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The broken European lighthouse

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ABSTRACT

L'Unione Europea ritiene di essere ed è considerata da molti attori come un'area di pace, libertà, sicurezza e giustizia. Molteplici Paesi nel mondo sono stati influenzati dall'esercizio della sua generale attrattiva, del suo *soft power* e, talvolta, delle sue capacità militari ed hanno, in diversa misura, modificato le proprie politiche per entrare a far parte dell'Unione o per sviluppare con essa legami più stretti, imitarne il modello, cercare di raggiungere standard di prosperità e ricchezza ad essa comparabili o sviluppare metodi di *governance* ritenibili altrettanto efficaci.
L'Unione Europea si è circondata di una sfera d'influenza, di un Impero non imperiale, la cosiddetta Eurosfera, per la quale rappresenta essa stessa un faro, un punto di riferimento.
Questa relazione tra l'UE, l'Eurosfera ed il resto del mondo sì è potuta sviluppare grazie all'evoluzione di meccaniche ufficiali che regolano le relazioni esterne dell'Unione, in un percorso molto lungo e non senza ostacoli.

L'idea di costruire una Comunità di Difesa Europea dopo la Seconda Guerra Mondiale, benché presente sin dagli anni 50, ha fatto non poca fatica a concretizzarsi, anche solo in minima parte.
Dopo vari tentativi ed altrettanti nulla di fatto, attraverso il Trattato di Maastricht, dodici Stati europei hanno deciso di dotare la neonata Unione Europea di una Politica Estera e di Difesa Comune (PESC).
Entrato in vigore nel 1993, il Trattato sull'Unione Europea diede vita a questo particolare strumento intergovernamentale, creato ad hoc per dare la possibilità agli Stati Membri dell'UE di parlare con una sola voce, creare una diplomazia comune e gradualmente porre le basi per lo sviluppo di una Unione delle Difese europea, senza tuttavia cedere rilevanti quantità di sovranità a Bruxelles: ad

ogni Stato Membro era infatti garantita per Trattato la possibilità di porre il veto a qualunque tipo di iniziativa o operazione in ambito PESC sulla quale non si riuscisse a trovare un compromesso soddisfacente a livello comunitario.

Il Trattato di Maastricht, tuttavia, fece emergere un nuovo "ordine delle relazioni esterne" a livello europeo, regolato da tre distinti canali di stimolo in ambito di politica estera: la somma aggregata delle azioni dei singoli Stati Nazione rimase il cardine delle politiche estere europee, ma venne tuttavia affiancata anche dalla cornice di coordinamento della PESC – che dava agli Stati Membri UE l'obbligo di informarsi e consultarsi reciprocamente su questioni di politica estera e di sicurezza al fine di aumentare il proprio peso negoziale agendo come un blocco unico – e dalle rappresentanze all'estero della Commissione Europea, con numerose responsabilità relative alle politiche commerciali.

Il fatto che gli Stati europei condividano dunque l'intenzione di formulare insieme le loro politiche estere e di sicurezza comuni, non implica che l'Unione Europea ed i suoi membri si esprimano con una sola voce su ogni possibile tematica internazionale, bensì dimostra che esiste l'intenzione di raggiungere tale obiettivo.

Questo traguardo, raggiunto da una costellazione di piccoli Stati che a varie riprese e per millenni si sono affrontati in sanguinosissimi conflitti, si è reso possibile durante un periodo di grandi cambiamenti nel Vecchio Continente, in concomitanza con la fine della Guerra Fredda, della Cortina di ferro e dell'Unione Sovietica e a ridosso delle guerre e del genocidio che hanno contrassegnato la dissoluzione della Jugoslavia.

La fine della "minaccia sovietica" aveva tolto alla NATO la propria *raison d'être*, aprendo una finestra di opportunità per lo sviluppo di un sistema di sicurezza puramente europeo che peraltro fu incoraggiato dagli stessi Stati Uniti, la cui massiccia presenza militare in Europa occidentale non era più considerata essenziale a fini strategici.

D'altro canto, la creazione della PESC non fu concepita al fine di mettere in discussione l'esistenza del sistema di sicurezza NATO, bensì per creare una maggiore autonomia ed efficacia del frammentato panorama securitario europeo ed alleviare il peso finanziario derivante dal mantenimento di un apparato enorme quale quello funzionale al dispiegamento massiccio di forze statunitensi oltreoceano, che poté essere notevolmente ridotto nel corso degli anni 90.

L'introduzione di questa nuova competenza UE, tuttavia, non si tradusse immediatamente in una compagine capace di fornire risultati apprezzabili: esisteva già quello che lo Storico britannico Christopher Hill definì "*capability-expectation gap*", ovvero il divario tra ciò che l'Unione ha la possibilità di fare ed il risultato che, nella pratica, riesce ad ottenere: per divenire un credibile attore internazionale, l'Unione Europea avrebbe dovuto restringere tale divario e dimostrare la propria

politica estera e di sicurezza comune sul campo – e non solamente a livello di aspirazioni e prospettive future.

In tal senso, la guerra in Jugoslavia ebbe un'enorme importanza simbolica, essendo il primo conflitto aperto avvenuto in Europa dagli anni 40: fu la prima occasione che l'UE ebbe per dimostrare la propria vocazione in difesa di pace, democrazia, giustizia e sicurezza.

L'Unione, tuttavia, fallì nell'impresa di rappresentare un deterrente credibile nei confronti di Miloseviç ed i suoi Stati Membri, benché stessero negli stessi anni elaborando la PESC, agirono unilateralmente ed in modo contraddittorio tra loro nelle prime fasi della crisi, contribuendo attivamente al deteriorarsi della situazione nei Balcani.

Genocidio, milioni di profughi e guerre di conquista furono il risultato diretto dell'incapacità dell'Unione di riempire il divario tra aspettative e capacità effettive durante le guerre in Jugoslavia.

Venne perciò avviata una stagione di riforme all'interno dell'ambito PESC, lanciato dai Governi di Francia e Regno Unito, che portò alla creazione delle Politiche Europee di Sicurezza e Difesa (PESD).

Come frutto di quello che fu chiamato "*St.Malo Process*" (dal nome del paese in cui il Presidente francese Chirac e il Primo Ministro britannico Blair lanciarono, nel 1998, l'idea di costruire progressivamente una Difesa europea all'interno dei meccanismi UE, complementare a quella fornita dalla NATO), l'Unione Europea si dotò della capacità di portare a termine missioni umanitarie, di mantenimento della pace, di gestione delle crisi e missioni militari (le cosiddette "Missioni di Petersberg"), con la capacità di dispiegare fino a 60.000 soldati e numerose altre unità civili.

Furono inoltre creati nuovi corpi, all'interno della struttura comunitaria, atti a gestire l'apparato della PESD, quali il Comitato politico e di sicurezza, lo Staff militare, il Comitato militare ed altri ancora.

Fu anche scelto un Alto Rappresentante per la PESC, Javier Solana, che sarebbe dovuto diventare, gradualmente, il Rappresentante ufficiale dell'Unione per quanto riguarda le relazioni esterne.

Dotata di questi nuovi strumenti, l'UE ha iniziato ad influenzare efficacemente le nazioni vicine con il proprio *soft power*, creando attorno a sè una sfera d'influenza estesa all'Europa dell'Est, ai Balcani, al Medio Oriente, al Nord Africa ed all'Africa sub-sahariana, quell' "Eurosfera" che il Presidente della Commissione Europea Barroso definì "il primo Impero non imperiale".

Con il lancio delle sue prime missioni militari, l'UE divenne, all'alba del nuovo Millennio, un attore strategico a livello globale.

L'Unione Europea, dimenticandosi o cercando redenzione per o persino ignorando il proprio passato coloniale ed il suo presente post-coloniale, cominciò a presentarsi come un faro di solidarietà che, con la sua luce, irradia il resto del mondo.
Il *capability-expectation gap*, tuttavia, continuava ad esistere: l'Unione si ritrovò divisa anche nella gestione delle conseguenze degli attentati dell'11 settembre e dei successivi attentati di Madrid e Londra.
Per quanto riguarda la PESC e la PESD, l'UE trascorse il primo decennio del Ventunesimo Secolo a cercare di superare le proprie contraddizioni, elaborando una coerente Strategia di Sicurezza Europea ed assurgendo ad un ruolo di effettivo attore globale.
Il fallimento della Costituzione Europea e lo stallo istituzionale che ne seguì, tuttavia, portarono in secondo piano lo sviluppo della politica estera europea.
Il Trattato di Lisbona fece emergere una nuova struttura delle Istituzioni europee, più malleabile e porosa. La creazione del Servizio Europeo per l'Azione Esterna (SEAE) e la nomina dell'Alto Rappresentante a Vice-Presidente della Commissione Europea, così come lo smantellamento della "struttura a pilastri" dell'Unione, rivoluzionarono il modo di concepire la PESC e la PSDC (Politica di sicurezza e difesa comune, erede della PESD).
La crisi finanziaria globale, la crisi del debito europea e le altre problematiche che l'UE dovette affrontare dopo l'entrata in vigore del Trattato di Lisbona ed il focus sui problemi interni della PESC da parte dell'Alto Rappresentante Catherine Ashton non fecero progredire di molto lo sviluppo della politica estera UE.
La dimensione esterna dell'Unione, però, tornò attuale a causa delle Primavere Arabe e della crisi migratoria che ne succedette, della crisi ucraina e degli attentati di Parigi.
Gli ultimi anni del mandato di Catherin Ashton ed i primi di Federica Mogherini furono e sono a tutt'oggi contraddistinti da tensioni e problematiche che l'Unione ha dovuto affrontare utilizzando anche i numerosi strumenti PESC e PSDC.
Oggi, chiamata a rispondere a crisi alle porte di casa propria che mettono alla prova i suoi stessi principi e forse finanche la sua stessa esistenza, l'Unione affronta una delle più grandi sfide della sua breve storia: cercare di dimostrare di essere ciò che reclama essere – dimostrare che, quello che chiamo "il faro europeo", l'area di pace, libertà, sicurezza e giustizia, funzioni ancora.

Due particolarissimi strumenti di cui si è dotata l'Unione Europea con il Trattato di Lisbona sono la clausola di solidarietà (Art. 222 TFUE) e la clausola di difesa collettiva (Art. 42.7 TUE).

La prima, la cui attivazione può essere richiesta da uno Stato Membro in caso di disastro naturale, causato dall'uomo o in caso di attentati terroristici, conferisce all'Unione il potere di mobilitare tutti i mezzi a propria disposizione per dare assistenza allo Stato richiedente.
Barocca nelle procedure che portano alla sua effettiva attivazione, essa non è mai stata utilizzata – nemmeno per far fronte alla crisi migratoria che sta tutt'ora affliggendo l'intera Unione, benché questa rientri, a livello teorico, tra le possibili crisi a cui tale clausola può far fronte, in quanto l'entità della stessa è senza precedenti nella storia dell'Europa post-bellica.
In effetti, la gestione della crisi migratoria da parte dell'Unione e dei suoi Stati Membri è stata caratterizzata da ben poca solidarietà – fatto questo lamentato a più riprese, in particolare dalle autorità italiane.
Solo dopo essere stati messi di fronte per anni allo stillicidio di migliaia di persone che avevano tentato la traversata del Mediterraneo in precari barconi, affidandosi a trafficanti di esseri umani ed alla criminalità organizzata, l'UE e i suoi membri hanno deciso di lanciare l'Operazione militare EUNAVFOR MED, con l'obiettivo di rintracciare e rendere non più operative le manovre illecite dei trafficanti attraverso la rotta del Mediterraneo centrale.
Allo stesso tempo, il summit UE-Africa de La Valletta ha cercato di trovare dei modi per contrastare le cause prime della migrazione e di coordinare gli sforzi euro-africani per lo smantellamento delle reti di traffico di esseri umani, mentre le agenzie europee di quelli che prima dell'entrata in vigore del Trattato di Lisbona facevano parte di dure "realtà istituzionali" diverse (GAI da una parte, PESC dall'altra) hanno cominciato a collaborare, per facilitare il coordinamento tra le dimensioni esterna ed interna della crisi, al fine di potere più efficacemente registrare i migranti in entrata, prevenire infiltrazioni terroristiche, ridistribuire i richiedenti asilo tra gli Stati Membri e compiere numerose altre azioni.
La crisi migratoria ha anche costretto l'Unione a mettere in discussione il Regolamento Dublino III che, benché ancora esistente e legalmente vincolante, è stato parzialmente bypassato dal meccanismo di ricollocamento di emergenza lanciato nel 2015.
In seguito agli attentati di Parigi dello stesso anno, inoltre, la permanenza dell'Area di libera circolazione di Schengen è stata messa alla prova, con cinque Stati Membri dell'Unione che, a fine 2015, hanno reintrodotto i controlli alle frontiere.

La clausola di difesa collettiva (Art.42.7 TUE), a differenza della clausola di solidarietà, che ha uno scopo più ampio, può essere attivata da uno Stato Membro solamente in caso di aggressione armata e, per i Paesi NATO, solo dopo avere messo all'opera gli strumenti forniti dall'Alleanza Atlantica.

Essa impone l'obbligo a tutti gli Stati Membri dell'Unione Europea di venire in soccorso allo stato aggredito con tutti i mezzi a loro disposizione, pur in accordo con gli eventuali status di neutralità di alcuni Stati Membri ed ulteriori valutazioni politiche nazionali degli stessi.
L'uso effettivo delle clausole di solidarietà e di difesa collettiva deve comunque essere regolato a livello pratico dall'individuazione delle minacce cui l'UE deve far fronte e dalla conseguente elaborazione esplicita dei modi e degli strumenti più appropriati da utilizzare nel caso del concretizzarsi di tali pericoli.
Le minacce e i rischi per l'UE in ambito PESC sono stati per più di un decennio elencati nella Strategia di Sicurezza Europea del 2003, benché il panorama securitario europeo non fosse rimasto cristallizzato ed avesse continuato a subire negli anni drastici cambiamenti, senza un adeguamento ufficiale agli stessi da parte delle Istituzioni di Bruxelles.
Il Consiglio Giustizia e Affari Interni ha, d'altro canto, adottato una Strategia di Sicurezza Interna, nel 2010, più aggiornata, ma ancora incompleta, in quanto le sfide nel campo della sicurezza europea spesso non possono essere considerate meri problemi di sicurezza interna, avendo anche una marcata dimensione esterna. Allo stesso tempo, problematiche dalla genesi esterna ai confini dell'Unione possono avere sviluppi che devono prendere in considerazione azioni che trascendono il mandato PESC. Nel 2014, dunque, al fine di risolvere questa gestione "a compartimenti stagni" delle strategie securitarie unionali, è stata elaborata l'Agenda europea per la sicurezza, che ha avviato un processo di avvicinamento e cooperazione tra gli ambiti PESC e GAI, in piena coerenza con la fine della "struttura a pilastri" dell'Unione, venuta meno con l'entrata in vigore del Trattato di Lisbona e, entro giugno 2016, l'Alto Rappresentante Mogherini ha intenzione di preparare un documento di ancora più vasta portata che vada a definire una Strategia globale europea, che verrà elaborata coinvolgendo tutte le istituzioni europee, gli Stati Membri e la società civile.
Tale strategia andrà anche a rivedere il ruolo che l'UE dovrà ricoprire nell'ambito delle politiche di vicinato, divenute incrementalmente importanti a livello securitario. Il rapporto tra Bruxelles e l'Eurosfera sta evolvendo: non è più il semplice esercizio di *soft power*, ma un nuovo emergente modello securitario con implicazioni presenti e future senza precedenti.
L'idea, su cui si fonda l'Unione, che una maggiore interdipendenza garantisca automaticamente la pace e prevenga i conflitti, è stata confutata dalla crisi ucraina, causata dall'attrito venutosi a creare nella gestione dei confliggenti interessi dell'UE e della Russia.
Considerando l'Ucraina come un paese dell'Eurosfera, partecipe delle politiche di vicinato orientale dell'Unione e ufficialmente associato con l'UE, Paesi come la Lituania hanno avanzato la proposta di considerare l'asserita invasione della Russia del territorio governato da Kiev e l'annessione della

Crimea come atti di aggressione nei confronti dell'Unione Europea stessa, spianando la strada per una possibile attivazione della clausola di difesa collettiva.
La natura assolutamente pacifista dell'Accordo di Associazione tra UE e Ucraina, tuttavia, rende illegale nella cornice unionale una tale interpretazione dei fatti.
Bruxelles ha dunque deciso di concorrere alla gestione della crisi in modi alternativi.
A livello diplomatico, la presenza dell'Unione è stata assolutamente marginale, avendo essa implicitamente delegato a Francia e Germania l'elaborazione di condizioni di pace condivise, una passività questa che Federica Mogherini sembra voler far finire con la pubblicazione della Strategia globale europea.
L'Unione ha agito attraverso altre vie, applicando misure restrittive nei confronti dei territori di Crimea e Sebastopoli e della Russia, il sollevamento delle quali è collegato all'implementazione degli Accordi di Minsk II, negoziati da Francia, Germania, Ucraina e Russia, senza un coinvolgimento diretto di altri membri dell'Unione che implementano le sanzioni stesse e che subiscono le conseguenti ritorsioni russe.
Una missione civile in ambito PSDC, denominata EUAM Ukraine, è stata inoltre dispiegata per fornire supporto alle autorità ucraine nella formulazione delle strategie e delle riforme del settore securitario nazionale, nel rafforzamento dello stato di diritto e nello sviluppo di istituzioni efficaci per il mantenimento della legge.
La crisi ucraina può essere dunque utilizzata come esempio per dedurre quale sia l'attuale approccio dell'Unione nei riguardi della propria politica estera e di sicurezza comune.
Secondo i Trattati istitutivi, la PESC è il frutto delle decisioni prese dal Consiglio europeo e viene eseguita da numerosi corpi e rappresentanti dell'UE.
La realtà fattuale, tuttavia, va ben al di là dei limiti stabiliti dall'interpretazione teorica del diritto europeo: la PESC sembra essere regolata non dai soli input del Consiglio europeo, bensì da quelli di una molteplicità di attori, rispondenti a input diversificati: il Consiglio UE, il SEAE, l'Alto Rappresentante, il coordinamento tra Consiglio degli Affari Esteri e Consiglio per Giustizia e Affari Interni, a cui si aggiunge, nel caso specifico ucraino, l'acquiescente delega senza mandato a Francia e Germania della gestione dello sforzo diplomatico nella risoluzione della crisi.
Questa gestione ibrida della PESC, benché possa denotare una evoluzione della stessa in senso olistico, transettoriale e paneuropeo, può funzionare nel medio-lungo periodo solamente in presenza di una maggiore integrazione politica europea che al momento l'Unione non possiede.

La battaglia tra solidarietà e confini che continua tutt'oggi, così come il bivio davanti a cui l'Unione si trova, dovendo scegliere tra una maggiore integrazione politica ed il rischio di diventare (o

restare) un'Europa con 28 voci spesso incoerenti tra loro, dimostrerà, nel tempo, se il faro europeo sia rotto o funzionante. Certo è che il divario tra capacità ed aspettative è ancora ampio ed attende di essere riempito. Al fine di avere una Unione veramente efficace, sarebbe dunque necessario che i cittadini europei dessero mandato ai propri Governi di alimentare il fuoco del faro dell'integrazione europea, giungendo ad una maggiore integrazione politica.

