the Commission and the EP have no formal decision-making role and the ECJ has only limited competences.¹¹ This treaty-based distinction tends to jeopardize the intuitive complementarity of both policy fields.

⁵ Maurizio Carbone gives a useful overview of the most important expressions of the EU’s commitment to the nexus in his contribution to this special issue on, *An uneasy nexus: development, security and the EU’s African Peace Facility*.

⁶ *Council Conclusions on an EU Response to Situations of Fragility*, 2831st External Relations Council Meeting (Brussels, 19–20 Nov. 2007).

⁷ *Council Conclusions on Security and Development*, 2831st External Relations Council Meeting, (Brussels, 19–20 Nov. 2007).

⁸ C. Gebhard & P.M. Norheim-Martinsen, *Making Sense of EU Comprehensive Security towards Conceptual and Analytical Clarity*, 20 *European Sec. J.* 2, 231–233 (2011).

⁹ *Council Annual Report (10477/10) on the Implementation of the EU Programme on the Prevention of Violent Conflict*, 29 (31 May 2010).

¹⁰ Article 209 TFEU.

¹¹ Article 24 (1) TEU.

Further compounding this complexity is the general lack of a complete empirical understanding of the security-development linkage. Whereas there is no shortage of econometric analyses documenting the destructive chain reaction of insecurity and underdevelopment,¹² it has proven considerably more complicated to turn this into a positive policy guide.¹³ Research undertaken by leading experts in 2006 concluded that the different configurations of security and development 'can be mutually supportive, mutually harmful or independent of each other [...] Claiming the contrary can only lead to faulty diagnosis and inappropriate responses'.¹⁴ The EU's standard refrain is that 'there cannot be sustainable development without peace and security, and without development and poverty eradication there will be no sustainable peace'.¹⁵ Yet, for lack of an action plan setting out concrete guidelines, this creates the impression of a simplistic 'all good things go together' mantra where security and development initiatives automatically reinforce each other.¹⁶

3 THE NEXUS AS A TEST-CASE FOR THE LISBON TREATY REFORMS

Enhancing coherence is the main thread cutting across the Lisbon Treaty reforms to the EU's external architecture. Whilst not explicitly formalizing the long-standing commitment to the security-development nexus, the new legal framework provides important linkages at both the constitutional and institutional level.¹⁷

First, the Lisbon Treaty constitutionally streamlines the Union's external action system. The pillar structure, which both EU institutions¹⁸ and scholars¹⁹ identified as a major impediment to coherence at the security-development interface, has been abolished.²⁰ Article 21 TEU reflects this change by grouping

¹² For instance, M. Humphreys, *Economics and Violent Conflict* 28 (Harvard U. 2003); E. Miguel et al., *Economic Shocks and Civil Conflict: An Instrumental Variable Approach*, 112 J. Political Econ. 4, 741 (2004).

¹³ D. Chandler, *The Security-Development Nexus and the Rise of 'Anti-Foreign Policy'*, 10 J. Int'l Rel. & Dev. 4, 376 (2007).

¹⁴ IPA, *The Security-Development Nexus: Research Finding and Policy Implications*, Program Report 6 (Int'l Peace Aca., New York, 2006).

¹⁵ For instance, *Report on the Implementation of the European Security Strategy - Providing Security in a Changing World*, S407/08, 8 (Brussels, 11 Dec. 2008).

¹⁶ P. Vennesson & C. Büger, *Coping with Insecurity in Fragile Situations*, European Report on Development, 14-15 and 27 (European U. Inst. Florence, 2009).

¹⁷ For an analysis specifically focussed on the effects of the Lisbon Treaty on EU civilian coordination in peace-building see the contribution of Claudia Major and Christian Mölling to this special issue.

¹⁸ *Commission Staff Working Document (SEC(2009) 1137 final) accompanying the Report on Policy Coherence for Development*, 73-74 (17 Sep. 2009).

¹⁹ D. Sicurelli, *Framing Security and Development in the EU Pillar Structure. How the Views of the Commission Affect EU Africa Policy*, 30 European Integration 2, 217-219 (2008).

²⁰ Article 1 TEU.

together all external action principles and objectives. This renders the aim of eradicating poverty and the objective of preserving peace and preventing conflicts ‘an organic part of the indissoluble whole which the Union’s external action is designed to be’.²¹ Together with the enhanced duty of consistency,²² this reads as a strong plea to integrate and interlink the EU’s various external competences. Because the security-development nexus incarnates the many challenges of building coherence across the ‘integrated but separate legal orders’ of the former European Community (EC) and the Union,²³ it constitutes an important test-case for the practical impact of these Treaty changes.

Yet, as is well-known, the distinct sets of rules were not torn down with the pillar walls and the CFSP is entirely excluded from the Treaty of the Functioning of the EU (TFEU) that lists all the other external competences. This remaining distinction is confirmed by Article 40 TEU that does not allow the implementation of CFSP/TFEU policies to affect the application of procedures and extent of the institutions’ powers under the TFEU/CFSP.²⁴ The challenges of reconciling the integration rationale of the nexus with the Union’s delimitation of competences consequently remain. However, the Lisbon Treaty provides a more solid constitutional framework for integrated EU action and better means to deal with this complexity in the form of institutional bridging functions. In particular, the High Representative of the Union for Foreign Affairs and Security Policy (further: ‘High Representative’), the EEAS and the Union Delegations are provided with responsibilities on both sides of the legal divide.