INTRODUCTION

Exactly seventy years ago, the member States of today's EU (or their predecessors) were finding their way out of the most bloody massacre Humankind has ever witnessed: World War II. Those same warmongering States that had been at each other's throats throughout their entire History, warring against one another in all possible ways, now share the same flag, the same anthem and the same values. Most of them share the same currency, the same market and they have gone as far as building a Common Foreign and Security Policy and a Common Security and Defence Policy.

The European Union has built a safe area of peace, freedom, security and justice whose example could even be inspirational for the rest of the World, whose soft power leadership has brought to many positive results in many parts of the Planet – I will metaphorically associate it to a lighthouse, a European beacon of hope – hope for a better future, because if Europe has managed to end its internal conflicts and build a Union, then everyone can.

Thinking back at European History, torn by many of the bloodiest wars ever battled, such a situation might seem a miracle, a dream of peace of unreachable magnitude.

Yet it is the framework in which our lives are currently set.

Currently.

The European Union is today facing crises that might be undermining its own existence.

The European Debt Crisis has taken its toll on the European integration process, but there are other threats looming over it, coming from outside the Union: the Migrants crisis is testing the solidity of

the Schengen Area and the spirit of solidarity that is supposed to be at the core of the founding principles of the EU, whereas the Ukrainian crisis has strongly challenged the conception of a Union that is supposed to be speaking more or less with one voice, in a coherent way and that has even come to start a debate on the collective defence of the European Union and its role in the protection of its closer partners.

Faced with this many and difficult crises, does the European lighthouse possess the tools to keep functioning? Or have the damages that have this far been inflicted broken it beyond repair?

In this Thesis, I am going to try and give an answer to this question, first giving a historical and juridical background of the history of EU's CFSP and CSDP and then analysing the conception and possible uses of the Solidarity Clause (Article 222 TFUE) and the Collective Defence Clause (Article 42.7 TUE) and their possible utility in the management of the Migrants crisis and the Ukrainian crisis.

CHAPTER I

Common Foreign and Security Policy and Common Security and Defence Policy

1. Before Maastricht

The idea of building a European Defence Community after World War II was conceptualized in the 50s as an initiative by French Defence Minister René Pleven.

His plan was to build a European Army by integrating small infantry units from all western European countries.

Chancellor Adenauer, supported by US President Eisenhower, saw in the Pleven Plan a way to re-militarize the Federal German Republic, to enter NATO, rescind the Occupation Statute imposed to his country after the fall of National Socialism, and defend itself from any possible Soviet-backed invasion from the Democratic German Republic – a fear that had been enhanced by the Korean War that had burst right during the negotiations for the ECSC Treaty ([1]).

After some alterations, western European Governments started discussing the establishment of a European Defence Community (EDC), in order to *de facto* build a western European common military force.

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1 DESMON DINAN, *Europe recast – a History of European Union* (Palgrave McMillan, 2014), pp.66-67

2 JEAN LACOUTURE *Pierre Mendès-France* (New York: Holmes and Meier, 1984) p.268

3 WORLD POLITICS n° 2 *Paris from EDC to WEU –*, pp. 193-219

4 DESMON DINAN *Europe recast – a History of European Union* (Palgrave McMillan, 2014) pp.67-68

In France, divisions over EDC were "complicated" and "irrational"([2]): an influential and old politician such as former Prime Minister Edouard Herriot came to state that the EDC would mean "the end of France", expressing the fear of many amongst his colleagues that their State, stripped of army and empire, would be condemned to the same irrelevance as the other parties building the European Army (the small Benelux countries and the two defeated Axis Powers, struggling to gain back full sovereignty and an international role) and that world strategy would be dealt with thereafter only by United States and United Kingdom in what he called an "Anglo-Saxon Axis" ([3]).

In the end, the EDC never came to light because, in 1954, the French Parliament did not ratify the Treaty establishing it, making Western Europe rebound into the extension of the Brussels Treaty Organization -an international intergovernmental organization covering cultural, educational and military issues whose members were France, UK and Benelux- to the former Axis Powers, thus creating what came to be known as the Western European Union, through which the FGR was able to achieve its goal of entering NATO and being remilitarized ([4]).

European military coordination, security and collective defence remained predominantly NATO's domain, becoming therefore a task shared with the United States, which played a pivotal role inside the Alliance itself ([5]).

Making European States speak with a single voice in the international arena was a goal thereafter brought on in several ways and at several degrees throughout the subsequent decades: perhaps the most notable case was the one launched in 1970, when a council chaired by Étienne Davignon of the Belgian Foreign Office with mandate from the Council of European Communities, recommended that EC member States should try and speak with a single voice on international problems.

This "Davignon Report" inspired and paved the way for the building of the European Political Cooperation ([6]), an informal intergovernmental consultation mechanism for EEC member States on external relations issues ([7]).

In the early 1980s, the EEC governments, though, started to show concern about the fragmentation between the EEC system and the newly developed and institutionally separate EPC in foreign

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2 JEAN LACOUTURE *Pierre Mendès-France* (New York: Holmes and Meier, 1984) p.268

3 WORLD POLITICS n° 2 *Paris from EDC to WEU* –, pp. 193-219

4 DESMON DINAN *Europe recast – a History of European Union* (Palgrave McMillan, 2014) pp.67-68

5 NORHEIM-MARTINSEN *The EU and military force* (Cambridge University Press, 2013), p.3

6 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012)

7 R.H GINSBERG *Foreign Policy Actions of the European Community: the politics of scale* (Boulder: Lynne Rienner, 1989)

affairs ([8]). One of the aims of the Single European Act (an aim expressed by the use of the word "single") was to connect these two institutional strands more closely, but it did not effectively reach this goal ([9])([10]).

A new leap forward in the development of common European foreign and defence policies, ultimately happened only with the end of the Cold War, which heralded the dawn of a new era for the European Community.

2. The Maastricht Treaty

In the midst and aftermath of the huge change to the East-West balance of power in Europe caused by the dissolution of the Soviet Union and the gradual but inexorable and quick collapse of the Communist bloc, the Maastricht Treaty turned the EEC into the EC and established the European Union.

Entered into force in 1993, the Treaty on the European Union was designed to expand the scope of European integration, to reform the EC's institutions and decision-making procedures and to bring about the European Monetary Union, furthering the goal of the 1957 Treaty of Rome of an "ever-closer union" by bringing together the EC, the ECSC and Euratom as a part of an entirely new entity, to be called "European Union".

The EU, though, was not simply the sum of the 3 precedent Communities. It had a peculiar organizational structure that came to be known as "Temple structure" because it relied on the fact that the Union would be a "roof" covering or sustained by three metaphorical founding pillars:

1. The Communities – European Community, European Coal and Steel Community and Euratom, fused together as European supranational communities, with their own decision-making procedures for developing, adopting and policing policies;
2. The Common Foreign and Security Policy (CFSP), strictly intergovernmental;
3. The Justice and Home Affairs (JHA), also strictly intergovernmental ([11]).

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8 The amalgamation of the Community and EPC structures was one of the central aims of the so-called Genscher/Colombo proposals made jointly by the German and Italian governments in November 1981; see P NEVILLE-JONES *The Genscher/Colombo Proposals on European Union* (1983). On the institutional practice of those early years, see S NUTTALL, *Interaction between European Political Cooperation and the European Community* (7 Yearbook of European Law 211, 1987).

9 On the links between the two institutional settings after the Single European Act, see M LAK *Interaction between European Political Cooperation and the European Community (external): Existing Rules and Challenges* (1989) On the weakness of the EPC legal regime even after the Single European Act, see R DEHOUSSE, JHH WEILER *EPC and the Single Act: From Soft Law to Hard Law?* in M HOLLAND *The Future of European Political Cooperation: Essays on Theory and Practice* (Basingstoke, Macmillan, 1991)

10 MARISE CREMONA, BRUNO DE WITTE *EU foreign relations Law – essays on European Law* (Hart Publishing, 2009) p.7

In Maastricht, therefore, among the many deep reforms and innovations to Treaties, Communities, practices, symbols and significance of the European Communities, member States gave renewed importance to the goal of making Europe – or, better, the member States of the EU – speak with one voice to the world.

The Maastricht Treaty officially introduced the expression "Common Foreign and Security Policy" in the European vocabulary. It rallied together all the means that EU member States had and used in order to develop a common diplomacy with the goal of ensuring the security of the Union; an intergovernmental tool that collocated itself in the continuity launched in 1969 by the Hague Summit with the final aim of creating a European political union ([12]).

The CFSP, as it was conceived in Maastricht, was quite different from all other EU competences.

It clearly was not an exclusive competence of the Union: it did not in any way deprive Nation States of their own competences on diplomacy nor did it suppress national foreign policies ([13]).

It was not a shared competence either, because States were given no limit whatsoever to their national sovereignty on foreign policy matters (except for those imposed by general International Law); nor was it a complementary competence because it did not integrate national foreign and security policies: the CFSP produced the policies of the European Union as a whole.

Moreover, in most policy areas where the EU could act, the Commission was empowered to submit a proposal for a legal act; yet, for what concerned the CFSP, it did not have this power ([14]).

The Commission, however, according to the TEU, should have been "associated with all aspects of CFSP" and it had an equal right of initiative on external relations with member governments ([15]), differently from Pillar I, where it had the only right of initiative.

The European Parliament was to be kept informed of initiatives related to foreign and security policies and the European Court of Justice had no role at all, in order to ensure the continuation of Member State pre-eminence in the policy ([16]).

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11 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) pp. 29-30

12 Sous la direction d' ALAIN FENET: JEAN-FRANÇOIS AKANDJI-KOMBÉ, ALAIN FENET, ANNE-SOPHIE LAMBLIN-GOURDIN, GWENAËLLE PROUUTIÈRE-MAULION *Droit des relations extérieures de l'Union européenne* (Lexis Nexis Litec, 2006) p.255

13 ibid. p. 260

14 *http://ec.europa.eu/citizens-initiative/public/competences/faq?lg=en#q1*

15 GEOFFREY EDWARDS, ALFRED PIJPERS *The politics of European Union reform – the 1996 intergovernmental conference and beyond* (A Cassel imprint, 1997) p. 201

16 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) pp. 242-245

The Commission transformed its small staff dealing with EPC into a new Directorate General for External Political Relations, but its responsibility over CFSP remained merely nominal because of its lack of competence ([17]).

All of these characteristics made the Common Foreign and Security Policy its own category of EU competence, one that was built and thought of in order to let States keep all power in their own hands giving each government the ability to veto any policy initiative or operation in a very conservative lowest common denominator kind of policy-making ([18]).

In fact, the establishment of the CFSP cannot really be considered a huge normative revolution.

According to the European Council held in Lisbon in June 1992, it "should be considered as a successor to the activities carried out by member States up to that point in the framework of the European Political Cooperation (EPC) by virtue of the Single European Act" ([19]).

Yet it also aimed to give the feeling that the European Union might one day play a more active international role, with the ultimate goal, cited in the Treaty itself, of "framing a common defence policy which might in time lead to a common defence" ([20]).

The five key objectives of CFSP have been first established in Article J.1.2 of the Maastricht Treaty:

- Safeguarding the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;
- Strengthening the security of the Union;
- Preserving peace and strengthening international security, in accordance with the principles of the United Nations Charter (including those on external borders);
- Promoting international cooperation;
- Developing and consolidating democracy and the rule of Law and respect for human rights and fundamental freedoms ([21]).

Overall, a new European "external relations order" emerged with Maastricht, founded on three distinct sources of foreign policy stimulus: first of all, individual national action remained the key to external relations in Europe, since member States retained their own foreign, defence and security policies, pursuing them independently from the Union's framework; secondly the CFSP

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17 GEOFFREY EDWARDS, ALFRED PIJPERS *The politics of European Union reform – the 1996 intergovernmental conference and beyond* (A Cassel imprint, 1997) p. 201

18 ROBERT DOVER *The EU's foreign, security and defence policies* (Oxford University Press, 2006) p.240

19 *Bulletin CE 6-1992* p.19

20 *Art. J.4.1* MAASTRICHT TREATY ON THE EUROPEAN UNION (1993)
The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence.

21 *Art. J.1.2* MAASTRICHT TREATY ON THE EUROPEAN UNION (1993)

coordinating framework, which placed on member States a responsibility to "inform and consult each other on matters of foreign and security policy" with the aim of increasing the international leverage they could exert working together; finally the Commission's overseas representations, with extensive responsibilities over trade policies. ([22])

By all means, however, the fact that member States retained such a large part of their national sovereignties on what the CFSP was concerned did not imply that they could actively create obstacles to the wider European framework or act in ways that could be deemed "likely to impair its effectiveness as a cohesive force in international relations".

Since 1993, EU member States are bound by a Treaty to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity" ([23]).

Coherent with this spirit, they provided the Union two key instruments in order to pursue a common foreign and security policy.

The first were *common positions*: they required member States to adopt national policies that complied with a stated EU position on a particular issue ([24]);

The second were *joint actions*: operational actions agreed by member States, falling under the flag of the EU. They required a unanimous vote and went beyond mere consultation (as had been the case under the EPC framework), obliging member States to conform to the positions they adopted([25]). They did not have a normative character since they "address specific situations" and were for use "where operational action by the Union is deemed required". Their essential function was to organise international action, which it would be decided should be taken in the name of the Union ([26])([27]).

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22 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) pp. 242

23 *Art. J.1.4* MAASTRICHT TREATY ON THE EUROPEAN UNION (1993)

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council shall ensure that these principles are complied with.

24 *Art. J.2.2-3* MAASTRICHT TREATY ON THE EUROPEAN UNION (1993)

2. Whenever it deems it necessary, the Council shall define a common position. Member States shall ensure that their national policies conform to the common positions.

3. Member States shall co-ordinate their action in international organizations and at international conferences. They shall uphold the common positions in such forums.

25 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) p. 244

26 MARISE CREMONA, BRUNO DE WITTE *EU foreign relations Law – essays on European Law* (Hart Publishing, 2009) p.54

27 *Art. J.3* MAASTRICHT TREATY ON THE EUROPEAN UNION (1993)

Through these instruments provided by the Maastricht Treaty, the new-born EU wanted to empower an embryo of Common Foreign and Security Policy going beyond a mere intergovernmental political cooperation. This step forward towards a European common Defence can be considered big, small, insufficient, over-reaching, ambitious, useless, but it is the fruit of the years in which it happened and its development did not stop in 1993.

3. How the CFSP came to be possible

There can be many possible narratives concerning the CFSP.

The fact that European States share the intention of formulating together their collective foreign security policies does not entail that the EU speaks as one on every possible international issue, but it does show that an effort exists on going towards a similar direction. At the very least it is an other and definitive guarantee that member States will not go to war against each other and not only because it would be economically inconvenient, but because they are a Union of citizens with, ideally, a common voice.

Europe, that had being torn by internal wars throughout all of its History, had committed itself to trying and identifying as a whole some external policies' common ground, in a "progressive framing of a common defence policy" ([28]). Suddenly, the idea of a common European defence, which had been floated on several occasions since the first attempt to establish the EDC in 1952, became feasible and took root.

The years of the framing of CFSP were ones of great change in Europe.

In the night of 9th November 1989 the Berlin Wall had been brought down. On 3rd October 1990 Germany was re-unified. The Eastern bloc abandoned communism and all Soviet Republics declared their independence. On 27th June 1991 the Yugoslav Wars burst. In December 1991 the USSR ceased existing and the TEU to be signed in February 1992, was agreed by the European Council ([29]).

The end of the "soviet threat" had huge consequences.

There was no more such a compelling need for a "buffer zone" between Western and Eastern Europe (at least not from a European perspective): the States of the European Free Trade Area (EFTA) did not need not to enter the EU anymore – nor did the other States of the Eastern bloc. The end of the iron curtain had made possible the eastern enlargement of the EU.

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[28] *Art. J.4.1* TREATY ON THE EUROPEAN UNION
The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence.

[29] JOYLON HOWORTH *Security and Defence Policy in the European Union* (The European Union Series, 2007) p.23

The North Atlantic Treaty Alliance had lost its *raison d'être*. Europe did not need USA's protection from the USSR anymore, because the "Evil Empire" was no more ([30]). This existential turmoil in the womb of NATO opened a window of opportunity in which the EU-to-be was able to reflect on, conceive and ultimately build the CFSP, but it did not entail the end of the Alliance or of American presence in Europe nor even the will of Western European States for that or anything similar to happen. Much of the remainder 1990s was essentially marked by hesitation and scepticism towards what could have become an independent European Defence on the part of key member States, especially Britain ([31]), Germany and new Central and Eastern European (EEC) Governments that looked at US engagement in Europe as a particularly important feature.

A boost to the idea of a "more autonomous" Europe, though, came from the United States themselves.

The creation of the common framework on external policies had set the basis for its own evolution: it allowed US President Bill Clinton, who had taken office in 1993, to try and seize the opportunity of creating a "peace dividend" and limit its country's involvement in mainland Europe ([32]), thus alleviating the US financial burden of maintaining military bases overseas.

Clinton's plan of re-defining NATO not as an Alliance opposing to an adversary, but as a "security community", disengaging therefore from the soon-to-be obsolete Cold War posts and deployments in the "Old World", would only have been possible if the EU member Governments proved capable of shouldering more of the security burden in Europe – and there came the first test for the CFSP.

4. The Yugoslavian Wars

Whereas the establishment of the CFSP was a huge milestone in the wider European History, a huge difference existed between theory and practice, between "what the EU has been talked up to do and what it is actually able to deliver", a characteristic that British Historian Christopher Hill in 1993 defined as "capability – expectations gap" ([33]). Hill argued that if the EU had to be a more

30 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) pp. 242

31 JOYLON HOWORTH *Security and Defence Policy in the European Union* (The European Union Series, 2007) p.23

32 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) pp. 242

33 CHRISTOPHER HILL *The capability-expectations gap or conceptualizing Europe's international role* from Journal of Common Market Studies (1993) pp. 305-328

credible international actor, the gap had to be closed, which meant that European foreign policy had to be demonstrated in actual behaviour rather than aspirations or prospects ([34]).

The first time the EU, brandishing its new Common Foreign and Security Policy, could have got closer to closing the gap was with the outburst of the Yugoslavian Wars.

This conflict had a huge symbolic importance, because it was the first all-out military confrontation happening in Europe after World War II and it gave the chance to the Union of proving its continental vocation for peace, democracy justice and security.

The wars started by the end of March 1991, during the negotiations of the Maastricht Treaty, with the Soviet Union still (barely and nominally) standing, when Croatia declared its independence from the Socialist Federal Republic of Yugoslavia, followed in June by Slovenia.

Still historically and institutionally linked by the memories of the World Wars, French and British Governments held historical allegiances with Serbia, while Germany eagerly armed Croatian and Slovenian insurgents. This initial divergence on the Yugoslavian dissolution created problems in formulating a European common response, and, going even further from this intent, Germany, on 23rd December 1991, unilaterally recognized Slovenia and Croatia as sovereign States, hastening the political and military crisis of the Milosević regime, prompting the rest of the EU governments to recognize them as well in January 1992.

The declarations of independence and subsequent European recognitions helped the Bosnians gain enough confidence as to make a referendum for independence pass not one month later, thus provoking an extraordinary escalation of the conflict that led to the death of almost 100 000 people, incredibly violent events such as the siege of Sarajevo and ultimately the first genocide in Europe since 1945.

This extremely violent outcome was also the result of the inability on the part of the European Union of deploying a credible military threat that would have prevented Serbians from breaching all international agreements brokered with Milosević and of the fact that the EU was only capable of deploying economic leverage in order to try and bring the conflict to a close, since they were the only means that could find the unanimous approval of all EU governments ([35]).

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[34] CHRISTOPHER HILL *Closing the capability-expectations gap* in JOHN PETERSON & HELENE SJURSEN *A Common Foreign Policy for Europe? Competing visions of the CFSP* (European Public Policy Series 1998) pp. 18-38

[35] MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) pp. 245

The civil war and the Yugoslav National Army's crimes were put to an end only after the NATO-led Operation Deliberate Force, with widespread airstrikes against Bosnian Serb positions, supported by UN rapid reaction force artillery attacks ([36]).

Genocide, displacement of millions and imperial conquest by Slobodan Milosević had been the indirect result of the failure on the side of the European Union of speaking as one even after having created the framework of CFSP.

Something needed to be changed and the capabilities-expectations gap needed to be filled.

5. The Amsterdam Treaty and the ESDI

Treaty reform continued in Amsterdam in 1996, but there was no much progress as far as the CFSP was involved. Among the most notable changes that were introduced was "constructive abstention", where a member could abstain in a vote where unanimity was required without thereby blocking the success of the vote. This was intended to allow states to symbolically withhold support while not paralysing decision-making ([37]).

The European Council, in Amsterdam, also introduced "common strategies", to be decided unanimously by the European Council on the basis of recommendation by the Council and implemented by adopting joint actions and common positions that can be achieved through a qualified majority voting unless a member State argues that the measure runs contrary to its core national interests ([38]).

It established the Policy Planning and Early Warning Unit (henceforth called "Policy Unit") as well, and created the figure of the High Representative for Common Foreign and Security Policies (henceforth called "HR/CFSP"), also to act as Secretary-General of the EU Council.

As such, the person holding the latter position, Jürgen Trumpf, became the first High Representative for the CFSP from 1st May 1999 (date when the Amsterdam Treaty entered into force) to 18th October 1999, when Javier Solana succeeded him by virtue of the Cologne European Council that appointed him.

These initiatives meant to bring external relations closer to Brussels, with Representatives of the Union performing more visible functions than in the past.

In Amsterdam, the Council also incorporated the Petersberg Tasks among EU competences.

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36 TARCISIO GAZZINI *The changing rules on the use of force in international law* (Manchester University Press 2005) p.69

37 E. PHILIPPART, MONIKA SIE DHIAN *Flexibility and the new Constitutional Treaty of the European Union* in JACQUES PELKMANS, MONIKA SIE DHIAN HO, BAS LIMONARD *Nederland ed de Europese grondwet* (Amsterdam University Press 2003) pp.128-136

38 *Art. 210* AMSTERDAM TREATY ON THE EUROPEAN UNION (1999)

These tasks had been first listed in 1992 during a ministerial summit of the Council of the WEU that had been held at the Petersberg Hotel, near Bonn, Germany.

They were designed to cope with the possible destabilizing of Eastern Europe ([39]) and were vague in nature, relying on the limited means of the Western European Union organization.

In the outskirts of Bonn, in 1992, member States had agreed to deploy their troops and resources from across the whole spectrum of the military under the authority of the WEU ([40]); in Amsterdam, four years later, the tasks were incorporated in the TEU: from that moment on, the EU claimed for itself the commitment of making available a wide range of military forces for European-led military tasks, including contributions to the collective defence in accordance with Article 5 of the Washington (NATO) Treaty ([41]), humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peace-making ([42]).

In a parallel way, coincidently with negotiations in Amsterdam, in June 1996 a Ministerial Meeting of the North Atlantic Council was held in Berlin, during which it was agreed that the WEU would oversee the creation of a European Security and Defence Identity (ESDI) within NATO structures, in the "peace dividend" optic that Clinton was using in building the new order of transatlantic relations.

Through the ESDI, NATO would be able to give mandate to WEU countries to act militarily where the United States wished not to, and at the same time let them use the Atlantic Alliance's assets if they so wished.

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39 EUROPA GLOSSARY – *Petersberg Tasks*

40 THEO KOELE *West-Europa wil vrede afdwingen* (Trouw 1992)

41 *Art. 5* NORTH ATLANTIC (WASHINGTON) TREATY (1948)

> *The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.*
>
> *Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.*

42 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) pp. 247

6. From St.Malo to Cologne: the foundations of the ESDP

In the second half of the 90s the opportunity emerged for EU leaders to put the issue of a collective European Defence back on the agenda when the French Government led by Jacques Chirac was unexpectedly approached by British officials seeking to advance a EU-based security solution ([43]).

British caution in creating means that could allow the EU to make NATO unnecessary had in fact been softened by the election of pro-European Prime Minister Tony Blair, from the Labour Party.

Blair believed that the issue of a European defence cooperation would eventually be brought at the core of the European programme and felt the absolute need to prevent France, Italy and Spain to force the issue in the agenda in a way that disadvantaged the United Kingdom and that would not see NATO as the security institution of choice ([44]).

The French government, on the other hand, was traditionally less transatlantic in nature and saw in Blair's opening an unexpected opportunity to reduce American influence in Europe.

Chirac and Blair held therefore, in December 1998, a summit in St. Malo, France, producing a "Joint Declaration on European Defence" which stated that "*the European Union needs to be in a position to play its full role on the international stage"*([45]).

"To this end, the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises (…) acting in conformity with our respective obligations in NATO, we are contributing to the vitality of a modernised Atlantic Alliance which is the foundation of the collective defence of its members. ([46])*"*

As proved by the text itself of the joint declaration, NATO would still play the central role in European collective defence, yet steps towards a dichotomy in its management were taken, also stating that *"The reinforcement of European solidarity must take into account the various positions of European states. The different situations of countries in relation to NATO must be respected.([47])"*

France and UK also called for "appropriate structures" and "sources of intelligence" without unnecessary duplications, calling for a strict EU-WEU and EU-NATO cooperation as well as for

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[43] HORWATH *Britain, NATO, CESDP: fixed strategies, changing tactics* (European Foreign Affairs Review 16/3 2000) pp.1-2

[44] ROBERT DOVER *For Queen and company: the role of intelligence in the UK arms trade* (Political Studies 2007) pp.683-708

[45] JACQUES CHIRAC, TONY BLAIR *Art.1 St. Malo Declaration* (4th December 1998)

[46] JACQUES CHIRAC, TONY BLAIR *Art.2 St. Malo Declaration* (4th December 1998)

[47] *ibid.*

"strengthened armed forces that can react rapidly to new risks" ([48]) finally declaring their determination to unite in their efforts to enable the EU to give concrete expression to those objectives ([49]).

The Amsterdam leftovers on matters concerning the CFSP were taken up by successive European Councils that followed the St. Malo Declaration and whose negotiations were conducted outside formal EU frameworks in order to avoid Commission's and Parliament's inputs ([50]).

On 3rd and 4th of June 1999 the European Council held a Summit in Cologne, under German Presidency.

The Heads of Government of EU countries reunited there decided "*to give the European Union the necessary means and capabilities to assume its responsibilities regarding a common European policy on security and defence*" and to overtake from the Western European Union the Petersberg Tasks ([51]). The WEU Council of Ministers, therefore, at a Summit held in Marseille on 13th November 2000, agreed to begin transferring the organisation's capabilities and functions to the European Union ([52]).

NATO's position on the development of a common European Defence launched in Cologne, also appeared overtly expressed in the Presidency conclusions of the European Council, where it is stated that "*a stronger European role will help contribute to the vitality of the Alliance for the 21st century*" and that it "*would be compatible with the common security and defence policy established within the framework of the Washington Treaty. This process will lead to more complementarity, cooperation and synergy." ([53])*.

The European Union would henceforth not only be able to launch EU-led military operations using national or multinational European means, but also to launch them using NATO assets and

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48 JACQUES CHIRAC, TONY BLAIR *Art.4 St. Malo Declaration* (4th December 1998)

49 JACQUES CHIRAC, TONY BLAIR *Art.5 St. Malo Declaration* (4th December 1998)

50 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) pp. 246

51 COLOGNE EUROPEAN COUNCIL *Presidency Conclusions* Annex III: *European Union Council Declaration on strengthening the common European policy on security and defence* pp.33-42

52 WESTERN EUROPEAN UNION COUNCIL OF MINISTERS *Marseille Declaration* (13th November 2000)

53 COLOGNE EUROPEAN COUNCIL *Presidency Conclusions* Annex III: *European Union Council Declaration on strengthening the common European policy on security and defence* pp.33-42

> *The NATO Washington Summit welcomed the new impetus given to the strengthening of a common European policy on security and defence by the Amsterdam Treaty and confirmed that a stronger European role will help contribute to the vitality of the Alliance for the 21st century. The NATO summit furthermore stressed that the development of a CFSP, as called for in the Amsterdam Treaty, would be compatible with the common security and defence policy established within the framework of the Washington Treaty. This process will lead to more complementarity, cooperation and synergy.*

capabilities, implementing the arrangements based on the Berlin decisions on ESDI in 1996 and the Washington NATO summit decisions of April 1999 ([54]).

All of the provisions taken in Cologne became the foundations of the European Security and Defence Policy (ESDP); but the European Council did not only debate about ESDP: it also decided, for the first time, a common strategy in the framework of CFSP, as permitted by the Amsterdam Treaty. The "Common strategy on Russia" was outlined in article 78 of the Presidency Conclusions and was decided in order to strengthen EU bonds with the country, in a relationship to be extended "far into the next century" and which was considered "crucial to maintaining peace and security in Europe and beyond and to meeting common European challenges" ([55]). This approach to relations with the greatest and most powerful of the Union's Eastern neighbours would rapidly change in the months to come.

7. Helsinki: the headline goals and Chechnya

During the Year 1999 two conflicts started in the immediate neighbourhood of the Union: Milosević had engaged a new war in the Former Republic of Yugoslavia against the autonomist region of Kosovo, while Russia had attacked another autonomist rebel region in the Caucasus, Chechnya, naming its whole population as "terrorist" and therefore leading the Russian army to bomb, siege and threaten to destroy the city of Grozny as well as to dispose the forcible displacement of the population of entire cities - among several other violations of human rights ([56]).

The Kosovo War saw the EU playing still only a small and fractured part and the conflict was once again solved only after the military intervention of NATO, led by the Clinton Presidency of the United States ([57]).

This new show of weakness in the Balkans and the outburst of the new military crisis in Russia – State with which the EU had just declared in Cologne of wanting to build a long-standing relationship in order to maintain peace in Europe – prompted even more the European Council to keep developing the ESDP at the European Council summit held in Helsinki in mid-December 1999.

In that occasion, the EU underlined its determination to develop an autonomous capacity of taking decisions and to launch and conduct EU-led military operations in response to national crises even

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54 COLOGNE EUROPEAN COUNCIL *Presidency Conclusions* Annex III: *European Union Council Declaration on strengthening the common European policy on security and defence par.4* pp.33-42

55 COLOGNE EUROPEAN COUNCIL *Presidency Conclusions* Art. 78 "Common strategy on Russia"

56 HELSINKI EUROPEAN COUNCIL *Presidency Conclusions* Annex II: *Declaration on Chechnya*

57 MAMMARELLA, CACACE *Storia e politica dell' Unione Europea* (Editori Laterza, 2013) p.287

outside NATO's framework. It was anyhow adamant on the fact that this would not mean that the Union would engage in building its own Army ([58]).

The European Council also individuated some "headline goals" for the ESDP to reach in the following years, in particular it was agreed that, by 2003, Member States would need to be able to deploy and sustain for at least one year military forces up to 60.000 persons capable of the full range of the Petersberg tasks and that new political and military bodies and structures would be established within the Council to enable the Union to ensure the necessary political guidance and strategic direction to such operations ([59]).

These bodies would be the Political and Security Committee (PSC), located in Brussels and composed of national representatives of senior/ambassadorial level, with the power of exercising political control and strategic direction of operations in the case of a military crisis; the Military Committee (EUMC), composed of the Chiefs of Defence, to meet as and when necessary, giving military advice to the PSC and implementing its guidelines; the Military Staff (EUMS) that would provide military expertise to the Council, performing early warning, situation assessment and strategic planning for the Petersberg tasks ([60]). Interim bodies absolving the functions of the to-be official bodies over defined were already operational by 1st March 2000 ([61]).

Also, EU Member States were recommended to list a "capabilities catalogue", an inventory of national and collective resources that could be marshalled within the rapid reaction framework([62]).

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58 HELSINKI EUROPEAN COUNCIL *Presidency Conclusions* Art.27

59 HELSINKI EUROPEAN COUNCIL *Presidency Conclusions* Art.28

> *28. Building on the guidelines established at the Cologne European Council and on the basis of the Presidency's reports, the European Council has agreed in particular the following:*
> *- cooperating voluntarily in EU-led operations, Member States must be able, by 2003, to deploy within 60 days and sustain for at least 1 year military forces of up to 50,000-60,000 persons capable of the full range of Petersberg tasks;*
> *- new political and military bodies and structures will be established within the Council to enable the Union to ensure the necessary political guidance and strategic direction to such operations, while respecting the single institutional framework;*
> *- modalities will be developed for full consultation, cooperation and transparency between the EU and NATO, taking into account the needs of all EU Member States;*
> *- appropriate arrangements will be defined that would allow, while respecting the Union's decision-making autonomy, non-EU European NATO members and other interested States to contribute to EU military crisis management;*
> *- a non-military crisis management mechanism will be established to coordinate and make more effective the various civilian means and resources, in parallel with the military ones, at the disposal of the Union and the Member States.*

60 HELSINKI EUROPEAN COUNCIL *Presidency Conclusions* Annex 1 to Annex IV *Presidency Progress Report To The Helsinki European Council On Strengthening The Common European Policy On Security And Defence*

61 SANTA MARIA DE FEIRA EUROPEAN COUNCIL *Presidency Conclusions* Annex 1 to Annex IV *Presidency Progress Report on Strengthening The Common European Policy On Security And Defence*

62 HELSINKI EUROPEAN COUNCIL *Presidency Conclusions* Annex I *Presidency Report on non-military crisis management of the European Union*

In addition, the common strategy on Russia was reviewed in the light of the ultimatums, - considered unacceptable by the EU, - the violations of humanitarian law and extensive violence perpetrated on civilian population by the hand of the Russian Government; accordingly, some of the provisions of the Partnership and Cooperation Agreement between EU and the belligerent country were suspended ([63]) among other minor sanctions, symbolic stances and strong invitations to cease all hostilities in order to find a political solution to the crisis.

New momentum was however injected into the Union's common foreign and security policy with the arrival in office of the Secretary-General/High Representative, Mr Javier Solana.

The European Council officially invited the Council "to take the necessary steps to ensure that optimum use is made of all the various means at the Union's disposal for more effective and comprehensive external action by the Union." ([64]) encouraging the development of systematic schedules of ministerial meetings to which the High Representative could actively participate ([65]), in order to make the European Institutions adjust to the idea that its figure existed and that it indeed was the most legitimate voice of the Union on what concerned external relations.

8. The last touches to ESDP: Feira and Nice

Development of the Common European Security and Defence Policy continued in Santa Maria de Feira, on 19th and 20th June 2000, where new provisions on the civilian dimension of the policy were implemented.

The Summit concluded that, by 2003, Member States should have been able to provide up to 5000 police officers for international missions across the range of conflict prevention and crisis management operations. They should also be able to identify and deploy, within 30 days, up to 1000 police officers ([66]).

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[63] HELSINKI EUROPEAN COUNCIL *Presidency Conclusions* Annex II: *Declaration on Chechnya, Art.7*

7. In the light of the above, the European Council decides to draw the consequences from this situation:
- for the implementation of the European Union's Common Strategy on Russia, which should be reviewed;
- for the Partnership and Cooperation Agreement, some of the provisions of which should be suspended and the trade
provisions applied strictly;
- for TACIS, the budgetary authority is asked to consider the transfer of some funds from TACIS to humanitarian assistance. Finance in the budget for 2000 should be limited to priority areas, including human rights, the rule of law, support for civil society and nuclear safety.
It invites the Presidency with the Secretary-General/High Representative to notify this decision and the contents of this declaration urgently at the highest level to the Russian authorities.
It invites the OSCE and the Council of Europe to review, in their field of competence, the modalities of their cooperation with Russia.

[64] HELSINKI EUROPEAN COUNCIL *Presidency Conclusions, Art.54*

[65] HELSINKI EUROPEAN COUNCIL *Presidency Conclusions* Annex III: *An effective Council for an enlarged Union, B. External Relations*

[66] SANTA MARIA DE FEIRA EUROPEAN COUNCIL *Presidency Conclusions* Annex I: Presidency report *on strengthening the Common European Policy on Security and Defence*

The civilian dimension also comprised an ambition to provide up to 200 Judges, prosecutors and other legal experts to areas in crisis; the ability to assist at a humanitarian level at short notice, with the EU capable, within 3 to 7 hours, of providing two or three assessment teams, as well as intervention teams consisting of up to 2000 people and, finally, the creation of the European Defence Agency (EDA), to be established by 2004, with the task of identifying gaps in the EU's military capability and then to suggest programmes and assist in conducting efforts to fill these gaps([67]).

A new common strategy was also launched concerning the Mediterranean, in order to "guide the policies and activities of the Union in developing the Euro-Mediterranean Partnership established by the Barcelona Declaration and its subsequent acquis, both in bilateral and regional components, as well as the consolidation of peace, stability and security in the Middle East following a comprehensive peace settlement." ([68]).

After Feira and a final Commitment Conference held in Brussels on 20th November that defined a "mechanism for evaluating military capabilities" ([69]), the negotiations for the ESDP were completed and the new European policy could be formally agreed in the framework of the European Council that, between the 7th and the 9th December 2000 produced the Nice Treaty.

The Presidency Report on the European Security and Defence Policy annexed to the Conclusions to the Nice European Council started as follows:

> *The aim of the efforts made since the Cologne, Helsinki and Feira European Councils is to give the European Union the means of playing its role fully on the international stage and of assuming its responsibilities in the face of crises by adding to the range of instruments already at its disposal an autonomous capacity to take decisions and action in the security and defence field. In response to crises, the Union's particular characteristic is its capacity to mobilise a vast range of both civilian and military means and instruments, thus giving it an overall crisis-management and conflict prevention capability in support of the objectives of the Common and Foreign Security Policy.*
>
> *In developing this autonomous capacity to take decisions and, where NATO as a whole*

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[67] SANTA MARIA DE FEIRA EUROPEAN COUNCIL *Presidency Conclusions* Annex I: Presidency report *on strengthening the Common European Policy on Security and Defence*

[68] SANTA MARIA DE FEIRA EUROPEAN COUNCIL *Presidency Conclusions* Annex V: *Common Strategy of the European Union on the Mediterranean region*

[69] NICE EUROPEAN COUNCIL *Presidency Conclusions* Annex VI Presidency Report on the European Security and Defence Policy I. 1. Elaboration of the headline goal and of the military capability goals established in Helsinki

is not engaged, to launch and conduct EU-led military operations in response to international crises, the European Union will be able to carry out the full range of Petersberg tasks as defined in the Treaty on European Union: humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peacemaking. This does not involve the establishment of a European army. The commitment of national resources by Member States to such operations will be based on their sovereign decisions. As regards the Member States concerned, NATO remains the basis of the collective defence of its members and will continue to play an important role in crisis management ([70])

thus summarizing the aims and the development of the work on ESDP done ever since the Amsterdam Treaty gave the European Union the means to launch it.

European leaders decided then that the ESDP would need to be fully operational by the end of 2001, not later than the programmed Summit to be held in Laeken by the end of that year ([71]): the new Millennium would see the dawn of the European Security and Defence Policy.

9. The Eurosphere

At the beginning of the new Millennium the EU was able to implement its capabilities derived by the newly created ESDP in the CFSP framework, as well as new soft power tools.