In the subsequent parts we will set out the main legal challenges of the nexus between CFSP and development cooperation and analyse how these could be affected by the Treaty innovations.

4 THE SECURITY-DEVELOPMENT TOOLBOX: CENTRIFUGAL FORCES AT PLAY

One of the main challenges for the EU with regard to the security-development nexus is to approach this interface by way of a toolbox that is split along those lines. Consequently, the objectives of both the EU’s development cooperation and

²¹ P. Koutrakos, *The Nexus between the European Union’s Common Security and Defence Policy and Development*, in *A Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood* 591 (A. Arnall, et al. eds., Hart Publishing 2011).

²² See further, P. Van Elsuwege & H. Merket, *The Role of the Court of Justice in Ensuring the Unity of the EU’s External Representation*, in *Principles and Practices of EU External Representation*, CLEER Working Papers 5, 40–43 (S. Blockmans & R.A. Wessel eds., Centre L. European Union External Rel. 2012).

²³ Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3544, para. 156 and Case T-315/01 *Kadi v. Council and Commission* [2005] ECR II-3659, para. 120.

²⁴ P. Van Elsuwege, *EU External Action after the Collapse of the Pillar Structure: in Search of a New Balance between Delimitation and Consistency*, 47 CML Rev. 4, 988 (2010).

CFSP toolbox have gradually converged towards the core of the nexus. Almost naturally this implies significant potential for overlap and duplication.

4.1 DEVELOPMENT INSTRUMENTS ON THE INTERFACE WITH SECURITY POLICY

The gradual adaptation of the development cooperation toolbox has mainly been undertaken by the Commission following a two-tiered approach. First, traditional development funding is targeted at what it calls the ‘root causes of conflict’, such as poverty or uneven distribution of resources.²⁵ For this purpose the Commission has put a number of measures in place aimed at making development cooperation more security-sensitive. These include conflict impact assessments, a root causes checklist with a watch list of countries most at risk of instability, trainings and efforts to increase the flexibility of development programming by reserving funds for unforeseen events²⁶ or including emergency procedures to revise strategy papers.²⁷

A second track targets development instruments more directly at security challenges with the argument that they undermine development activities. In this regard reference is often made to the Instrument for Stability (IfS). Yet, before going deeper into its functioning, it is important not to ignore the ability of traditional external instruments to finance security-oriented actions. Besides the IfS there is one other thematic instrument, the European Instrument for Democracy and Human Rights (EIDHR), and three geographic instruments, the European Neighbourhood and Partnership Instrument (ENPI), the European Development Fund (EDF) and the Development Cooperation Instrument (DCI). For one thing all these instruments are accorded – with varying gradations – a role in the elastic field of security sector reform (SSR).²⁸ This goes from strengthening

²⁵ Communication from the Commission on Conflict Prevention, COM(2001)211 final, 5 (11 Apr. 2001).

²⁶ ADE, *Thematic Evaluation of European Commission Support to Conflict Prevention and Peace-Building* 36–40 (Aide à la Décision Economique, Brussels 2011).

²⁷ Article 7(6), *Regulation (1638/2006/EC) of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument*, OJ L310/1 (09 Nov. 2006) (further ‘ENPI Regulation’); Article 19(5), *Regulation (1905/2006/EC) of 18 December 2006 establishing a financing instrument for development cooperation*, OJ L378/41 (27 Dec. 2006) (further ‘DCI Regulation’); and Article 5(4), *Council Regulation (617/2007/EC) of 14 May 2007 on the implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement*, OJ L152/1 (16 Jun. 2007) (further ‘EDF Regulation’).

²⁸ Article 2(2)(d) and (r) ENPI Regulation, *supra* n. 27; Article 5(2)(f) and (h) DCI Regulation, *supra* n. 27; Article 2(1)(a)(ii) and (iv) *Regulation (1889/2006/EC) on establishing a financing instrument for the promotion of democracy and human rights worldwide*, OJ L386/1 (29 Dec. 2006) (further: ‘EIDHR Regulation’); and Article 33 of the Cotonou Agreement (Consolidated version of the APC-EC Partnership Agreement, signed in Cotonou on 23 June 2000) that the EDF implements.

the rule of law, over capacity-building, to fostering democratic accountability and oversight in the security and justice sectors.

Further, the EIDHR constitutes a remarkable conflict prevention tool because it allows the EU to finance projects in sensitive areas, such as election monitoring, prevention of torture and child soldiers, without requiring the respective government's approval.²⁹ The DCI funds cooperation with developing countries that are not covered by the ENPI and EDF and includes a specific section on post-crisis situations and fragile states.³⁰ This enumerates actions of reconstruction and rehabilitation, demining, and demobilization and reintegration of former combatants.

The EDF is the EU's most substantive external instrument with a budget of EUR 22,682 million for the period 2008–2013 (the 10th EDF). It is not part of the general budget but funded directly by the Member States, subject to separate financial rules. It finances cooperation with African, Caribbean and Pacific (ACP) countries and Overseas Countries and Territories (OCT) in the framework of the Cotonou Agreement. This agreement is not limited to development cooperation but based on the much broader (ex) Article 310 TEC (current Article 217 TFEU) on association.³¹ Notably, this implies that contrary to the other external instruments, the European *Development* Fund does not have the development legal basis of Article 209 TFEU (ex Article 179 TEC).