At the Zagreb Summit of 24th November 2000, for the first time the Western Balkans countries were brought together as countries that had returned to democracy.

The European Union took that occasion to show its continuous and active support to the countries' efforts in their progress towards democracy, the rule of law and reconciliation indissolubly binding the future development of regional cooperation to a clear prospect of accession ([72]).

The Union had thus decided to use the prospect of entering the European club as a means of negotiation, trying to verify if it would succeed where economic sanctions had previously failed, meaning where only heavy NATO bombings had been able to reach the goal: maintaining peace in the internal European neighbourhood.

Ultimately the plan mostly paid off and, through continuous democratic and economic reform and development, the Former Yugoslavian Republics were able to maintain peace and integrate themselves more and more closely with the rest of the continent throughout the starting decade.

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[70] NICE EUROPEAN COUNCIL *Presidency Conclusions* Annex VI Presidency Report on the European Security and Defence Policy

[71] SANTA MARIA DE FEIRA EUROPEAN COUNCIL *Presidency Conclusions* IV Common European Security and Defence Policy Art.14

[72] NICE EUROPEAN COUNCIL *Presidency Conclusions* Art.62 C.Western Balkans

"The postmodern, European answer to threats is to extend the system of co-operative empire ever wider" stated Director General for External and Politico-Military Affairs Robert Cooper.

This concept was defined by Mark Leonard, British political scientist to-be founder and Director of the European Council on Foreign Relations (ECFR) as the expansion of the "Eurosphere" ([73]). "But the next wave of transformation is only just beginning." he also stated: "The European Union is starting to develop an enormous sphere of influence, extending way beyond its borders (…) a belt of eighty countries covering from the former Soviet Union, the Western Balkans, the Middle East, North Africa and Sub-Saharan Africa", something that President of the European Commission Jose Manuel Barroso would define, in 2007, as "the first non-imperial Empire" ([74]).

All European Councils discussed various aspects of the Union's external relations on all of these regions, encouraging peace, development, free market and cooperation with all of its partners, rallying from Cyprus to East Timor - the Eurosphere where European soft power was exercised.

Javier Solana tried to use all of the EU's soft power in order to stop the seemingly unstoppable conflicts in the Middle East, strong of the "Biarritz Declaration" signed by all the Heads of State or Government of the EU, calling for an urgent resumption of the dialogue between the Prime Minister of Israel and the President of the Palestinian authority and their commitment to implement the Camp David Agreements.

They declared once more that the European Union "more than ever remains committed to peace"([75]).

This kind of statements, of calls for action, for peace, the successful use of the Union's soft power in the building of a huge European sphere of influence built on quality of life, sustainability and peace and harmony ([76]) were symptoms of a kind of self–awareness of the European Union that aimed to being an example to the world when it came to peace and solidarity, boasting on how its mere existence had granted peace throughout Europe in the previous 60 years and on how it had tried as well to build and keep peace all around the globe, with a particular attention to the Balkans and the democratization and Europeanization of the "Eurosphere".

The EU, forgetting or looking for redemption for or even ignoring its colonial past and its post-colonial present, presented itself as a lighthouse of peace and solidarity enlightening the World.

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[73] MARK LEONARD *Why Europe will run the 21st Century* (Fourth Estate, 2004) pp. 145-146

[74] https://euobserver.com/institutional/24458

[75] BIARRITZ EUROPEAN COUNCIL *Biarritz Declaration by the Heads of State or Government of the European Union on the situation in the Middle East* (13th – 14th October 2000)

[76] JEREMY RIFKIN *The European Dream* (Jeremy Tracher Inc., 2004)

This ideal, though, would become consistent only with the effective existence of a common European voice, coming from a closer and closer integration and a never–faltering nature of this kind of European "promise".

10. Still lacking a common voice: the 9/11 fallout

One of the most notable setbacks for the Common Foreign and Security Policy this far has been the 2003 Iraq crisis ([77]).

The first European Council after 9/11, held in December in Laeken, and earlier still, an extraordinary meeting on 21st September, showed a compact and resolute unity in the Union's absolute solidarity with the American people vis à vis the "deadly terrorist attacks" and in combat against terrorism ([78]). The European Council also declared that it would be by developing the CFSP and by making the ESDP operational at the earliest opportunity that the Union would be most effective ([79]).

This kind of unity on the subject, though, did not last much longer, and each and every Member State of the EU decided to act without seeking a common position with the rest of the Union.

Spanish and British Prime Ministers Jose Aznar and Tony Blair supported the US-led intervention in Iraq and Afghanistan in the subsequent years, until Rodriguez Zapatero withdrew Spanish troops from Iraq in 2004, following the Madrid bombings.

French President Jacques Chirac's and German Chancellor Gerhard Schröder's positions were completely different: they vehemently opposed Bush's invasion of Iraq. The latter, in his memories, came to state, when talking about his own relationship with George Bush's administration, that the impression was created that political decisions, on the part of the US, were a result of a conversation with God and that that was one of the reasons why he refused to let Germany have a part to any military intervention in Iraq – a position that, supported by the French Government, created a gap in the relationship between the two countries and the USA ([80]).

Italian Prime Minister Silvio Berlusconi, in 2006, gave a passionate speech in front of the US Congress stating how much he felt a very strong bond of gratitude to America, remembering the teachings of his late father, saying that he felt the need for Europe to be a partner and an ally, not an

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[77] PER M. NORHEIM - MARTINSEN *The European Union and Military Force* (Cambridge University Press, 2013) p.13

[78] LAEKEN EUROPEAN COUNCIL *Presidency Conclusions II. The Union's action following the attacks in the USA on 11th September 2001* (14th – 15th December 2001)

[79] EUROPEAN COUNCIL *Conclusions and plan of action of the extraordinary European Council meeting on 21st September 2001*

[80] GERHARD SCHRÖDER *Entscheidungen: Mein Leben in der Politik* (Hoffmann und Campe, 2006)

opponent of the USA, these being the reasons why he had arranged the Italian support to the American troops in Iraq ([81]), a support that came without Italian forces taking part to the actual war because of the limits given by the Italian Constitution that forbid any offensive use of military strength ([82]).

Without further analysing the other Member States' positions on US foreign policy during George W. Bush's Presidency, a huge divergence is evident in the approaches chosen by the Governments of France, Germany, UK, Spain and Italy that prevented any common European position to be produced.

11. The European Union's evolution to strategic actor

Following the military and police Capability Improvement Conferences held in Brussels on 19th November 2001, the Union became capable of conducting some crisis-management operations([83]).

About one year later, on 16th December 2002, EU capabilities were boosted by the Berlin+ Agreements, which gave to the Union, inter alia, full access to NATO assets ([84]).

Thus it was that, at the Thessaloniki Council on 19th and 20th June 2003, the EU declared itself ready to tackle the full range of the Petersberg Tasks ([85]).

In fact, in the first months of the year 2003, the EU launched its first three military missions: the European Union Police Mission (EUPM) in Bosnia and Herzegovina (1st January 2003), Operation Concordia in the FYROM (31st March 2003) and Operation Artemis (12th June 2003).

The EUPM followed on from a UN's international police task force, seeking to establish sustainable policing arrangements under Bosnia and Herzegovina ownership in accordance with best European and international practice ([86]).

Operation Concordia was the first EU mission to use NATO assets in accordance with the Berlin+ agreements and it contributed to "the efforts to achieve a peaceful, democratic and prosperous country, as part of a region of stable countries" ([87]).

Operation Artemis was the first non-civil operation of the EU and was conducted in accordance

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81 SILVIO BERLUSCONI *Speech to the US* Congress http://www.youtube.com/watch?v=fat0IB3baRk (3rd January 2006)

82 ITALIAN CONSTITION Art. 11

L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali

83 LAEKEN EUROPEAN COUNCIL *Presidency Conclusions* Art.6 (14th – 15th December 2001)

84 EU – NATO DECLARATION ON ESDP (16th December 2002)

85 THESSALONIKI EUROPEAN COUNCIL *Presidency Conclusions* Art.55-63 (19th – 20th June 2003)

86 http://www.eeas.europa.eu/csdp/missions-and-operations/eupm-bih/mission-description/index_en.htm

87 http://www.eeas.europa.eu/csdp/missions-and-operations/concordia/mission-description/index_en.htm

with the UN in order to contribute to the stabilisation of the security conditions and the improvement of the humanitarian situation in Bunia, in the Great Lakes region ([88]).

These three operations were the first of a list of 35 civil and military operation that the EU has carried out so far in Africa, in the Western Balkans, in Indonesia, Georgia and, more recently, in the Mediterranean and Ukraine.

With military operations, the EU has stopped being merely an intergovernmental organization, becoming a strategic actor, which is a category describing any actor, State or non-State, that can purposefully prepare for and apply the use of military force ([89]).

Another aspect of EU military operations that might be considered a change in the perspective with which the Union looked at itself is that only operation Concordia in FYROM and on-going Operation Althea in Bosnia and Herzegovina have been launched in collaboration with NATO. This data can be seen as a growing will of pursuing autonomous capabilities and conducting autonomous operations without any strict collaboration with the Northern Atlantic Alliance.

In a gradually more confident EU, the CSDP can be seen as a "third way" in the European security approach: it was not merely a response to the call of sharing the European security burden, nor a simple duplication of NATO's strategy in the world ([90]).

What gave a real sense of purpose and direction to the CSDP was however the formulation of a European Security Strategy (henceforth ESS) addressing a range of threats to the continent's security, such as terrorism, the proliferation of Weapons of Mass Destruction, regional conflicts (such as those in Kashmir, Korea or the Great Lakes), State failure (Somalia, Liberia, Afghanistan) and organised crime. The 2003 ESS was founded on the assumption that no single country is able to tackle today's complex problems on its own. As a union of 25 states with over 450 million people producing a quarter of the world's Gross National Product (GNP), and with a wide range of instruments at its disposal, the European Union was inevitably a global player and should be ready to share in the responsibility for global security and in building a better world ([91]).

The EU was gradually appointing itself with more and more autonomous capabilities, albeit existing resistance from some Member States. Whether the CSDP would actually evolve to become a truly independent policy, remained to be seen.

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[88] http://www.eeas.europa.eu/csdp/missions-and-operations/artemis-drc/mission-description/index_en.htm

[89] PER M. NORHEIM - MARTINSEN *The European Union and Military Force* (Cambridge University Press, 2013) p.1

[90] SVEN BISCOP *The ABC of European Security Strategy: ambition, benchmark, culture* (Egmont Royal Institute of International Relations, 2007) Egmont Paper 16

[91] EUROPEAN SECURITY STRATEGY *A secure Europe in a better world* (Brussels, 12th December 2003)

12. Towards a EU Minister for Foreign Affairs

The Laeken European Council, held in December 2001, decided to convene a European Convention composed of the main parties involved in the debate on the future of the Union. Presided by Mr. Valéry Giscard d'Estaing, the Convention started its work on 28th February 2002, producing a preliminary draft Constitutional Treaty by the end of October of the same year, to be submitted to the European Council that would give mandate to an Intergovernmental Conference (IGC) to use it as a starting point to define the definitive text of a European Constitution (henceforth called CT) by the end of 2003 ([92]).

The production of the CT was intended to be a historic step in the direction of furthering the objectives of European integration and it meant to bring the Union closer to its citizens, strengthening the Union's democratic character, facilitating its capacity to make decisions – particularly after the enlargement, enhancing its ability to act as a coherent and unified force in the international system and effectively dealing with the challenges globalization and interdependence created ([93]).

With this mind set did the Convention and the IGC insert in the text of the CT the figure of the Foreign Minister of the European Union.

This emblematic figure would need to be chosen by the European Council through qualified majority voting with the approval of the President of the European Commission, and it would manage the Common Foreign and Security Policy as well as the Common Security and Defence Policy.

According to art. I – 28 of the CT, the Union Minister for Foreign Affairs would be one of the vice-Presidents of the Commission and he or she would conduct political dialogue with third parties on the Union's behalf and express the Union's position in international organisations and at international conferences.

In fulfilling his or her mandate, the Union Minister for Foreign Affairs would be assisted by a European External Action Service (EEAS), working in cooperation with the diplomatic services of the Member States and comprising officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States ([94]).

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[92] INFORMAL EUROPEAN COUNCIL DISCUSSES THE CONVENTION (Athens, 16th April 2003)

[93] THESSALONIKI EUROPEAN COUNCIL *Presidency Conclusions* Art.2 (19th – 20th June 2003)

[94] TREATY ESTABLISHING A CONSTITUTION FOR EUROPE; Art. III - 296

> *1. The Union Minister for Foreign Affairs, who shall chair the Foreign Affairs Council, shall contribute through his or her proposals towards the preparation of the common foreign and security policy and shall ensure implementation of the European decisions adopted by the European Council and the Council.*

The Minister would therefore become the face of the Union vis à vis the rest of the world, and would be able to make proposals on all possible uses of all EU tools as concerning foreign policy, politics, finance and the military. They would also be the Chair of the Council on Foreign Relations, reuniting all Ministers for Foreign Affairs of the Union ([95]).

Two other innovations of the CT were the collective defence clause *([96])* and the solidarity clause*([97])([98]),* whose use and scope will be more thoroughly explained in the next chapters.

However, since one of the goals of the Constitutional Treaty was to strengthen the Union's

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2. The Minister for Foreign Affairs shall represent the Union for matters relating to the common foreign and security policy. He or she shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences.

3. In fulfilling his or her mandate, the Union Minister for Foreign Affairs shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a European decision of the Council. The Council shall act on a proposal from the Union Minister for Foreign Affairs after consulting the European Parliament and after obtaining the consent of the Commission.

[95] DIMITRIS TRIANTAFYLLOU *La Constitution Européenne expliquée* (Bruylant Bruxelles, 2004) pp. 53-54

[96] TREATY ESTABLISHING A CONSTITUTION FOR EUROPE; Art. I – 41 §7

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

[97] TREATY ESTABLISHING A CONSTITUTION FOR EUROPE; Art. I – 43

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) — prevent the terrorist threat in the territory of the Member States;

— protect democratic institutions and the civilian population from any terrorist attack;

— assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. The detailed arrangements for implementing this Article are set out in Article III-329.

[98] TREATY ESTABLISHING A CONSTITUTION FOR EUROPE; Art. III – 329

1. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

2. The arrangements for the implementation by the Union of the solidarity clause referred to in Article I-43 shall be defined by a European decision adopted by the Council acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs. The Council shall act in accordance with Article III-300(1) where this decision has defence implications. The European Parliament shall be informed.

For the purposes of this paragraph and without prejudice to Article III-344, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article III-261; the two committees shall, if necessary, submit joint opinions.

3. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

democratic character, some of the EU Member States decided that its ratification should have been approved by national referenda.

The European Parliament consented on the text of the CT, signed in Rome on 29th October 2004, on 12th January 2005.

The risks of national votes were clear: if one of the smaller States refused to approve the Treaty, the damage would be mendable with little modifications and a second round (as had already happened with the Danish "No" to the Maastricht Treaty and the Dutch "No" to the Nice Treaty). But if one of the main nations such as Great Britain or France voted "No", there would be no easy solution.

Luxembourg Prime Minister Jean Claude Juncker stated that if France voted no, Europe would fall in an absolute crisis: "There would not be a European Dream anymore, a European ideal to fuel: it would mean a complete paralysis that would lead Europe into a stalemate" ([99]).

Many in France looked at the Constitution as a Treaty facing obsolete problems, such as the containment of the inflation, that was considered a fallout of the post-wartime period, or the references to NATO that appeared in the text, tagged as leftovers of the cold war period and a submission of the Continent to the USA.

The supporters of the "No" wanted a Constitution founded on other principles: the goal of full occupation, the independence of Europe from the former Superpowers (USA in particular) and serious industrial policies ([100]).

The French people, though, did not vote "No" on 25th May 2005 for these reasons: it voted "No" because of its malcontent towards its President Chirac, because the majority did not want Turkey to enter the EU, because of the social problems of the nation and for the life-costs increase after the adoption of the Euro; all issues that had nothing to do with the actual text of the Constitution. Mettiamo una nota su chi sostiene questo, altrimenti usare condizionale

According to Jean Baudrillard, journalist for the French newspaper "Libération", the French voted "No" also because they wanted to take control of the destiny of their nation, because they did not want to be passive spectators of the stream of events that was taking Europe towards a political union that was only the fruit of some bourgeois élite and not of the will of the people. To use his own words, they refused to give a "Yes" that was not the answer anymore, but the content itself of the question" ([101]).

Thus it was that Juncker's prevision suddenly became reality and the European stalemate began.

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99 ELÉONORE SULSER from an article written on "*Le Temps*" reported on "*Internazionale*" n° 574

100 GEORGES SARRE from an article written on "*Le Figaro*" reported on "*Internazionale*" n° 588

101 JEAN BAUDRILLARD from an article written on "*Libération*" reported on "*Internazionale*" n° 592

13. Lisbon

The crisis derived by the French and Dutch rejection of the CT was relatively mild. The EU was not in danger of collapsing, the Institutions continued to function and there were no economic repercussions. Nevertheless, rejection of a treaty that had emerged out of a broadly based convention and that specifically addressed citizens' complaints about how the EU operated, was a cause of deep concern ([102]).

The stalemate stopped the furthering of closer integration in the fields of CFSP and ESDP as well, blocking, among others, the creation of the EEAS and of the Minister for Foreign Affairs.

Between the French "NO" to the CT and the final ratification of the Lisbon Treaty (which happened by the end of the year 2009), though, the EU did not stay idle and kept using its existing tools to carry out the Petersberg Tasks around the world, launching 16 civil and military missions abroad in numerous countries, such as the Palestinian Territories, Indonesia, Afghanistan, Georgia, Somalia among others ([103]).

In Brussels, however, no way was found to save the European Constitution: a new phase of renegotiation of the Treaties began, more careful in preserving particular national interests and aimed at "de-constitutionalizing" the CT, which abandoned its own name and all references to the symbols of the Union – the flag, the anthem, the motto ([104]).

A change of mind-set founded on a "de-constitutionalizing" approach also happened for what concerned the CFSP. The Constitution had bound all aspects of the External Action to the CFSP, in order to give the Union an adequate framework that would prompt the EU to become a true global actor in the contemporary international society. The Lisbon Treaty, on the other hand, kept dividing them in two sectors.

CFSP and CSDP ([105]), except for some technical provisions on intelligent sanctions, the solidarity clause and enhanced cooperation that are found in the TFEU ([106]), can entirely be found inside the TUE, which is considered to be the Treaty with a "constitutional rank" for the European Union.

Provisions on all other aspects of external relations are instead to be found in the TFEU, a Treaty of "organic law". This distinction between the ranks of European Treaties is not unanimously accepted,

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102 DESMOND DINAN *Europe recast – A History of the European Union* (Palgrave MacMillan, 2014) p. 305

103 *http://www.eeas.europa.eu/csdp/missions-and-operations/*

104 BERRAMDANE *Le Traité de Lisbonne et le retour des États* (JCP, *La semaine juridique,* n° 9-10, 2008) p. 3, 8

105 From the Lisbon Treaty on, the European Security and Defence Policy (ESDP) changed its name to Common Security and Defence Policy (CSDP)

106 CATHERINE SCHNEIDER *Le Traité de Lisbonne* (Bruylant, 2009) p. 296

since they are considered equal in legal value ([107]), but it has been used by some scholars to identify a division between an "aristocratic" external action, with a political-constitutional rank, composed by CFSP and CSDP, and a "prosaic" one, concerning trade, cooperation on development, know-how and finance ([108]).