The most striking expression of this broad legal basis is Article 11 of the Cotonou agreement which includes commitments on peace-building, conflict resolution, combating terrorism as well as countering the proliferation of weapons of mass destruction. That this article accords the EDF a far-reaching role on the verge of the CFSP is demonstrated most clearly by the African Peace Facility (APF)³², that was first created in 2003 under the 9th EDF.³³ Since then EUR 740 million have been channelled through the APF, with the biggest share (nearly 85%) for support to African-led peacekeeping operations.³⁴ Other areas of funding include capacity-building for the emerging African Union (AU) security structure and support for African initiatives of conflict prevention, early warning and

²⁹ ADE, *supra* n. 26, at 40.

³⁰ Article 5(w-z) DCI Regulation, *supra* n. 27.

³¹ Council Decision (2003/159/EC) of 19 December 2002 concerning the conclusion of the Partnership Agreement between the African Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L65/27 (8 Mar. 2003).

³² Maurizio Carbone sets out a detailed and comprehensive analysis of the African Peace Facility in his contribution to this special issue.

³³ Decision of the APC-EC Council of Ministers (3/2003/EC) of 11 December 2003 on the use of resources from the long-term development envelope of the ninth EDF for the creation of a Peace Facility for Africa, OJ L345/108, (21 Dec. 2003).

³⁴ DG EuropeAid Development and Cooperation, *African Peace Facility*, at: http://ec.europa.eu/europeaid/where/acp/regional-cooperation/peace/index_en.htm.

post-conflict stabilization. Because the APF is not an instrument in itself but a facility under the EDF there is no regulation stipulating these aims. Article 12 of the 10th EDF Regulation only covers the financing arrangements and leaves the objectives, scope and nature of possible interventions to be defined in three-year action programmes. Given the clear entrance in the traditional CFSP territory of peacekeeping a more solid legal basis would however not be redundant.

Both European and African stakeholders have welcomed the APF for the concerns it addresses.³⁵ However, opinions are considerably more mixed regarding its funding structure. On the one hand, the APF facilitates the integration of development objectives and Cotonou principles such as ownership, partnership and accountability into the AU peace and security architecture. On the other hand, it is criticized for diverting money from development objectives, being biased towards peace support and insufficiently linking with longer-term capacity-building.³⁶ Another criticism is that despite changes made in 2007, such as the creation of the APF's Early Response Mechanism (ERM), the EDF's cumbersome procedures are not well-suited to tackle the unpredictable challenges at issue.³⁷

It is this slowness of the development response that the Instrument for Stability (IfS) aims to address in countries victim to or at risk of crises or natural disasters.³⁸ The IfS has a budget of EUR 2,062 million (2007–2013) spread over a short (Article 3 IfS Regulation) and a long-term component (Article 4). The former accounts for 73% of the allocated amount, and aims at filling the strategic void left by the absence of development funding in situations of crisis. It provides assistance to (re-)establish the essential conditions for cooperation. The long-term component funds capacity-building when conditions for cooperation are stable in areas such as law and order, early warning, reconciliation and recovery.

The IfS does not derive its uniqueness from the areas of intervention that it covers, as these are to a large extent comparable to those of the aforementioned instruments. Its added value lies in the conditions of crisis wherein it operates and the rapidity of its response. To put the IfS into effect, the Commission can decide on 'Exceptional Assistance Measures' and 'Interim Response Programmes'. The former have a maximum duration of twenty-four months and do not require

³⁵ IBF, *Part 1 of the African Peace Facility Evaluation: Reviewing the Procedures of the APF and Possibilities of Alternative Future Sources of Funding* 9–10 (IBF Int'l Consulting collaboration BAA (Spain), Brussels, 2011).

³⁶ R. Youngs, *Fusing Security and Development: Just another Euro-Platitude?* in *Policy Coherence and EU Development Policy* 101 (M. Carbone ed., Routledge 2009).

³⁷ IBF, *supra* n. 35, at 27–28. The on-going discussions on alternative sources of funding should be seen in this light (Article 12(f) EDF Regulation).

³⁸ *Regulation (1717/2006/EC) of 15 November 2006 establishing an Instrument for Stability*, OJ L327/1, (24 Nov. 2006) (further: 'IfS Regulation').

heavy comitology procedures if their cost remains below EUR 20 million.³⁹ The latter are not subject to time constraints but always trigger comitology.⁴⁰ In practice the focus is clearly on the speediness of response with sole use of Exceptional Assistance Measures that only seldom exceed the EUR 20 million bar.

The IfS may only operate if the other (former EC) external instruments cannot provide an adequate response.⁴¹ This gap-filling function can be triggered due to the sense of urgency, the trans-regional nature of the problem, the exclusion of the supported area from other ODA-bound⁴² instruments or the non-country specific nature of assistance. By addressing these blind spots the IfS prepares the ground for development cooperation and closes the gap with CFSP activities. This implicates that the IfS *raison d'être* lies in the link with other instruments. However, it is precisely on this point that the main difficulties emerge. First, the gap-filling conditions to activate the IfS are not clearly defined which increases the risk of overlap.⁴³ Second, the IfS is meant to cushion the blow of instability but often proves too slow.⁴⁴ Third, the maximum duration of twenty-four months for IfS initiatives often poses a problem because no follow-up is provided by long-term instruments at the end of this mandate.⁴⁵

It is clear that recent years have witnessed an impressive rise of development instruments that tackle the interface with security. This is evidenced by an independent thematic evaluation of the Commission's support to conflict prevention and peace-building (CPPB) calculating its security-related assistance at EUR 7.7 billion for the period 2001–2010, or 10% of the total Commission-managed development budget.⁴⁶

4.2 SECURITY INSTRUMENTS ON THE INTERFACE WITH DEVELOPMENT POLICY

The gradual operationalization of the CFSP, beyond its mainly declaratory role, moved this policy area considerably closer to the interface with development

³⁹ Article 6 IfS Regulation.

⁴⁰ Commission Report, *Annual Report on the Instrument for Stability*, COM(2012) 405 final, 3–4 and accompanying Staff Working Document (24 Jul. 2012).

⁴¹ Article 2(1) IfS Regulation.

⁴² Official Development Aid as defined by the Development Assistance Committee (DAC) of the Organization for Economic Cooperation and Development (OECD).

⁴³ The picture gets particularly blurry when taking into account Article 2(6) DCI Regulation that oddly appears to give precedence to the IfS, except 'where there is a need to ensure continuity of cooperation from crisis to stable conditions for development', which is in fact the assigned role of the IfS.

⁴⁴ If the minimum time span for the launch of an intervention of two to six months can appear already very long for victims of crisis, in practice it is rather nine to eleven months with reported excesses of one and a half year; ADE, *supra* n. 26, annex 3, 16–17.

⁴⁵ *Ibid.*, 35–39.

⁴⁶ *Ibid.*, 7.

policy. This started with the Treaty of Amsterdam that created the function of High Representative (HR) for the CFSP as well as the Special Representatives (EUSRs) operating under the authority of the HR.⁴⁷ In an expression of remarkable vagueness the TEU states that the mandate of these EUSRs can relate to ‘particular policy issues’. In practice, EUSRs have been appointed to specific countries, regions, international organizations and recently also on a thematic basis.⁴⁸ Even though EUSRs are – at least before the Lisbon Treaty entered into force⁴⁹ – strictly CFSP instruments, some of their mandates clearly touch upon development competences. This is the case, for instance, with regard to the EUSR for the African Union (AU) whose mandate is based on the objective of supporting institutional development ‘including through development assistance’.⁵⁰

The creation of the European (now Common) Security and Defence Policy blurred the security-development distinction even further. The initial purpose, as expressed at the 1999 Cologne European Council, of developing ‘an EU military crisis management capacity’⁵¹ was soon extended to include a civilian component as well as conflict prevention.⁵² This evolution has only gained pace and currently the latter dimensions have taken the upper hand. Of the fifteen operational CSDP missions twelve are of civilian nature and only three have a military mandate. Moreover, even though CSDP missions were initially classified as short-term instruments to address imminent crises, eleven of these missions have been operational for over four years. The track record of the CSDP now ranges from exclusively military interventions aimed at stabilizing security conditions (Artemis DRC, EUFOR CHAD/RCA), over security sector reform (EUSEC RD Congo, EU SSR Guinea-Bissau), to border assistance (EUBAM Moldova and Ukraine) and monitoring (AMM Aceh, EUMM Georgia).

The use of civilian means in the CSDP has only been formally codified by the Lisbon Treaty. Article 43(1) TEU broadens the responsibilities under the CSDP

⁴⁷ Although this was not explicitly stated in ex Article 18(5) TEU.

⁴⁸ *Council Decision (2012/440/CFSP) appointing the European Union Special Representative for Human Rights*, OJ L200/21 (27 July 2012); in the past there were Personal Representatives (for non-proliferation of weapons of mass destruction, human rights, parliamentary affairs in the CFSP and African peacekeeping capabilities) without an explicit Treaty basis.

⁴⁹ Given that the TEU includes the EUSRs in the CFSP chapter, they are *sensu stricto* CFSP actors. However, this is also the case for the EEAS and, in the unified external action system of the Lisbon Treaty, this did not prevent the adoption of a Council Decision that gives it a hand on the TFEU competence of development cooperation (cf. *supra* section 4.3).

⁵⁰ Article 2(c) *Council Joint Action (2008/898/CFSP) extending the mandate of the European Union Special Representative to the African Union*, OJ L322/50, (2 Dec. 2008).

⁵¹ Annex III European Council Conclusions, *Presidency Report on the strengthening of the common European policy on security and defence*, (Cologne, 3–4 Jun. 1999).

⁵² Santa Maria da Feira European Council, *Conclusions of the Presidency*, (19–20 Jun. 2000); Council “I/A” Item Note (15863/04) *Civilian Headline Goal 2008*, (7 Dec. 2004); Council “I/A” Item Note (14823/07) *New Civilian Headline Goal 2010*, (0 Nov. 2007).

by adding joint disarmament operations, military advice and assistance, conflict prevention and post-conflict stabilization to the so-called ‘Petersberg tasks’. Since this is the first time that EU primary law explicitly refers to activities in the grey area between security and development, a literal reading of the TEU may create the impression that the security-development nexus is a CSDP preserve.