The Lisbon Treaty, however, did not modify one of the changes of the CT: since the "pillar structure" of the Union created in Maastricht ceased existing, CFSP and CSDP officially became policies of the Union.

The abolition of the pillar structure created also the necessary means for the CFSP to tackle some problems in management that had emerged in previous years: particularly since the Madrid bombings of 11th March 2004, perpetrated by Al Qaeda, the utmost need had arisen of strengthening the Area of Freedom, Security and Justice, which was competence of Justice and Home Affairs (JHA). Fight against terrorism, though, was also one of the goals of the European Security Strategy, which was competence of the CFSP ([109]).

This diachronic and uncoordinated approach was kept in the same months of the IGC elaboration of the CT, while the European Council was already merging all aspects of External Relations in one melting pot that would come to tackle all External Affairs ([110]).

On the other hand, the growing terrorist threat prompted the EU to launch the Hague Programme, strengthening the Area of Freedom, Security and Justice. Among its provisions, there was the call for the development of a coherent external dimension of the Union policy of freedom, security and justice, with an invitation to the Commission and the HR to present, by the end of 2005, a strategy covering all external aspects of freedom, security and justice in cooperation with JHA ([111]).

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[107] Cf report n°691 of the French National Assembly, made in the name of the Commission for Foreign Affairs on the project of law authorising the ratification of the Lisbon Treaty

[108] C.SCHNEIDER, E. BROSSET, C. CHEVALIER, V. EDJHARIAN *Le Traité de Lisbonne* (Bruylant, 2009) pp. 290-291

[109] EUROPEAN COUNCIL *Presidency Conclusions* Chapters I and V (17th – 18th June 2004)

[110] *Cf* the evolution in terminology in the Presidency Conclusions of the European Councils between 2003 and 2004: until 2003, "External relations" and "CFSP" were kept separated. In the Presidency Conclusions of the European Council held in June 2004, they figure together in Chapter VI. Which is named "External Relations/CFSP/ESDP". The subsequent summit, held in November 2004 merged them in only one category, Chapter V., "External Affairs".

[111] EUROPEAN COUNCIL *Presidency Conclusions* Annex I (4th – 5th November 2004)

> 4. *EXTERNAL RELATIONS*
> *The European Council considers the development of a coherent external dimension of the Union policy of freedom, security and justice as a growing priority.*
> *In addition to the aspects already addressed in the previous chapters, the European Council calls on the Commission and the Secretary-General / High Representative to present, by the end of 2005, a strategy covering all external aspects of the Union policy on freedom, security and justice, based on the measures developed in this programme to the Council. The strategy should reflect the Union's special relations with third countries, groups of countries and regions, and focus on the specific needs for JHA cooperation with them. All powers available to the Union, including external relations, should be used in an integrated and consistent way to establish the area of freedom, security and justice. The following guidelines should be taken*

Generally, however, Member States, through the European Council, had not given much new momentum to CFSP and ESDP between Nice and Lisbon, concentrating on welcoming the work and adopting the strategies of the Institutions working inside the External Affairs framework ([112]).

The Lisbon Treaty, however, successfully broke the stalemate: overall, even if the Lisbon Treaty lost much of the ambition and the momentum of the Treaty establishing a Constitution for the EU, it represented a huge normative change vis à vis the previously existing Nice Treaty, fact which is clear already at a merely visual level: eight new articles were added, 17 modified and two abolished – no article was left untouched ([113]).

The Minister for Foreign Affairs disappeared – as a name – but was replaced by a technically identical figure that kept the name of High Representative for Foreign Affairs and Security Policy.

The new and improved HR covered also the role of Vice–President of the European Commission, reflecting the supposed seriousness with which external relations would henceforth be taken([114]); together, Commission and HR could submit joint proposals on external action – thus bringing together the economic and military sectors ([115]).

The Lisbon Treaty also operated what came to be called a "Brusselsization" of the CFSP by creating the European External Action Service (EEAS), as it was intended by the Constitution ([116]), acting as the diplomatic corps of the EU and made up of seconded staff from the Member States, the Commission and the General Secretariat of the Council, managing the EU's response to crises and containing an intelligence function ([117]).

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into account: the existence of internal policies as the major parameter justifying external action; need for value added in relation to projects carried out by the Member States; contribution to the general political objectives of the foreign policies of the Union; possibility of achieving the goals during a period of reasonable time; the possibility of long-term action.

[112] Cf European Council Presidency Conclusions from 2000 to 2007

[113] FRANÇOIS-XAVIER PRIOLLAUD, DAVID SIRITZKY *Les Traiés européens après le Traité de Lisbonne* (La documentation française, 2010) pp. 29-45

[114] MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) p. 248

[115] LISBON TREATY ON THE EUROPEAN UNION; Art. 22 §2

The High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council.

[116] LISBON TREATY ON THE EUROPEAN UNION; Art. 27 §3

In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

[117] MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) p. 250

The Treaty made it clear that Member States should make military assets available for common EU activities formerly part of the JHA pillar, such as counter-terrorism, mass migration, cooperation against organized crime ([118]) as well as for the active support to the work of the European Defence Agency (EDA), a shorter route into an expanding European defence market for defence-related business.

The Lisbon Treaty enriched the CFSP and the CSDP of a number of new tools in a period when terrorism, proliferation of WMDs and peace–keeping were the main strategic challenges of the Union in its Eurosphere. New challenges were about to come, though, and these tools were about to be put to test.

14. After Lisbon: the Ashton era

The first HR/FASP was chosen to be the little-known British politician from the Labour Party, Baroness Catherine Ashton, previously European Commissioner for Trade, but with no other experience in the domain of Foreign Relations, unlike her predecessor Javier Solana.

Her inexperience and the infancy of her new working arrangements strongly contributed to the sense that she spent excessive amounts of time focusing inwards on the organizational aspects of the job and insufficient time developing the EU's international visibility ([119]).

Overall, after the Lisbon Treaty, and perhaps having as a contributing factor that the attention of the Union was focused elsewhere during the global financial crisis and the European Debt crisis, neither the Commission nor the High Representative have demonstrated an ability to act with the decisiveness or influence of a domestic Ministry.

Ms Ashton in particular, has been perceived as not able to negotiate as an equal with other security partners on security issues ([120]).

This again did not mean that the EU achieved nothing during Catherine Ashton's mandate for what concerns CFSP and CSDP: following the Treaty of Lisbon, the ambition to "preserve peace, prevent conflicts and strengthen international security" had become an explicit objective of the Union ([121]).

As reported in the final report by the High Representative and Head of EDA on the CSDP in October 2013, by the end of the year the EU deployed, through CSDP, more than 7,000 civilian and military personnel.

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[118] LISBON TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION; Art. 87

[119] MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) p. 248

[120] BOSSONG R. *Assessing the EU's added value in the area of terrorism prevention and radicalization* (Economics of Security WP 60) cf the parts concerning the HR negotiations with the US Department for Homeland Security on the Passenger Name Record (PNR) transfers

[121] LISBON TREATY ON THE EUROPEAN UNION; Art. 21 §2/b

The EU's maritime operation ATALANTA reduced the scourge of piracy off the coast of Somalia, and security in Somalia has greatly improved thanks to the training provided by EUTM Somalia to 3,000 Somali recruits and the EU funding of AMISOM.
EUPOL Afghanistan had trained up to 5,000 Afghan police officers, and EULEX Kosovo played a key role in accompanying implementation of the Belgrade-Pristina agreement.
In the Sahel, the Union was deploying a military mission (EUTM Mali) and a civilian mission (EUCAP Niger Sahel), both of which contributed to stabilizing the region.
The impact of CSDP had raised interest among many partners, among which figured the US, Asian countries, Middle-East countries among others.
The EU was becoming an effective security provider, and was increasingly being recognized as such, but it was still facing challenges, the greatest one from within. As the Representative outlined:

> *There is no agreed long-term vision on the future of CSDP. Decision-making on new operations or missions is often cumbersome and long. And securing Member States' commitment to supporting missions and operations, especially when it comes to accepting risk and costs, can be challenging, resulting in force generation difficulties. CSDP also faces recurrent capability shortfalls, either due to a lack of commitment or because the capabilities are not available, as well as various legal and financial constraints resulting in difficulties to act rapidly ([122]).*

In the same Report, Ms Ashton identified some proposals and actions to strengthen CSDP: a better alignment between external action actors, a reinforced cooperation with NATO and the African Union (AU), support to capacity-building of local and regional partners, the launch of a Cyber Security Strategy and the development of a Cyber Defence Policy Framework (prompted by the 2007 cyber-attacks to Estonia, for which the Russian Government was held responsible by some experts ([123])) as well as the development of a CFSP dimension of the European Space Policy, the increase of the Union's ability to address maritime and border challenges and a more rapid deployment of military and civilian missions among many other proposed provisions ([124]).
As pointed out by Sven Biscop, Director of the Europe in the World Programme at the Egmont-Royal Institute for International Relations in Brussels, nowadays there is no way to asses Europe's

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[122] CATHERINE ASHTON *Final report by the High Representative and Head of EDA on the Common Security and Defence Policy* (15th October 2013)
[123] THE GUARDIAN *Russia accused of unleashing cyberwar to disable Estonia* (17th May 2007) available at: *http://www.theguardian.com/world/2007/may/17/topstories3.russia*
[124] CATHERINE ASHTON *Final report by the High Representative and Head of EDA on the Common Security and Defence Policy* (15th October 2013)

military effort in its entirety. There is no forum where to discuss the targets for "defence in Europe".

In political terms it is "Europe" the public arena refers to and expects to act, but there is no clear definition of "Europe" for what concerns Defence. It might refer to European States acting through NATO or through an ad hoc international coalition or through the CSDP.

Even "Washington really no longer cares under which "European" flag we act, as long as we act and the problem is dealt with without extensive American assets being drawn in" ([125]).

In 2010 the Council of the European Union produced a draft internal Security Strategy for the European Union, titled "Towards a European Security Model" consisting of common tools and a commitment to: a mutually reinforced relationship between security, freedom and privacy; cooperation and solidarity between Member States; involvement of all the EU's institutions; addressing the causes of insecurity, not just the effects; enhancing prevention and anticipation; involvement, as far as they are concerned, of all sectors which have a role to play in protection – political, economic and social; and a greater interdependence between internal and external security.

European common threats were perceived to be terrorism, serious and organised crime, cyber-crime, cross-border crime, violence itself and natural and man-made disaster.

This perception would change dramatically in the subsequent years.

15. The Arab Springs

The start of revolts against the Government of Ben Alì in Tunisia in December 2010 sparked huge change in the Arab world.

By the end of February 2012, rulers had been forced from power in Tunisia, Egypt, Libya and Yemen; civil uprisings had erupted in Bahrain and Syria; major protests had broken out in Algeria, Iraq, Kuwait, Morocco and Sudan: this chain of uprising that have characterized so many Arab countries came to be known as "Arab Springs".

Many of the States involved in these revolutions and revolts belong to the Mediterranean basin and were counterparts in the European Neighbourhood Policy: after the entry into force of the Lisbon Treaty and therefore the reform of CFSP and CSDP, no geo-political turmoil had been so geographically close to the borders of the Union.

[125] SVEN BISCOP *The state of Defence in Europe: state of emergency?* (Egmont Paper 62, Academia Press, 2013) p.6

European foreign policy towards its neighbours has surely been questionable, if not even coward. For decades, European politicians have supported brutal dictatorships. They invested in them when there was profit to be made. An entire generation, however, has risen up against this. A generation that had its fill and that is now rising up to treat with you as equals. We do not need your help to realize a new political system. We are strong and intelligent enough to be able to do so ourselves. We do not want you to force on us your values and your forms of government. But we do need you, we need you to side with the Revolution and with the people, to condemn the military regime and end your arms supply. ([126])

Leila Soliman, a famous Egyptian theatre Director, uttered these words in front of several high-level German politicians at the Willi Brandt Prize Ceremony in 2011.

This speech and similar ones convinced many European politicians, like the President of the European Parliament, Martin Schulz, that they could not make their States and the EU stand idly in the face of what might have been a game-changing evolution in the politics of North Africa and of the Mediterranean.

Standing idly and watching from afar is, however, exactly what Europe did in the first years of the upheavals, divided as it was – again – in its particular interests.

Silvio Berlusconi (many times Prime Minister of Italy) and Muhammar Gheddafi (Chief of State of Libya) shared a privileged relationship, in particular after the signing between their two countries, in 2008, of a Friendship Agreement that also regulated the influx of African migrants from Libya to the Schengen Area ([127]).

Egypt and Jordan were the only two Arab countries that had signed a Peace Agreement with Israel and destabilizing them would open risky scenarios in the Middle East. Really, siding with any side that might had the chance of losing would have been risky for any European State, that would thus put in jeopardy relations with partners that, in various degrees, could be considered as crucial.

Each Arab uprising had its particular development, but the one that is perhaps the most relevant for the purposes of the analysis of the history of EU policies is the one that occurred in Libya.

On the 10th March 2011, far before the Libyan National Transitional Council (NTC) had taken control over the country, gaining effectiveness and independence over any territory, France, led by President Nicolas Sarkozy, recognized the NTC as the legitimate Government of Libya, clearly

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126 LAILA SOLIMAN *Speech at the Willi Brandt Prize Ceremony* (25th October 2011)

127 CORRIERE DELLA SERA Berlusconi da Gheddafi: Siglato l'accordo" (30th august 2008) http://www.corriere.it/esteri/08_agosto_30/berlusconi_libia_gheddafi_bengasi_478ee3f4-767e-11dd-9747-00144f02aabc.shtml

siding against Muhammar Gheddafi ([128]).

This choice was taken without consulting any European Institution beforehand and represented a political choice not shared by other Member States.

In fact, when the UN voted Resolution 1973 of the 17th March 2011, that gave mandate to the international community to use "all necessary means" to protect civil population from the attacks of Gheddafi's forces, EU Member States in the Security Council were not able to find common ground to vote unanimously: France, United Kingdom, Portugal and Bosnia Herzegovina voted in favour for the Resolution, whereas Germany did not.

According to Martin Schulz, what emerged from this attitude was that *"whenever a Government believes that opposing to the majority of the EU will lead to some advantage in its internal politics, it is more than willing to go against the rest of the Union. It is a fatal attitude. The result is that the EU, as a global actor in the international political arena, is not taken seriously anymore. By doing this, the EU has lost much of its relevance. (...) European States seem not to understand that this attitude hurts their own particular interests too."*

He, however, noted that the blue flag with 12 stars of the Union was the first foreign flag to be raised in the post-Gheddafi Libya ([129]), but raising a flag is merely a symbolic gesture: Brussels had yet to fully appreciate what the Arab Springs had entailed.

After this huge setback, the European Union needed to draw some conclusions and strategies, in order to understand how to proceed – and to tackle other crises that were coming its way, such as the one in Ukraine, that would present to the EU a whole new set of challenges at its borders.

16. Today's European Security environment

"Europe's security environment has changed dramatically" ([130]): this is what the European Council concluded during the June 2015 Summit.

The end of the Ashton era and the beginning of the Mogherini era were indeed characterized by an increasing importance of Security in Europe: the future of many of the countries involved in the Arab Springs remains to this day unclear, but one consequence is adamant and in front of everyone's eyes: mass migration has become an even more important issue for the European Union.

Loss of life at sea and human smuggler activities were so much enhanced that the EU was forced to launch a military mission, the EUNAVFOR MED, decided on 22nd June 2015, in order to counter the phenomena.

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[128] NEW YORK TIMES *France becomes first country to recognize Libyan Rebels* (10th March 2011) available at: http://www.nytimes.com/2011/03/11/world/europe/11france.html?_r=0

[129] MARTIN SCHULZ Il gigante incatenato – ultima opportunità per l'Europa? (Fazi Editore, 2014) pp. 100-107

[130] EUROPEAN COUNCIL *Presidency Conclusions,* II.Security and Defence Art. 10 (25th – 26th June 2015)

The very ideas of “European Union” and “European border” were put to test by the shipments of tens of thousands of human beings in frontline Member States such as Italy and Greece in a period of already great crisis for the EU, also faced with a possible collapse of the Eurozone and the exit of the United Kingdom from the Union.

As the next chapters will more thoroughly analyse, another key problem for the EU’s Foreign and Security Policy was the clash between the Eurosphere and Russia in a country that had to decide whether to enter the Euro-Asian Union or sign a Stabilization and Association Agreement (SAA) with the European Union, resulting in coup d’état, civil war, wars of conquest and a growing fear of a Russian invasion, in particular among the Eastern Members of the Union.

This kind of problems are altogether new for the EU and what the Union is doing and will do to tackle them will probably define much of the destiny and scope of the Union itself.

Since its foundation the European Union has been given more and more tools by Member States, becoming a strategic actor with its own autonomous military and civilian capabilities. It has successfully proven its effectiveness all around the world, but today it has to answer calls much closer to home.

What are the tools at its disposal that the Union has this far used to tackle the migrant crisis and the Ukrainian crisis? Can the solidarity clause and the collective defence clause be used in such events? Is the European lighthouse still functioning or is it broken?

CHAPTER II

European solidarity and the Migrants crisis

1. From CT to Lisbon: the texts of the Solidarity Clause

The European Convention convened by the European Council summoned in Laeken in 2001 was nothing but ambitious. Its purpose was to write a Constitution for the European Union, a Constitutional Treaty for an international organization with supranational powers having the ambition of reaching the political union of countries that had been divided, throughout most of their history, by war, hatred and national pride ([131]).

As we now know that project derailed, but traces of its ambition endured in the text of the Reform Treaty signed in Lisbon in 2007. One of these traces is the Solidarity Clause.

This provision of the treaty, whose length is inversely proportional to its magnitude, first emerged as an idea of Working Group VIII of the Convention, which focused on defence policies and collective European security.

Members of the working group claimed that the EU should develop a "mutual defence" mechanism, in order to commit Member States to solidarity in case of an armed aggression against any other Member State of the Union. Such provision (as will be seen in the next chapter) did not receive the welcome of all participants to the Convention and the fear arose that all solidarity mechanism that would be produced by that sort of proposal would need be implemented via opt-in provisions that would undermine the concept itself of "European solidarity" even before it came to light.

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[131] LAEKEN EUROPEAN COUNCIL *Annex I* Laeken Declaration (14th – 15th December 2001)

Over the last ten years, construction of a political union has begun and cooperation been established on social policy, employment, asylum, immigration, police, justice, foreign policy and a common security and defence policy. (...) The Union stands at a crossroads, a defining moment in its existence.

The unification of Europe is near.

Besides, the working group debated on whether the prospect of an "armed aggression" could actually be considered realistic, or whether it was, to that point, out-of-date.

As highlighted by the European Security Strategy, whose draft already was circulating in 2002, during the Convention's meetings, threats to internal European security were mostly related with terrorism and organized crime – a fact that was very clear in the minds of all participants to the working group, due to the proximity in time of the 9/11 attacks: the threat spectrum could therefore no longer be narrowed down to military aggressions, but needed to be expanded to include a broader set of issues in a broad solidarity approach that would clearly distinguish the Union from a mere military alliance, in particular concerning terrorist attacks and the use of weapons of mass destruction ([132]).

The IGC, in writing the final text of the CT, went even further. Declaring that Europe "wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world" ([133]) and claiming "solidarity" to be one of the Union's values ([134]), it added to the Constitutional Treaty the proposal of Michel Barnier, former European Commissioner and French Minister and Chair of Working Group VIII, of creating means for the EU to intervene not only in case of intentional threats, but also in case of unintentional man-made and natural disasters - a proposal that had, since the beginning of the debates, been set aside ([135]).