To manage this considerable range of responsibilities the CFSP has – compared to development instruments – a relatively small budget of 1,740 million for the period 2007–2013. In 2009 and 2010 over 85% of that amount went to civilian CSDP missions, which are concomitantly financed by voluntary Member State contributions. The CFSP envelope is part of the general Union budget. This implicates that the Council decides on the use of funds while the Commission is responsible for administering them. Military operations cannot be charged to the EU budget⁵³ and are for about 10% funded by a separate Athena mechanism.⁵⁴ The remaining 90% are covered by the participating Member States on the basis of an unstable ‘costs lie where they fall’ principle.⁵⁵

Because of the considerable differences in financing mechanisms, actors and working cultures, it often proves difficult to dovetail the civilian and military CSDP strands.⁵⁶ Despite the inescapable common ground with development cooperation, efforts regarding civil-military coordination have therefore tended to overshadow the debate on the security-development nexus in the CSDP.

4.3 CHALLENGES OF FINE-TUNING AND COORDINATION

The above enumeration of instruments operating on the nexus between security and development may create the impression of an improvised amalgam of initiatives that has come to blur the logics distinguishing development cooperation and CFSP. The fragmented toolbox raises difficult questions of fine-tuning and coordination.⁵⁷ The legal boundary running through this range of instruments obstructs the exchange of security and development-related expertise. As a result, the practical consequences of different policy choices on the respective security or

⁵³ Article 41(2) TEU.

⁵⁴ Council Decision (2011/871/CFSP) establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena), OJ L343/35 (23 Dec. 2011).

⁵⁵ M. Drent & D. Zandee, *Breaking the Pillars: Towards a Civil-Military Security Approach for the European Union*, 50–52 (Netherlands Inst. Int’l Rel. Clingendael 2010).

⁵⁶ F. Faria & R. Youngs, *European Conflict Resolution Policies: Truncated Peace-Building*, Working Paper 94, 4 (FRIDE, Madrid, 2010).

⁵⁷ For a detailed and critical analysis of coordination in the planning cycle of EU crisis management see the contribution of Alexander Mattelaer to this special issue.

development perimeters remain unclear and thus unsatisfactorily anticipated.⁵⁸ Associated problems are the duplication of institutional structures⁵⁹ and inter-institutional disagreements on competence delimitation.⁶⁰ This is further complicated by a budgetary structure that hands the Commission the purse strings of the bulk of security funding while the centre of relevant expertise is located within the CFSP, wherein it participates but has no formal say.

Over the years a number of initiatives have emerged to close these inter-institutional gaps. Examples are the creation, within the former Commission DG RELEX, of a 'Crisis platform – Policy coordination in CFSP' and the practice of Commission participation in drafting CFSP joint actions.⁶¹ Yet, these tend to be ad hoc interventions, generally resulting in an exchange of information while 'room for further improving the inter-institutional coordination, planning and decision-making' remains.⁶² The problem is that the answer to these challenges formulated in various EU policy declarations has so far been limited to a generic call for coordination and coherence. Such an approach requires strong leadership and clearly defined roles for all actors involved, two conditions that are hard to accomplish in the EU's policies on the security-development axes.

On this point the Lisbon Treaty holds potential for improvement. First, there is the triple-hatted High Representative who combines the portfolios of conducting the CFSP, presiding over the Foreign Affairs Council (FAC) and ensuring consistency of the Union's external action as Vice-President of the Commission.⁶³ Because this function bridges the legal and institutional divide between development cooperation and CFSP, it provides the legal mandate that, combined with the necessary political clout, could ensure much-needed leadership over the nexus. This integrative function trickles further down to the EEAS which is assigned to assist the HR. The EEAS mirrors the three hats of its principal in

⁵⁸ K. Del Biondo, S. Oltsch & J. Orbie, *Security and Development in EU External Relations: Converging, but in which Direction?* in *The Routledge Handbook of European Security* 128–129 (S. Biscop & R. Whitman eds., Routledge 2012).

⁵⁹ For instance, in 2010 around fifteen different rapid alert systems were located within the EU institutions, see Council Annual Report (10477/10), *supra* n. 9, at 29.

⁶⁰ Besides the well-known ECOWAS case (cf. *supra* section 5.1.) other examples of documented inter-institutional disagreements are the negotiations on the regulations for demining actions and the IfS as well as its predecessor the Rapid Reaction Mechanism, see A. Dashwood, *Article 47 TEU and the relationship between first and second pillar competences*, in *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 86–87 (A. Dashwood & M. Maresceau eds., Cambridge U. Press 2008).

⁶¹ D. Spence, *The Commission and the Common Foreign and Security Policy*, in *The European Commission* 375–376 (D. Spence ed., John Harper Publishing 2006).

⁶² Commission (SEC(2009) 1137 final), *supra* n.18, at 73.