It was Michel Barnier himself who, in 2006, would produce the so-called "Barnier Report", titled "For a European Civil Protection Force: Europe Aid" that would list a series of natural and man-made disasters inside and outside the EU, implicitly defining with examples what he meant to be the range of the Solidarity Clause.

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[132] THE EUROPEAN CONVENTION *Final Report of Working Group VIII - Defence* (16th December 2002)

[133] TREATY ESTABLISHING A CONSTITUTION FOR EUROPE; Preamble

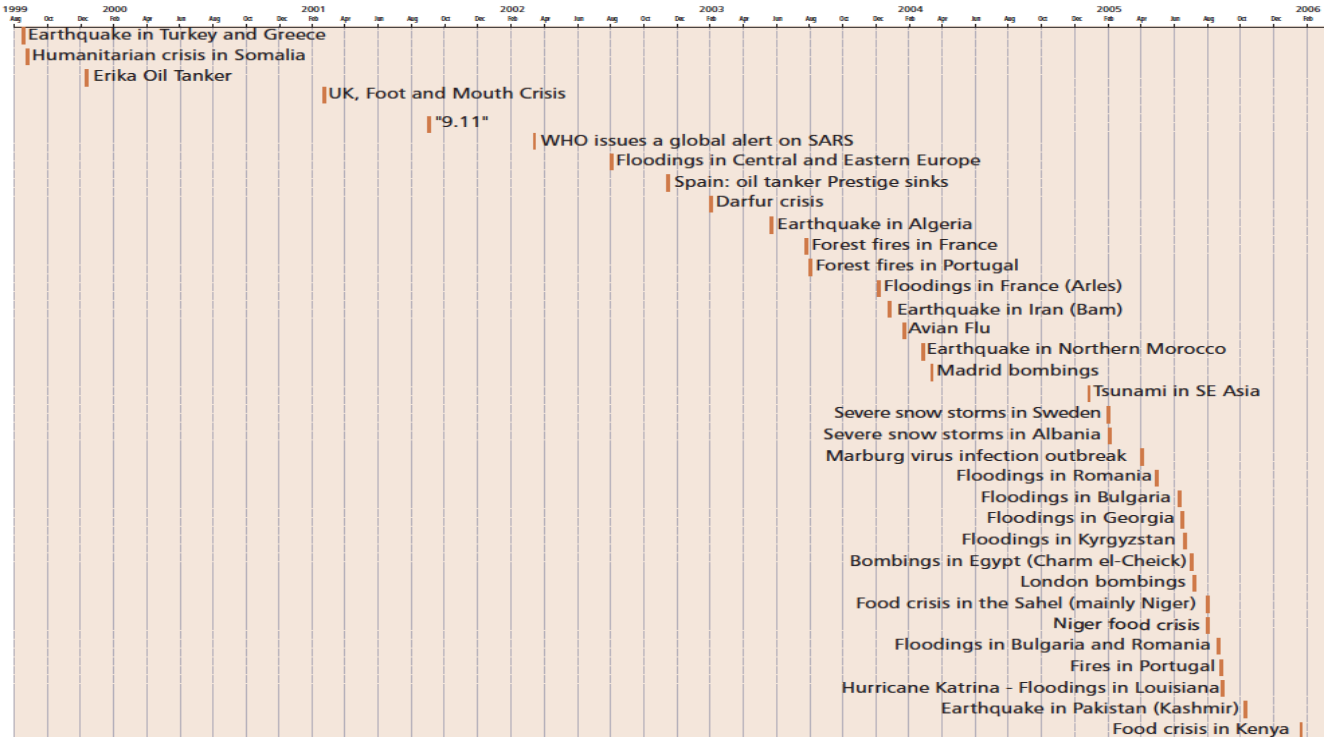
BELIEVING that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world

[134] TREATY ESTABLISHING A CONSTITUTION FOR EUROPE; Art. I-2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.
These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

[135] SARA MYRDAL, MARK RHINARD *The European Union's solidarity clause: Empty letter or effective tool?* (Swedish Institute of International Affairs, Occasional UI Papers n° 2, 2010) p.4

Diagram 1: Examples of natural and man-made disasters inside and outside the EU (1999-2006)



The final text of the clause appeared in the CT in article I-43:

Article I-43

Solidarity clause

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) — prevent the terrorist threat in the territory of the Member States;

— protect democratic institutions and the civilian population from any terrorist attack;

— assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. The detailed arrangements for implementing this Article are set out in Article III-329.

Paragraph 1 was referred to "the Union and its Member States", revealing the supranational key of interpretation of the clause: in case of a terrorist attack or of natural or man-made disasters, it was not only the Member States of the Union that should have acted as an intergovernmental group of States, but also the Union at its higher level, involving the EU institutions that "should mobilize all the instruments at its disposal, including the military resources made available by the Member States".

Article I-43 focused on terrorism, as would be expected by a document produced months after 9/11 and in the international environment that would bring to the Madrid and London bombings orchestrated by Al Qaeda in 2004 and 2005; yet it did profile the "broader security" approach initiated by Barnier in Working Group VIII.

The Clause, appearing in Part I of the Constitution, had gained a prominent role in the European legislation, whereas further arrangements were instead defined in Part III, in Article 329. The entire Chapter VIII of Title V of the III part of the CT, (Title that focused on the Union's External Action) was dedicated to the provisions for the implementation of the Solidarity Clause.

CHAPTER VIII

IMPLEMENTATION OF THE SOLIDARITY CLAUSE

Article III-329

1. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

2. The arrangements for the implementation by the Union of the solidarity clause referred to in Article I-43 shall be defined by a European decision adopted by the Council acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs. The Council shall act in accordance with Article III-300 where this decision has defence implications. The European Parliament shall be informed.

For the purposes of this paragraph and without prejudice to Article III-344, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article III-261; the two committees shall, if necessary, submit joint opinions.

3. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

The first paragraph does not speak to the Union's Institutions anymore, shifting the focus on what Member States should do to assist other Member States that, through their political authorities, should plead for the activation of the Solidarity Clause: no further instruction was given other than a recommendation for coordination of the intergovernmental means of assistance at the Council level.

Paragraph 2 dealt with the arrangements for the implementation of the Clause, post-posing the issue of their definition to such a time when the Council would be able to produce a decision about it. The Council would need to decide by unanimity where the decision had defence implications and, in any case, the European Parliament would be allowed to play no role in the decision-making other than being kept informed.

The last paragraph mandated the European Council to "regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action".

The French and Dutch "NOs", however, froze all of these provisions until the Lisbon Treaty was produced and ratified.

The final text that entered into force saw, obviously, the necessary modifications due to the change in numbers of the articles, to the structure itself of the Treaties, to the scrapping of the figure of "Union Minister for Foreign Affairs" but, more importantly, it entailed a heavy downgrade of the Clause itself.

While in the CT it was divided in two blocks, one appearing in Part I and one in Part III - thus obtaining a high rank among European rules - after the Lisbon reform it only appears in the TFEU, losing its "constitutional" rank and becoming a merely "functional" provision ([136]).

SOLIDARITY CLAUSE

Article 222

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) – prevent the terrorist threat in the territory of the Member States;

– protect democratic institutions and the civilian population from any terrorist attack;

– assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union of this solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.

For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions.

[136] DIMITRIS TRIANTAFYLLOU *La Constitution Européenne expliquée* (Bruylant Bruxelles, 2004) p.302

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

Annexed to the Treaty of Lisbon, moreover, Declaration 37 on Article 222 of the Treaty on the Functioning of the European Union specified that:

> *Without prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State ([137]).*

2. A dispersive approach to solidarity

The reflection period that followed the failure of the Treaty establishing a Constitution for Europe represented a huge setback in the advance of European treaty reform: French and Dutch rejection of the CT and the initial Irish rejection of the Lisbon Treaty led EU leaders into a state of eagerness to stop reforming the rules of the EU.

About the Lisbon Treaty, Peter Ludlow, a seasoned observer of European Councils and IGCs, wrote that "everybody wanted an agreement, if only to put this wretched business behind them (…) Most of the Heads of State and Government were simply "fed up with", "sick and tired of" and "bored stiff" with the business" ([138]).

In January 2008, on the day after the signing ceremony in Lisbon, EU leaders declared that the new Treaty provided the Union with "a stable and lasting institutional framework". The mood was that the days of treaty reform had come to an end ([139]).

This was the institutional context in which the Solidarity Clause entered into force.

Moreover, the sub-prime mortgage crisis, evolving in the European debt crisis, catalysed much of the attention of European leaders, thus making Paragraph 4 of Article 222 an afterthought inside a

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[137] *Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007*

[138] PETER LUDLOW *A view on Brussels: the Lisbon Council of October 2007 – wrapping up the Treaty and debating globalisation* (Eurocomment briefing note 5/6, Brussels, 2007)

[139] MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) p. 54

bigger afterthought that the Lisbon Treaty had itself come to become.

Also, the new Treaty had created so many new provisions that implementing them all would necessarily have required much time.

The Solidarity Clause was born in a fermenting environment connected to a stronger development of a European Civil Protection, strongly advocated, among others, by Michel Barnier. The creation of that sort of mechanisms started being perceived as a *condition sine qua non* the Solidarity Clause would not possess the adequate means to become effective: this is proven by the fact that debate at the Council level on the implementation of the Clause did not even begin before the Commission and the EP had worked for some years already in the direction of strengthening the European disaster response capacity on the side of civil protection and humanitarian assistance.

These kinds of actions were based on other TFEU articles, such as Art. 196 and Art. 122 TFEU which enabled the EU to improve European disaster coordination and provided for the establishment of a European solidarity fund ([140])([141]).

In October 2010, almost two years after the entry into force of the Lisbon Treaty, did the Commission launch the idea of creating the European Emergency Response and Coordination Centre (ERCC) to be set up in the Directorate General of the Humanitarian Aid and Civil Protection Department (DG ECHO) of the European Commission, which would need to operate in coordination with the EEAS ([142]).

The Department of Home Affairs of the Commission, chaired by Cecilia Malmström committed

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[140] LISBON TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION; Art. 196

1. The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters.

The Union's action shall aim to:

(a) support and complement Member States' action at national, regional and local level in risk prevention, in preparing their civil-protection personnel and in responding to natural or man-made disasters within the Union;

(b) promote swift, effective operational cooperation within the Union between national civil-protection services;

(c) promote consistency in international civil-protection work.

2. The European Parliament and Council, acting in accordance with the ordinary legislative procedure shall establish the measures necessary to help achieve the objectives referred to in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.

[141] LISBON TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION; Art. 122

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

[142] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL - *Towards a stronger European disaster response: the role of civil protection and humanitarian assistance (Text with EEA relevance) [COM(2010) 600 final - Not published in the Official Journal].* (26 October 2010)

itself to much of this kind of actions on the civil protection level, creating means for the EU to be able to cope with natural and man-made disasters coherent with the goals set in Lisbon.
Malmström, in a memo on the Internal Security Strategy published in 2010, reflected however that the implementation of the Treaty was being carried out with almost no coordination between the parts and the DGs of the Commission that, if they were not creating duplicates *per se,* were at the very least wasting European resources to tackle specific sectors of problems with only sector-specific tools, without any overall coordination.

> *The EU should aspire to a more coherent approach to threat and risk assessment and risk management. To this end, the Commission is proposing a set of measures to identify better and minimize the impact of all natural, accidental and malicious threats and hazards. Existing sector-specific risk assessment and situation awareness functions in the EU institutions and agencies, such as those concerning natural disasters, threats of health pandemics, nuclear risk monitoring and terrorism, should be linked up ([143]).*

This informal recommendation was presumably thought to bring into the "civil protection equation" both EU agencies and the European External Action Service, which would have in turn contributed to information sharing and threat/risk assessment reports ([144]).
"Dispersion" seemed yet to be the keyword for the creation of the new Lisbon tools on civil protection, brought on ignoring that the Solidarity Clause would need, for its implementation, the use of "all the instruments at (the Union's) disposal", implying a strong coordination effort and a unity and compactness of all European agencies, in strict collaboration with Member States.

3. The Clause's activation proceedings

Only on 24th June 2014 did the European Council adopt a decision containing the arrangements for the practical implementation of the Clause, as disposed by the Treaty that had entered into force 5 years earlier.
The COREPER had understood that Article 222 TFEU had a crosscutting and overarching nature and that the wide range of policy areas concerned required a multi-sectorial approach, hence deciding for the *ad hoc* creation of a special group, the "Friends of the Presidency Group on the EU

[143] CECILIA MALMSTRÖM – *The EU Internal Security Strategy in Action: Five steps towards a more secure Europe* (Memo/10/598)
[144] THEODORE KONSTADINIDES *Civil protection in Europe and the Lisbon "Solidarity Clause": a genuine legal concept or a paper exercise* (Uppsala Faculty of Law, 2011) p.15

integrated Political Crisis Response arrangements and the Solidarity Clause Implementation" that brought the work forward. Finally, after half a year of work, the Council adopted the decision by unanimity ([145]).

Through the combined efforts of COREPER, European Council and of the Friends of the Presidency a series of steps for the implementation of the Solidarity Clause were identified, as well as some definition for the terms used in the Clause and for the purpose of the Decision itself on the arrangements for the implementation.

The word "disaster" means *any situation which has or may have a severe impact on people, the environment or property, including cultural heritage;*

"Terrorist attack" means *a terrorist offence as defined in Council Framework Decision 2002/475/JHA ([146]);*

*"*Crisis*"* means *a disaster or terrorist attack of such a wide-ranging impact or political significance that it requires timely policy coordination and response at Union political level;*

"Response", finally, means *any action taken in the event of a disaster or a terrorist attack to address its immediate adverse consequences ([147]).*

No document has yet provided though the definitions of these definitions. As an example, to what degree a "crisis" can be considered as responding to the above-mentioned definition is left unclear,

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145 LE PORTAIL DE RÉFÉRENCE POUR L'ESPACE DE LIBERTÉ, SÉCURITÉ ET JUSTICE: *http://europe-liberte-securite-justice.org/2015/07/27/the-solidarity-clause-one-of-the-most-unacknowledged-innovations-of-the-lisbon-treaty-the-european-parliament-debates-its-implementation-but-also-its-ambiguities/*

146 COUNCIL FRAMEWORK DECISION 2002/475/JHA

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of biological and chemical weapons;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h).

147 COUNCIL DECISION ON THE ARRANGEMENTS FOR THE IMPLEMENTATION OF THE SOLIDARITY CLAUSE (24th June 2014)

since the requirement of "timely policy coordination and response at Union political level" is a subjective one, having all Member States different reaction capabilities and different histories *vis-à-vis* their respective management of past crises.

If there is one adamant data is that, in case of terrorist attack or natural or man-made disaster, the first responder needs to be the Member State hit by the disaster, with no unrequested help.

Automatically some sort of European aid might be put in place through the EU Civil Protection Mechanism.

Said Member State can only invoke the Solidarity Clause after having exploited all available tools at national and Union level and if it considers that the crisis clearly overwhelms its response capability.

If these conditions subsist, the Head of State or Government of said Member State can decide to invoke the Solidarity Clause.

To do so, they need to address their invocation to their counterpart holding the seat of the rotating Presidency of the Council ([148]) as well as to the Emergency Response and Coordination Centre (ERCC) that will in turn inform the President of the European Commission.

The ERCC becomes at this point the central 24/7 contact point at Union level for the management of the crisis.

The President of the Council shall activate the Integrated Political Crisis Response (IPCR) thus informing all Member States of the Solidarity Clause invocation.

The Council shall ensure the political and strategic response of the Union taking full account of the Commission's and HR's competences, which will identify all Union instruments useful to the specific crisis-management, including military capabilities to be identified with the contribution of the EUMS and all instruments of all European agencies. If existing instruments are not sufficient, they shall submit proposals to the Council in order to create new ones or to ask for greater military capabilities.

The Presidency of the Council, in the meantime, shall use the IPCR web platform in order to inform all relevant stakeholders in Brussels and in all Member States and shall notify of the on-going situation both the President of the European Council and the President of the European Parliament.

It will also convene a roundtable in order to get the necessary support and advice by the General Secretariat of the Council, the Commission, the HR, the EEAS, experts, all CFSP/CSDP agencies as appropriate and, in case of terrorist attack, also the EU counter-terrorism coordinator.

The ERCC will then facilitate the production of Integrated Situational and Awareness Analysis

[148] The Council Presidency changes every six months according to a rotation mechanism. The Presidency is therefore always covered by a Head of Government of a EU Member State that changes every semester.

(ISAA) reports in collaboration with the EU Situation Room and the Union Crisis Centre, as long as with voluntary contributions of Member States, Commission, EEAS, and whichever agency or third international organization is considered relevant.

Intelligence assessments and briefings will, however, be handled separately using existing channels([149]).

Counting all 28 Member States' apparatuses, therefore, the implementation of the Solidarity Clauses will involve at the least some 40 agencies, bodies, institutions, members and miscellaneous actors orbiting or working inside the European Union.

Whether the EU is ready or not to handle such a high level of bureaucratic coordination in a high-pressure situation is not yet known since the Solidarity Clause has not been yet invoked this far.

4. Possible uses for the Clause

Even if the roadmap for the actual use of the Solidarity Clause has been established, there is this far no official assessment on what degree of "gravity" a terrorist attack or a natural or man-made disaster need to be in order for a Member State to ask for the implementation of the Clause.

When does a crisis "clearly" overwhelm a State's capacity? Which kind of crises fit in the definition of "crisis" found in the document?

Divisions still exist among Member States on the definition of the triggering thresholds of such a mechanism, but the Swedish Institute of International Affairs carried out an interview among a variety of officials from various branches of the European Institutions and other officials and experts from two Member States (Sweden and Finland) asking their opinion on whether the Clause can be activated in certain specific situations.

This survey is of course incomplete, since it does not investigate the opinions of officials and experts of other Member States not coming from the "World of law observance" ([150]), yet it does shed some light on what the Brussels intelligentsia might consider as events that could trigger the

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149 COUNCIL DECISION ON THE ARRANGEMENTS FOR THE IMPLEMENTATION OF THE SOLIDARITY CLAUSE (24th June 2014)

150 Cf LISA CONANT in MARISE CREMONA *Compliance and enforcement of EU Law* (Oxford University Press, 2012) p.8 "Worlds of compliance"
World of law observance: *EU Law proceeds with no difficulty in terms of both "Law of the books" and "Law in action"* (Denmark, Sweden, Finland)
World of domestic policy: *Loss/Benefit analysis before compliance. Political resistance generates violations* (Austria, Belgium, Germany, Netherlands, Spain, UK)
World of neglect: *Need of powerful supranational enforcement action. Need of shame and sanction* (France, Greece, Luxembourg, Portugal)
World of dead letters: *Where a "World of domestic politics" approach leads directly to widespread non-compliance* (Czech Republic, Hungary, Ireland, Italy, Slovakia, Slovenia)

Solidarity Clause ([151]).

According to the survey, the activation of Article 222 TFEU can be required in any of these major events, were they to overwhelm national capabilities to cope with them:

- Disruptions of oil supply to the EU
- Declared intent by a terrorist group in a third country to stage a 9/11 attack in Europe
- Radiological bombs exploding in the vicinity of European Institutions
- A major earthquake devastating a Member State
- Cyber-attacks against strategic information networks in a Member State
- Severe pandemic
- Massive migratory inflow

All of these situations are really heterogeneous in character, rallying from a "narrow" definition of "terrorist attack" and "natural" (earthquakes, pandemics) or "man-made disaster" (radiological bombs), but also covering a "wider" definition, comprising also events such as cyber attacks, disruptions of oil supplies and massive migratory flows.