⁶³ Article 18 TEU.

both composition and responsibilities.⁶⁴ It groups together and interlinks the various actors and instruments that span the security-development continuum in a single institutional framework. A good institutional management and the necessary support from the traditional EU external actors, in particular the Commission, the Council and the Member States, could turn the EEAS into a policy hub that facilitates interaction and enables a constant and decentralized exchange of experience-based knowledge, learning and analysis.⁶⁵

Finally, the Union Delegations, that replace the former Commission Delegations, are an integral part of the EEAS and fulfil a similar hub-function.⁶⁶ In an optimal scenario, these quasi-embassies could translate the EU's integrated policies into needs-oriented interaction, on-the-spot cooperation and inclusionary coordination adjusted to the specificities of each policy action in a given geographic setting. This refurbishment also brings the EU Heads of Delegation into a better position to take the lead in coordinating the whole range of EU actions on the ground, and tighten the often loose connections with CSDP missions. A similar mandate can be accorded to the EUSRs that transpose the High Representative's bridging function to the field. Although EUSRs typically operate on a regional basis, a formal clarification of tasks and cooperation channels between the EUSRs and the Heads of Delegation is called for.

This relates to a general observation regarding the Lisbon Treaty innovations: some potentially useful tools have been created to finally live up to the security-development pledge, but the challenge will be to give optimal effect to them. If the division of competences is seen as a zero-sum game, then the creation of new functions may face hesitance and resistance from the traditional EU external actors. Some signs in this direction have already appeared throughout the tense inter-institutional negotiations on the content of the EEAS Decision.⁶⁷

5 THE NEXUS AND THE DIFFICULT CHOICE OF LEGAL BASIS

While the idea behind the nexus is that security and development aspects of EU external action increasingly coalesce, the EU legal framework requires that for every initiative a choice must be made between either a legal basis in development cooperation or in the CFSP. However, security and development challenges are

⁶⁴ For a detailed analysis of the EEAS and the security-development interface, H. Merket, *The European External Action Service and the Nexus between CFSP/CSDP and Development Cooperation*, 17 *European For. Affairs Rev.* 4, 625–652 (2012).

⁶⁵ *Ibid.*, 638–640.

⁶⁶ Article 221 TFEU.

⁶⁷ B. Van Vooren, *A Legal-Institutional Perspective on the European External Action Service*, 48 *CML Rev.* 2, 477–481 (2011).

not structured along any formal delimitation of competences and it proves very difficult to draw this line in practice.⁶⁸

5.1 THE JUDICIAL TRACK

The standard refrain of the ECJ is that the choice of legal basis must be based on objective factors amenable to judicial review, which it finds in the measure's predominant aim and content.⁶⁹ In pre-Lisbon cross-pillar disputes, the ECJ added ex Article 47 TEU, stating that nothing in the TEU 'shall affect the Treaties establishing the European Communities', to this assessment. It interpreted this article as a 'hierarchical delimitation rule'⁷⁰ and took on the task to ensure that second (CFSP) and third (Police and Judicial Cooperation in Criminal Matters (PJCC)) pillar measures did not 'encroach' on EC competences.⁷¹ This was considered the case if these measures could have been adopted on an EC legal basis.

What this implies for the choice between a CFSP and development legal basis is clearly illustrated by Case C-91/05 on the appropriateness of Council Decision 2004/833/CFSP providing support to the Economic Community of West-African States (ECOWAS) to deal with the calamitous spread of Small Arms and Light Weapons (SALW).⁷² The Commission contested the legality of this Decision and held that it should have been adopted on the basis of Article 11(3) of the Cotonou agreement.⁷³ The Court's aim and content analysis led to the conclusion that the Decision contained intricately linked development and CFSP components, without one being incidental to the other.⁷⁴ It ruled that ex Article 47 TEU in principal prevented a dual legal basis; consequently preference had to be given to the EC, and the CFSP decision was to be annulled.⁷⁵

The clear language of the ECOWAS judgment appears to come at the expense of policy coherence. In order to come to the conclusion that the measure equally pursued development objectives the Court referred to the European

⁶⁸ European Parliament Report on the proposal for a regulation of the European Parliament and the Council establishing an Instrument for Stability, 78 (2 May 2006), A6-0157/2006.

⁶⁹ Case C-45/86, *Commission v. Council* [1987] ECR I-1517, para. 11.

⁷⁰ Van Elsuwege, *supra* n. 24, at 988.

⁷¹ Case C-176/03 (Environmental Penalties), *Commission v. Council* [2005] ECR I-7907; Case C-440/05, *Commission v. Council* (Ship-Source Pollution) [2005] ECR I-9128.

⁷² Case C-91/05, *Commission v. Council* (ECOWAS or Small Arms and Light Weapons) [2008] ECR I-3651; For a complete analysis of this controversial judgment, C. Hillion & R.A. Wessel, *Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?* 46 CML Rev 2, 551–586 (2009).

⁷³ Case C-91/05, *Commission v. Council* (ECOWAS or Small Arms and Light Weapons) [2008] ECR I-3651, para. 23.

⁷⁴ *Ibid.*, paras 79–108.

⁷⁵ *Ibid.*, paras 75–76 and 109–110.