These provisions are not to be found in any Treaty, declaration or official statement and, since the Clause has never been invoked, there is no possibility for them to have built any jurisprudence, yet they might outline some future possibilities.

Major cyber attacks are always a likely scenario (particularly after the 2007 Estonia incident)([152]), risk of disruptions in oil supplies have increased exponentially with the Ukrainian crisis and presently the European Union is facing an unprecedented migratory flow from the Mediterranean Sea.

The reality depicted in a survey, though, might not necessarily correspond to factual reality and implementing the Solidarity Clause to respond to the Migrants crisis might result trickier than at first glance.

5. The Migrants crisis: a solidarity issue?

The arrival inside the borders of the Member States of the European Union of thousands of migrants is not a new issue ([153]). Home to some of the countries with the highest Human

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151 SARA MYRDAL, MARK RHINARD *The European Union's solidarity clause: Empty letter or effective tool?* (Swedish Institute of International Affairs, Occasional UI Papers n° 2, 2010) p.4

152 THE GUARDIAN *Russia accused of unleashing cyberwar to disable Estonia* (17th May 2007) available at: *http://www.theguardian.com/world/2007/may/17/topstories3.russia*

153 Data from COMMISSIONE NAZIONALE PER IL DIRITTO D'ASILO OF THE ITALIAN MINISTER FOR INTERNAL AFFAIRS available at*: http://www.interno.gov.it/sites/default/files/quaderno_statistico_1990_-_2014_asilo.pdf#27 also:* FRONTEX *Annual Risk Analysis 2015* (Executive Summary) p.5

Development Index ([154]) and the highest GDP ([155]) and actively building a self-defined "Area of Freedom, Security and Justice", the EU is a natural gravity centre for people escaping wars, famine and looking for a better life.

As often this kind of movement of people degenerates into illegal migration or worse, to human trafficking, the Union created Frontex in 2004, an agency that promotes, coordinates and develops European border management in line with the EU Fundamental Rights Charter, helping border authorities from different EU countries work together ([156]).

Its 2015 risk analysis states that:

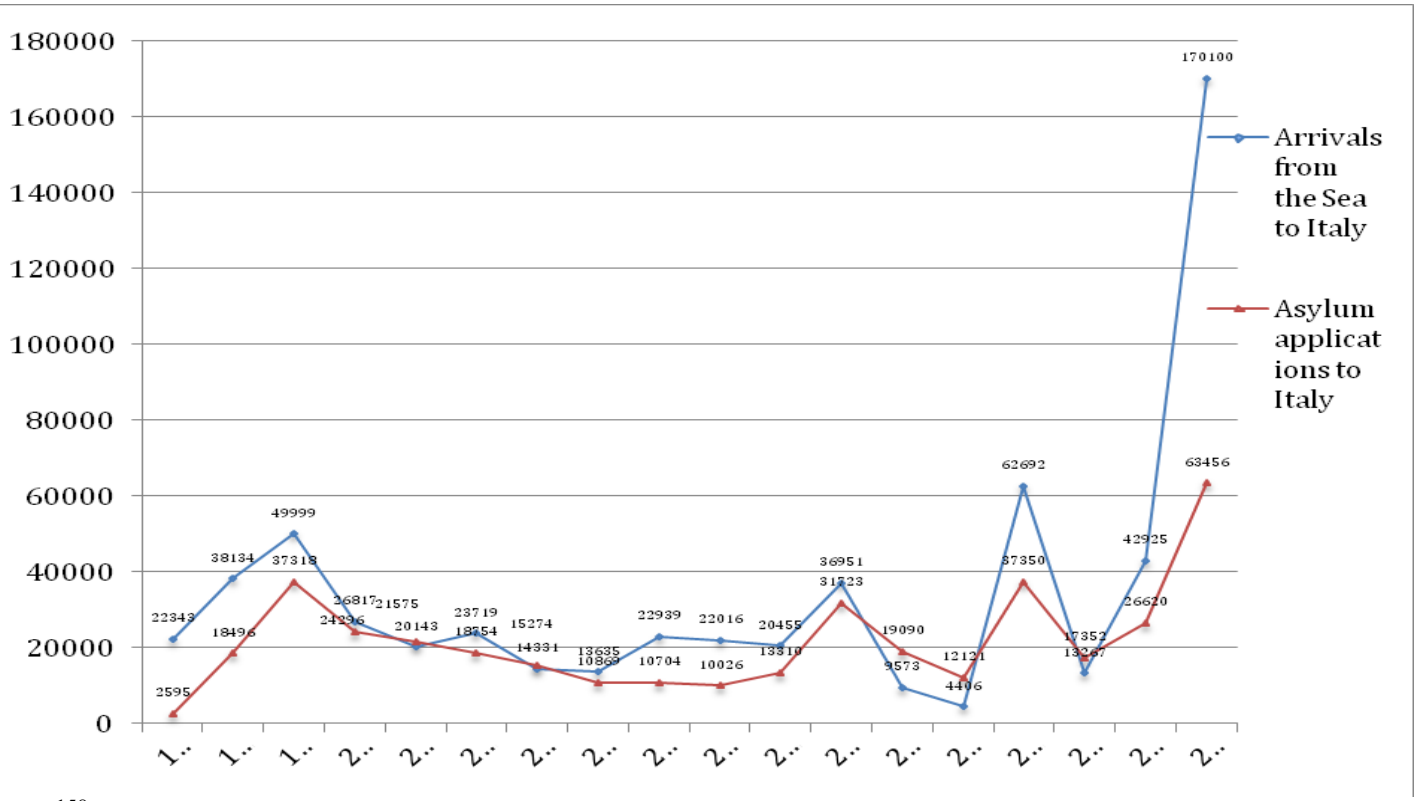
> *Last year, the European Union detected the biggest number of illegal border crossings since Frontex data-collection started eight years ago. The record number of 280 000 detections was mainly fuelled by the ongoing fighting in Syria, which has caused the worst refugee crisis since the Second World War. Syrians fleeing their country were the largest group of irregular migrants seeking to enter the EU. (…) The unprecedented number of migrants also encouraged facilitators to use cargo ships to smuggle them at a large scale. Starting in September, such vessels took migrants directly from the Turkish coast near Mersin to Italy. This is a multi-million-euro business for organised crime groups, which is likely to be replicated in other departure countries ([157]).*

154 Cf http://hdr.undp.org/en/data "Human development – or the human development approach - is about expanding the richness of human life, rather than simply the richness of the economy in which human beings live. It is an approach that is focused on people and their opportunities and choices."

155 Cf CIA website https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html

156 Cf FRONTEX Website: http://frontex.europa.eu/about-frontex/mission-and-tasks/

157 FRONTEX *Annual Risk Analysis 2015* (Executive Summary) p.5



([158])

As shown by data retrieved by the Ministry for Internal Affairs of the most exposed borderline country of the EU (Italy) – and as confirmed by the Frontex analysis quoted above, this "unprecedented number of migrants" is not an increase in the number of a mere couple of percentage points: it is the single greatest migratory crisis Italy has suffered since World War II.

This huge inflow of people is not, however, a problem concerning Italy only.

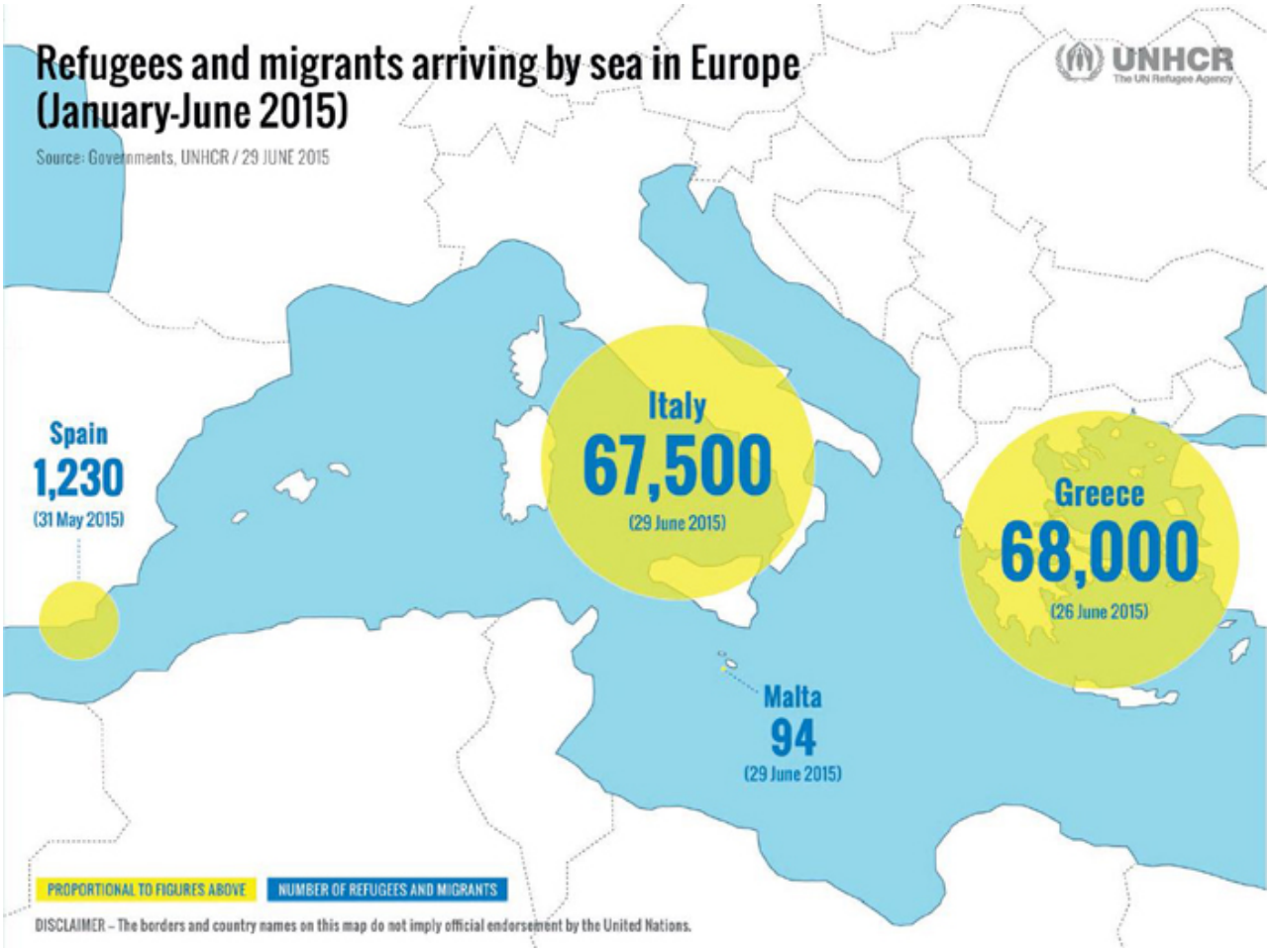
According to data retrieved and analysed by the United Nations High Commissioner for Refugees (UNHCR) in collaboration with national Governments, Greece received, in the first half of the Year 2015, as many or more refugees and migrants as its Mediterranean neighbour ([159]).

Illegal border crossing through the Central-Mediterranean Route increased of 277% between 2013 and 2014 and it constitutes 60% of illegal border crossings in the European Union ([160]).

158 Data from COMMISSIONE NAZIONALE PER IL DIRITTO D'ASILO OF THE ITALIAN MINISTER FOR INTERNAL AFFAIRS http://www.interno.gov.it/sites/default/files/quaderno_statistico_1990_-_2014_asilo.pdf#27

159 Data from UNHCR Website http://tracks.unhcr.org/2015/07/the-sea-route-to-europe/#_ga=1.95376020.945220386.1435738339

160 Cf FRONTEX *Annual Risk Analysis 2015* Q1 p.16



([161])

The number of people crossing EU borders illegally amounts to 283 532 in 2014 (63 338 by land and 220 194 by sea) having increased of 164% in comparison to the previous year ([162]), an increase observable, to various degrees, in all entrances of the Union ([163]).

Greek and Italian situations remain, however, the toughest, since they are geographically positioned in the middle of respectively the Eastern and Central Mediterranean routes, which together saw to 78% of illegal arrivals until the first quarter of 2015.

The amount of inflows changed drastically in the course of the rest of the year, with the launch of the EU military operation EUNAVFOR MED ([164]).

When the EU started working to secure the Central Mediterranean Route, traffickers and smugglers redirected the flow of people towards the Eastern route and the Western Balkan Route, reaching unprecedented highs.

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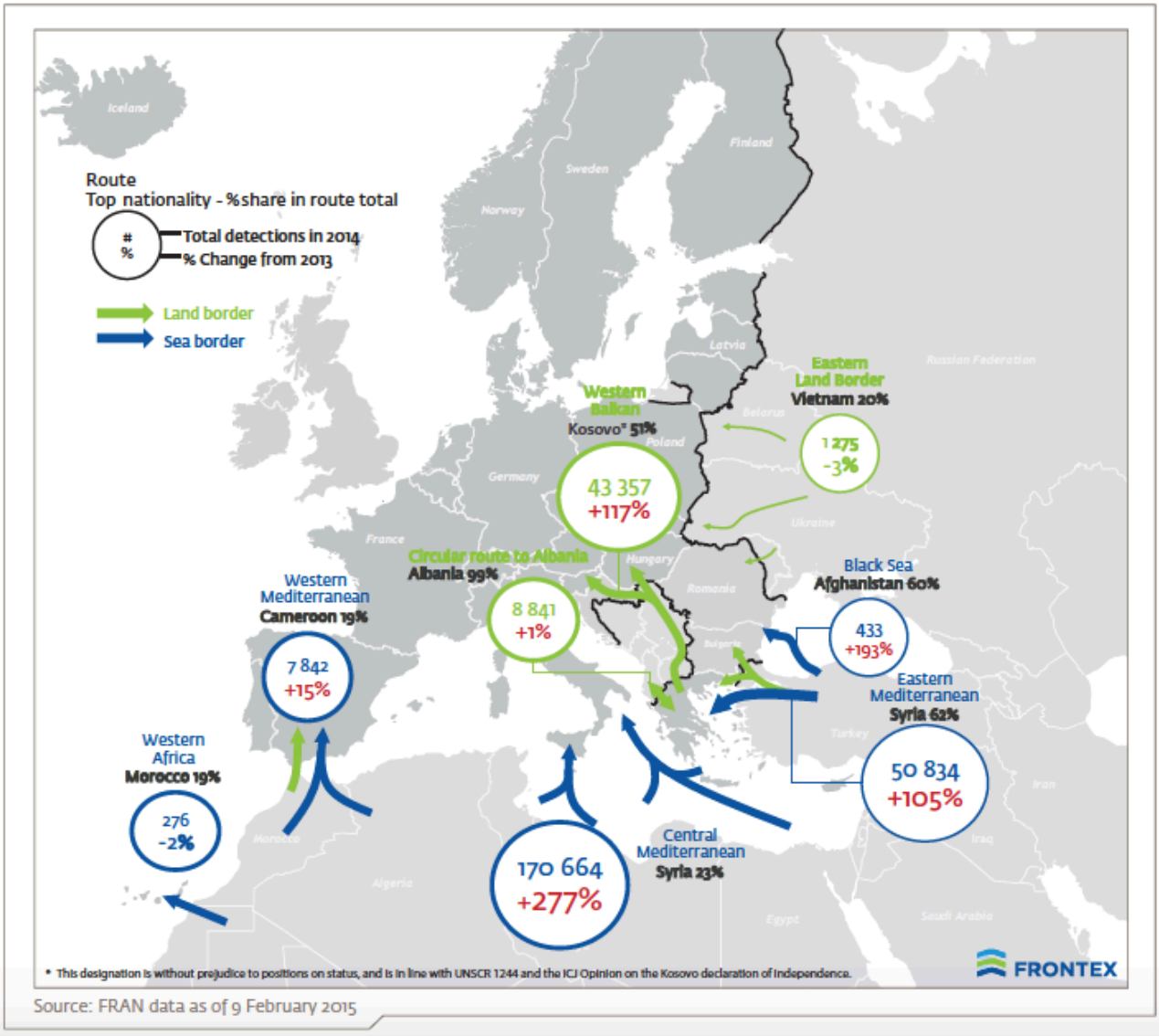
161 Data from UNHCR Website http://tracks.unhcr.org/2015/07/the-sea-route-to-europe/#_ga=1.95376020.945220386.1435738339

162 FRONTEX *Annual Risk Analysis 2015 Q1* p.57

163 FRONTEX *Annual Risk Analysis 2015* Q1 p.19

164 For more information on the mission, read the dedicated sub-chapter

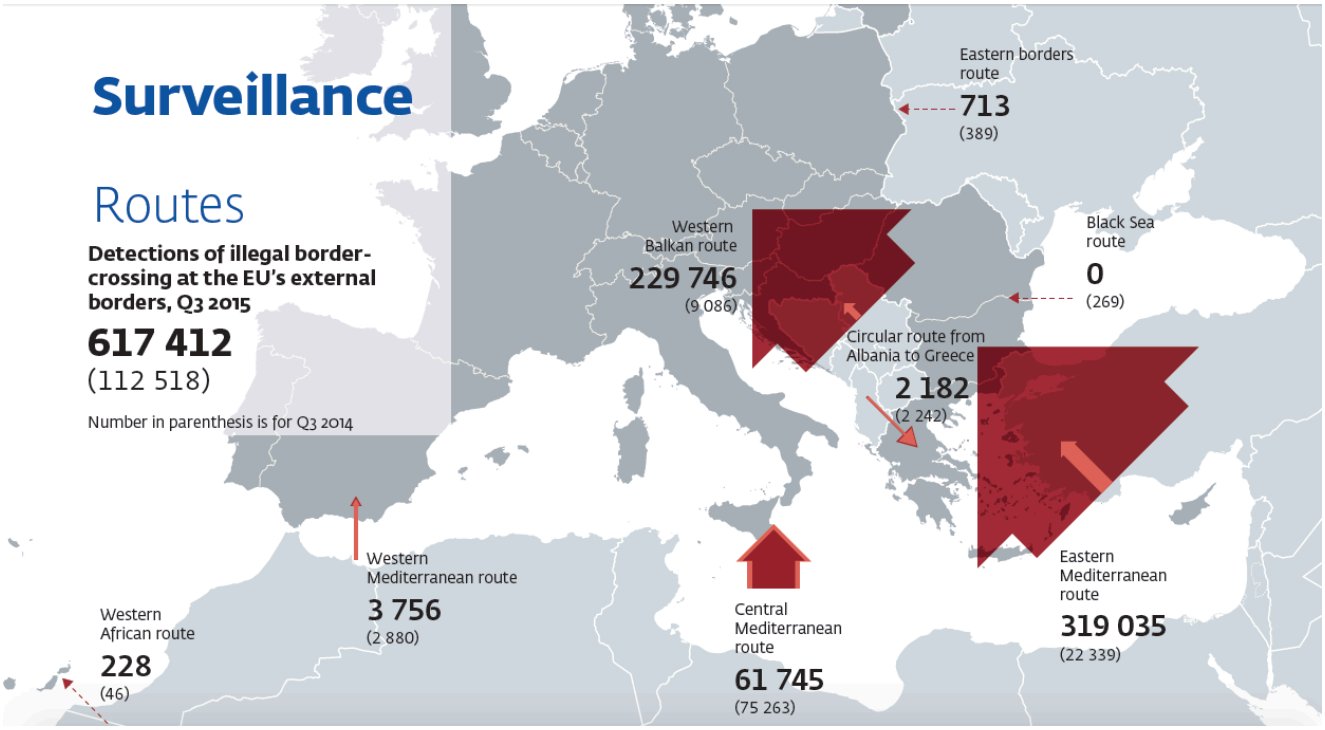
Figure 4. **Detections of illegal border-crossing in 2014 with percentage change on 2013, by route**



([165])

With its 170 664 crossers, the Central Mediterranean Route had been the most trafficked one in 2014, totalizing in the sole third quarterly 75 263 crossers. The third quarterly of 2015 saw, in the same period, a slight decrease in entrances (61 745), in favour of a huge spike of the Eastern Mediterranean Route that, between July and September 2015 alone, represented the chosen crossing of 319 035 people, six times more than all the entrances through the same route of the precedent year, whereas the Balkan Route saw the crossing, in those four months, of 229 746 people against the 43 357 of the whole precedent year ([166]).