Consensus on Development'⁷⁶ and a provision in the CFSP Decision stating that the spread of SALW 'reduces the prospects for sustainable development'.⁷⁷ Half a year after the adoption of the ambitious Council Conclusions on Security and Development this ruling may therefore discourage the Council from including cross-references to development issues in future legislation, ridiculing the EU's grotesque commitments. Such a trend seems to be confirmed in practice. The Joint Actions of 4 and 12 February 2008 setting up, respectively, a CSDP SSR mission in Guinea-Bissau and a Rule of Law Mission in Kosovo, refer explicitly to the need to ensure consistency with 'the external activities of the Community',⁷⁸ and to SSR as being 'essential for the stability and sustainable development'.⁷⁹ It is remarkable that the two other CSDP missions, drawn up in that same year but after the ECOWAS ruling, namely the counter-piracy operation off the Somali coast and the Monitoring Mission in Georgia, no longer include references to EC competences of any kind.⁸⁰

The Lisbon Treaty significantly shakes the legal foundations of this judgment.⁸¹ Article 40 TEU gives ex Article 47 TEU a janus-face by according the CFSP a similar level of protection from being affected by the implementation of TFEU policies. As a consequence the ECJ's hierarchical approach to cross-pillar cases will be difficult to uphold. Moreover, given that all external action objectives have been grouped together in a single article, and that the CFSP no longer disposes of its own specific aims, the future of the traditional aim and content test is unclear. The possibility of a dual CFSP-TFEU legal basis does not seem to offer a way out as the ECJ stuck to its opposition to such a solution in a recent case on restrictive measures.⁸² Bets are consequently open on how the judiciary might choose between two non-incidental legal bases. The Court may have to settle the dust in pending case C-658/11 wherein the EP contests the exclusive CFSP

⁷⁶ Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, 'The European Consensus on Development', OJ C-46/1 (24 Feb. 2006).

⁷⁷ Case C-91/05, *Commission v. Council (ECOWAS or Small Arms and Light Weapons)* [2008] ECR I-3651, para. 19.

⁷⁸ Article 17, *Council Joint Action (2008/124/CFSP) on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO*, OJ L042/92, (16 Feb. 2008).

⁷⁹ Second recital, *Council Joint Action (2008/112/CFSP) on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU)*, OJ L040/11 (14 Feb. 2008).

⁸⁰ *Council Joint Action (2008/736/CFSP) on the European Union Monitoring Mission in Georgia, EUMM Georgia*, OJ L248/26, (17 Sep. 2008); *Council Joint Action (2008/851/CFSP) on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast*, OJ L301/33, (12 Nov. 2008).

⁸¹ For an extensive analysis, B. Van Vooren, *The Small Arms Judgment in an Age of Constitutional Turmoil*, 14 *European For. Affairs Rev.* 2, 231–248 (2009).

⁸² Although this time not based on principled reading, but because of procedural incompatibility. Case C-130/10, *Parliament v. Council* [2012] nyr, paras 46–48; this was also the Advocate's General approach in ECOWAS: Case C-91/05, *Commission v. Council*, Opinion of AG Mengozzi [2008] ECR I-3655, para. 176 and n. 76.

nature of Council Decision 2011/640/CFSP on the signing and conclusion of the Agreement between the EU and the Republic of Mauritius regarding the conditions of transfer of suspected pirates. The EP argues that this Decision relates also to police, judicial and development cooperation.

5.2 THE POLICY TRACK

The fact that the various aspects of SALW policy had in the past been addressed both under development cooperation and CFSP, suggests that the true motives of the parties did not result from a mere dispute on competence delimitation. Whereas the Council claims that the fight against SALW is an exclusive CFSP competence,⁸³ Joint Action 2002/589/CFSP on the EU's contribution to combating the proliferation of SALW – on which the annulled decision was based – explicitly states that it can be implemented by both CFSP and EC measures.⁸⁴ Moreover, in 2005, OECD Member States (including nineteen of the then twenty-five EU Members) agreed to include the fight against SALW as a category of Official Development Aid (ODA).⁸⁵ The Commission, on the other hand, had not protested against the earlier implementation of that same Joint Action in for instance Latin America.⁸⁶

The practical circumstances of this case shed more light on the underlying causes of the conflict. The Commission had been supporting ECOWAS in the field of combating SALW for a number of years by funding local programmes and initiatives of the United Nations Development Programme (UNDP). The contested Council Decision entered this field and offered financial and technical assistance to 'convert the Moratorium into a Convention on small arms and light weapons'.⁸⁷ In this manner, the Decision unilaterally changed the modality of support and was difficult to reconcile with the Commission's widely portrayed development principles of local ownership and partnership.⁸⁸ This unsolicited Council interference could well provide a better explanation for the

⁸³ Case C-91/05, *Commission v. Council (ECOWAS or Small Arms and Light Weapons)* [2008] ECR I-3651, paras 45–50.

⁸⁴ Article 8, *Council Joint Action (2002/589/CFSP) of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP*, OJ L191/1, (19 Jul. 2002).

⁸⁵ *Development Assistance Committee (DAC) High Level Meeting*, (Paris 2–3 Mar. 2005).

⁸⁶ *Council Decision (2003/543/CFSP) concerning the implementation of Joint Action 2002/589/CFSP with a view to a European Union contribution to combating the destabilising accumulation and spread of small arms and light weapons in Latin America and the Caribbean*, OJ L185/59, (24 Jul. 2003).

⁸⁷ Article 1(2), *Council Decision, (2004/833/CFSP) of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons*, OJ L359/65, (4 Dec. 2004).

⁸⁸ B. Nivet, *Security by Proxy? The EU and (Sub-)Regional Organisations: the Case of ECOWAS*, ISS Occasional Paper 63, 26 (Inst. Sec. Stud. 2006).

Commission's complaint than the fact that the CFSP Decision encroached on development competences.

Undoubtedly, development cooperation and CFSP initiatives regularly touch upon each other's competences. Since the dispute on SALW is the only one that appeared before the Court, it might be assumed that in most cases some kind of *modus vivendi* is found. How is the appropriate legal basis decided upon in practice, and what is the degree of legislator's discretion? Hoffmeister's noticeable effort to disentangle the EU's division of competences in civilian crisis management uncovers a policy-making chaos, with similar efforts in other countries undertaken by different instruments (e.g., EC border assistance in Moldova/Ukraine and CFSP Border Assistance in Rafah), entire policy areas moving from the CFSP to the EC (election observation) and *vice versa* (monitoring missions) and an ESDP mission taken over by a Commission-funded project without further notice (EUJUST THEMIS).⁸⁹

Some criteria that guide the choice of legal basis can nevertheless be identified. When the focus is on funding local or international initiatives, the measure will rather be taken on the legal basis of development cooperation. If the measure involves a large-scale secondment of Member States' experts or when security conditions are unstable, it will instead be adopted under the CFSP.⁹⁰ In practice, the emphasis thus seems to lie on the content rather than the aim of the measure. This is not surprising given that policies in this area will by definition contribute to both development and security objectives. However, these criteria do not explain the full range of policy choices made. To give just one example, it is unclear why counter-piracy training to coastguards in the Gulf of Guinea is financed under a recently launched IfS project (CRIMGO),⁹¹ while similar activities in the Horn of Africa are undertaken by a CSDP mission (EUCAP Nestor).⁹² Whereas it might be argued that this does not constitute a problem as long as inter-institutional agreement is found, these ad hoc arrangements are not conducive to the maximization of expertise and lesson learning.⁹³

This illustrates the need for a consensual division of labour with regard to the security-development nexus. Whereas the overhaul of EU external action by the

⁸⁹ F. Hoffmeister, *Inter-Pillar Coherence in the European Union's Civilian Crisis Management*, in *The European Union and Crisis Management: Policy and Legal Aspects* 173–174, 167, 169–170; 164–166 (S. Blockmans ed., TMC Asser 2008).

⁹⁰ *Ibid.*

⁹¹ European Commission, *New EU initiative to combat piracy in the Gulf of Guinea*, Press Release (Brussels, 10 Jan. 2013).

⁹² Council Decision (2012/389/CFSP) on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP Nestor), OJ L187/40 (16 Jul. 2012).

⁹³ See the contribution of Michael E. Smith to this special issue for a complete analysis of experiential learning in the CSDP.

Lisbon Treaty has led to rising tensions, for instance with regard to the set-up of the EEAS, there are also signs that it has to some extent wiped the slate of inter-institutional suspicion clean. The Council reinvigorated the Göteborg Programme on Conflict Prevention,⁹⁴ the Union is substantiating the nexus with comprehensive strategies for the Sahel⁹⁵ and the Horn of Africa,⁹⁶ and the Agenda for Change, that sets out the new overall framework for development policy, expresses a clear commitment to take the work on the nexus forward.⁹⁷ A very concrete proof of this regained trust is that all Council Decisions setting up CSDP missions now include a standard phrase stating that the HR ‘shall ensure the consistency of the implementation of this Decision with the Union’s external action as a whole, including the Union’s development programmes’.⁹⁸

6 CONCLUSIONS

The commitment to enhance the coherence of EU security and development policies, has incited a range of EU-level initiatives that aim to stop the vicious circle of underdevelopment and insecurity. However, the legal, procedural and institutional divide between CFSP and development cooperation implies that the fine-tuning of these various initiatives is not self-evident. For lack of a systematic EU approach, this has resulted in high levels of improvisation with regard to the deployment of appropriate instruments and the choice of a suitable legal basis. In turn, this has given rise to duplication, fragmentation and inter-institutional tensions, creating the impression that the EU has underestimated the practical consequences of its rhetoric.

The Treaty of Lisbon provides a range of important innovations by mainstreaming the EU external action system and creating functions that bridge the divide between the CFSP and development cooperation. However, in this highly politicized and complex field, constitutional reform can only provide a general framework, while it ultimately remains the task of decision-makers to put it into practice. It is therefore high time the EU finalized its long-due Action Plan on Security, Fragility and Development and makes it ‘a top priority driven by

⁹⁴ Although without major innovations, *Council Conclusions on Conflict Prevention* (3101st Foreign Affairs Council meeting), (20 Jun. 2011).

⁹⁵ EEAS, *Strategy for Security and Development in the Sahel*, (26 Sep. 2011).

⁹⁶ *A Strategic Framework for the Horn of Africa* (3124th Foreign Affairs Council meeting), (24 Nov. 2011).

⁹⁷ *Council Conclusions Increasing the Impact of EU Development Policy: an Agenda for Change* (3166th Foreign Affairs Council meeting), (14 May 2012).

⁹⁸ For instance, Article 14(1) *Council Decision* (2012/389/CFSP), *supra* n. 92.

senior leadership’.⁹⁹ This action plan should set out a strategic vision, clear instructions as well as a detailed allocation of tasks in order to ensure that the whole of the EU is on the same wavelength with regard to the security-development nexus.

⁹⁹ DAC, *Peer Review: European Union* 33–34 (Development Assistance Committee, Organisation for Economic Cooperation and Development (OECD), Paris, 2012).