165 FRONTEX *Annual Risk Analysis 2015 Q1* p.19
166 FRONTEX *Annual Risk Analysis 2015 Q3*



([167])

Such numbers are made possible thanks to the proliferation of human trafficking and human smuggling activities, which has become a multi-million Euros activity for organized crime groups, which are very present and radicated, particularly on Italian soil ([168]).

The notion that Italy and Greece are capable of giving proper care and accommodation for incoming refugees and migrants is one that has been challenged in several occasions by multiple actors. For example, Cecilia Malmström stated, in December 2013, after being informed of the conditions of the Italian refugee reception centre in Lampedusa, that she would not hesitate to make the Commission launch an infringement procedure "to make sure EU standards and obligations are fully respected" ([169]).

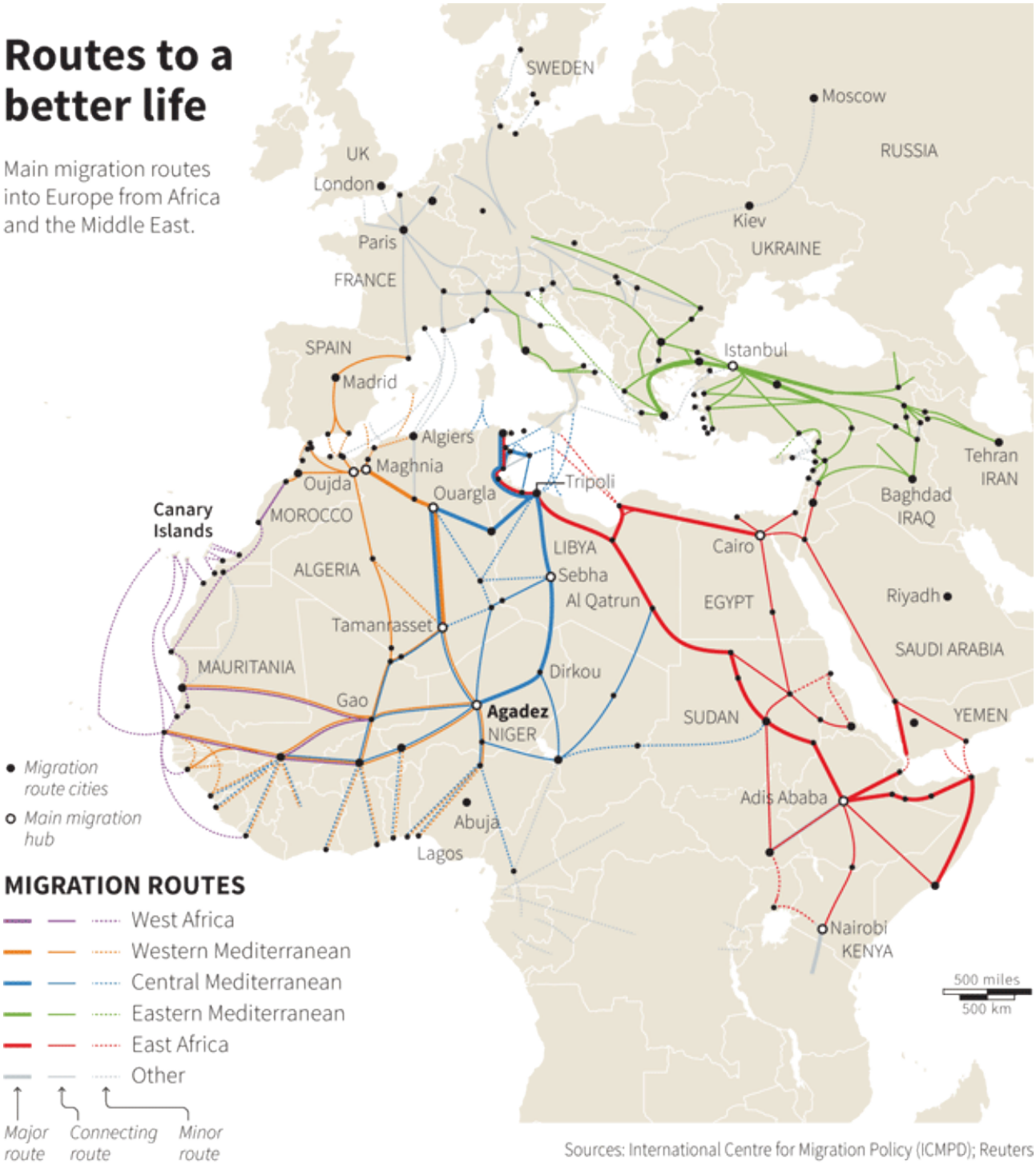
Vincent Cochetel, UNHCR's Director of the Bureau for Europe, said in a statement following a visit to Greece in august 2015 with the Director of Emergency, Security and Supply to assess the refugee crisis in the country that "Greece and Europe need to lead the response to this crisis, which can be resolved only through more solidarity within and outside the EU and increased alternative means to

167 FRONTEX *Annual Risk Analysis 2015 Q3*

168 EUROPOL *Threat Assessment - Italian organized crime*

169 EURACTIV *Commission warns Italy over degrading treatment of immigrants* http://www.euractiv.com/justice/commission-warns-italy-degrading-news-532453

reach Europe for refugees fleeing from violence" ([170]).“I've been working 30 years with UNHCR, I’ve visited many African and Asian countries and I’ve never seen such a situation,” Cochetel stated: “this is the European Union and this is totally shameful.” he also added ([171]).



[170] From UNHCR official Website http://www.unhcr.org/55c4d1fc2.html

[171] RUSSIA TODAY *UNHCR urges Greece to resolve refugee crisis deemed ‘shameful’ for EU member* (8th August 2015) http://www.rt.com/news/311906-unhcr-greece-refugees-shameful/

The causes of the departure of these migrants are, in fact, to be found well outside Europe and are strictly linked with the military and humanitarian crisis caused by the state-collapses that followed the Arab Spring in North Africa and Syria, which greatly facilitated illegal movement of people across borders and, for the first time, across the Mediterranean Sea, in particular from Libya ([172]).
According to the Italian Government, this kind of situation cannot be tackled effectively by Italy alone. Prime Minister Matteo Renzi called out for the solidarity principle of the European Union and fought for and obtained ([173]) the temporary and exceptional relocation over two years from the frontline Member States Italy and Greece to other Member States of 40.000 persons in clear need of international protection, in which all Member States will participate ([174]).
On 22nd September 2015, the Council raised the number of people to be relocated to 120 000, albeit facing great opposition on the issue from Romania, Czech Republic, Slovakia and Hungary ([175]).
Renzi was able to make the European Union admit that the Migrants crisis *is* a solidarity and responsibility issue for the Union as a whole. Such admission, though, was forced at a time in which European solidarity was perceived to be lacking so much that Renzi himself came to say to the Council that "there either is solidarity or you are wasting our time. (…) If this is your idea of Europe, you can keep it", also adding that his counterparts "are not worthy of being called "Europe""([176]).

The reason of such strong words, the frustration behind them, a feeling of helplessness *vis-à-vis* a European Union more and more lacking solidarity is a complicated issue that is not the object of this dissertation, but it is necessary to keep it in mind when analysing all the problems in the management at a European level of the Migrants crisis as well as the reasons why, so far, the Solidarity Clause has not yet been activated: when obstacles exist, they can be faced together only with the right state of mind. If that is lacking, obstacles are doomed to become insurmountable.

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172 FRONTEX *Annual Risk Analysis 2015* (Executive Summary) p.6

173 LA STAMPA *L'UE litiga ancora sulle quote migranti. Renzi: "Ci fate solo perdere tempo"* (25th June 2015) *http://www.lastampa.it/2015/06/25/esteri/migranti-tusk-non-c-consenso-tra-gli-stati-membri-sulle-quote-obbligatorie-836hNElqeKVpY2p8YQ4omL/pagina.html*

174 EUROPEAN COUNCIL *Presidency Conclusions,* Art.4 (25th – 26th June 2015)

175 REPUBBLICA *Migranti: "Sì" al piano di ricollocamento per 120mila. Via libera a maggioranza, blocco Est contrario (*22nd September 2015) available at:
http://www.repubblica.it/esteri/2015/09/22/news/migranti_ocse_europa-123412396/

176 LA STAMPA *L'UE litiga ancora sulle quote migranti. Renzi: "Ci fate solo perdere tempo"* (25th June 2015) *http://www.lastampa.it/2015/06/25/esteri/migranti-tusk-non-c-consenso-tra-gli-stati-membri-sulle-quote-obbligatorie-836hNElqeKVpY2p8YQ4omL/pagina.html*

6. Making the deadliest border in the world safer

What prompted the European Union to act on the migrants' front was the enormous number of people losing their lives at sea during the crossing. We can therefore talk of a different crisis that hit Europe, one that does not entail help to frontline Member States in their assistance to refugees or the management of asylum applications, which is a humanitarian issue, but also a practical one. The Mediterranean death toll needed to be tackled not because of any technical reasons, but for strictly moral ones: thousands of people died at sea each year trying to get to Europe and the European Union was doing nothing to stop the slaughter. This distinction between the Migrants crisis *per se* and the Mediterranean death toll is fundamental, because it creates a *Sea security dilemma*: if European States use their resources to stop the increasing number of deaths at sea, they encourage human trafficking because they decrease the risk of the crossing and thus fuel illegal activities – and aggravate the migrants crisis. On the other hand, not doing anything results in a inhuman butchery made by the Mediterranean, which could actually solve the migrants crisis for nations like Italy that are more reachable by maritime crossing, but at the cost of thousands of deaths. How this scenario could possibly fit with the idea of a European Union committed to peace and solidarity is undoubtedly unclear.

During the Arab Spring and, in particular, during the Tunisian and Libyan Civil Wars, arrivals of migrants by Sea to Italy's closest territory to Africa, Lampedusa, had reprised rising in number, reaching the all-time high of 62.692 people in one year ([177]) since Libya's brotherly Leader and Guide of the revolution Muammar Gaddafi would not keep enforcing the agreements reached with Italian Prime Minister Silvio Berlusconi in 2008, that ensured that the North African State would "stop immigrants instead of sending them to Italy" - as Umberto Bossi, leader of Lega Nord, one of the parties ruling Italy in a right-wing coalition at the time of the agreement, put it ([178]).

When this situation arose, Italy requested a Frontex Operation that would patrol the Mediterranean Sea in order to control immigration flows from Tunisia ([179]).

Operation Hermes was ridiculously under-equipped and was completely impotent to contain illegal human trafficking, which had started to be based in Libya, making arrangements with the Tunisian Government a bit preposterous ([180]).

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177 Data from COMMISSIONE NAZIONALE PER IL DIRITTO D'ASILO OF THE ITALIAN MINISTER FOR INTERNAL AFFAIRS http://www.interno.gov.it/sites/default/files/quaderno_statistico_1990_-_2014_asilo.pdf#27

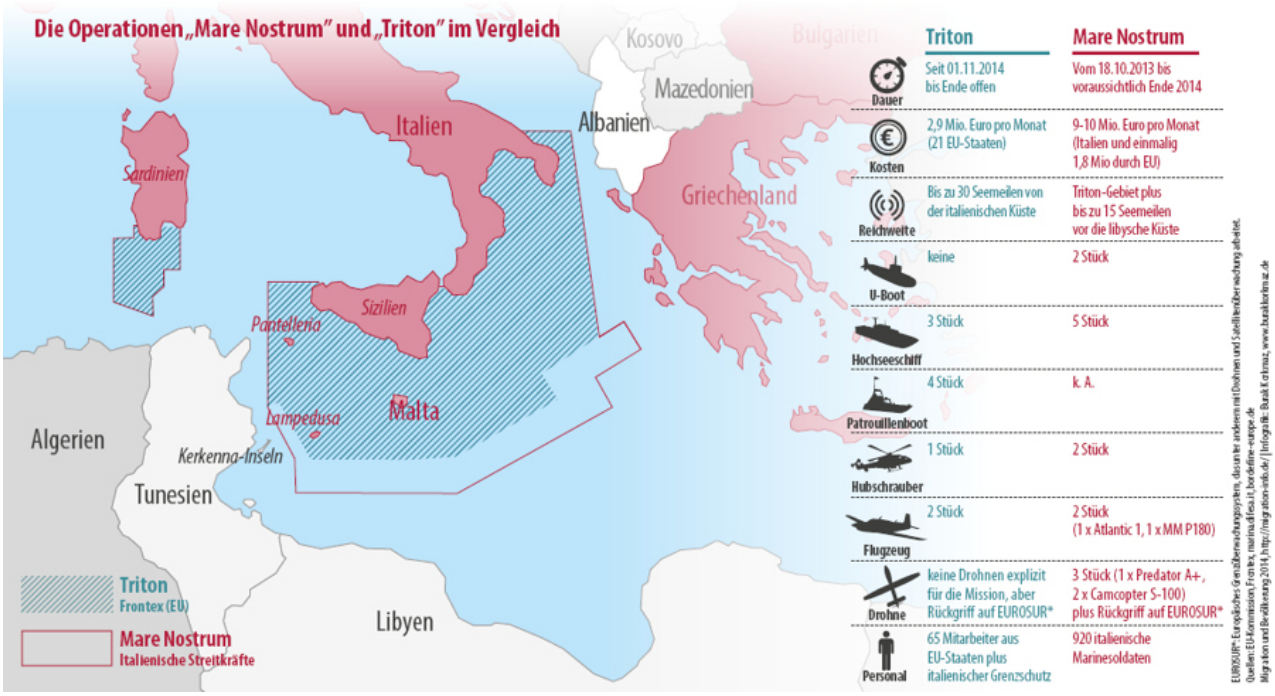
178 CORRIERE DELLA SERA Berlusconi da Gheddafi: Siglato l'accordo" (30th august 2008) http://www.corriere.it/esteri/08_agosto_30/berlusconi_libia_gheddafi_bengasi_478ee3f4-767e-11dd-9747-00144f02aabc.shtml

179 FRONTEX website: http://frontex.europa.eu/operations/archive-of-operations/aWEw6x

180 FRONTEX *FRAN Quarterly* (Quarter 2 April-June 2013) p.20

To tackle the dramatic increase of migratory flows during the second half of the year 2013 and consequent tragic ship wreckages off the island of Lampedusa, Italy – on its own- launched Operation Mare Nostrum ([181]). The name itself of the operation could be interpreted as a statement to whoever wanted to listen to it in Brussels: "Mare Nostrum" was the name Ancient Romans had given to the Mediterranean Sea and it means "Our Sea" from Latin. Far from having any imperialist or nostalgic scent to it, the name could be interpreted as an implicit accusation: "Italy will protect the Mediterranean and save the lives that are lost therein. We, as Italians, do it because it is our sea, ours only, apparently, since no one else in Europe is trying to prevent the butchery that is happening there".

Unlike Operation Hermes, Operation Mare Nostrum was very well equipped and its mandate was not limited to patrol and investigation: it was a huge search-and-rescue mission, with the ability to actively pursue smugglers.



([182])

During the last 364 days of relentless activity in all weather conditions, the units of the Italian Navy have engaged in 421 operations and rescued 150.810 migrants; 5 mother ships have been seized and 330 alleged smugglers have been brought to justice. These results have been achieved by 900

181 MARINA MILITARE ITALIANA website:
http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx

182 BUNDESZENTRALE FÜR POLITISCHE BILDUNG *Flucht nach Europa: Das Mittelmeer ist der gefährlichste Grenzübergang der Welt* (14th November 2014)
http://www.bpb.de/gesellschaft/migration/newsletter/195076/flucht-nach-europa

military engaged any single day, 32 naval units and 2 submarines taking shifts in over 45,000 hours of active operations, costing 114 millions Euros ([183]).

The new Frontex Triton Operation, under Italian command, replaced such huge operation, deemed too costly for only one State to manage. Operation Triton was not a search-and-rescue mission and had a more limited patrol area ([184]) for two reasons: one related to budget (the greater the patrol area, the greater the cost) and the other connected to the sea security dilemma (the greater the patrol area, the lesser the risk of crossing the Sea, the greater the number of people attempting the trip)([185]).

An operation with such smaller extent, though, did not stop migrants from trying and making the crossing and Central Mediterranean remained the most dangerous and deadly border in the world([186]).

After a shipwreck claimed the lives of more than 800 migrants in Central Mediterranean in April 2015 ([187]), the European Council convened a special meeting in order to find a more fitting way to tackle the Migrants crisis, the Mediterranean death toll crisis and human trafficking. In their final statement, the Heads of State and Government of the European Union declared that "the situation in the Mediterranean is a tragedy. (…) Our immediate priority is to prevent more people from dying at sea" ([188]).

The European Council committed to at least triple the financial resources at the disposal of Operation Triton (making them comparable to the ones dedicated to Mare Nostrum), fighting traffickers in accordance with international law, preventing illegal immigration flows increasing

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183 MARINA MILITARE ITALIANA website:
http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx

184 BUNDESZENTRALE FÜR POLITISCHE BILDUNG *Flucht nach Europa: Das Mittelmeer ist der gefährlichste Grenzübergang der Welt* (14th November 2014)
http://www.bpb.de/gesellschaft/migration/newsletter/195076/flucht-nach-europa

185 REUTERS *Migrants' bodies brought ashore as EU proposes doubling rescue effort (20th April 2015)*
http://www.reuters.com/article/2015/04/20/us-europe-migrants-idUSKBN0NA07020150420

186 THE INDEPENDENT reporting INTERNATIONAL ORGANIZATION FOR MIGRATION data
http://www.independent.co.uk/news/world/europe/worst-year-on-record-for-deaths-in-mediterranean-with-over-3000-casualties-9763516.html

Migrant border-related deaths worldwide (January-September 2014)
South Africa 17
Caribbean 45
Sahara 56
South East Asia 70
Horn of Africa 123
Bay of Bengal 205
US/Mexico border 230
East Africa 251
Mediterranean 3072

187 REUTERS *Migrants' bodies brought ashore as EU proposes doubling rescue effort (20th April 2015)*
http://www.reuters.com/article/2015/04/20/us-europe-migrants-idUSKBN0NA07020150420

188 SPECIAL MEETING OF THE EUROPEAN COUNCIL *Statement* Art.1 (23rd April 2015)

border controls building on current CSDP operations as well as on regional cooperation frameworks and in collaboration with the African Union and reinforcing internal solidarity and responsibility, also by implementing effectively the newly instituted Common European Asylum System ([189]).
This kind of agreement was not, however, deemed sufficient by everyone. Amnesty International said that Triton's operational area must be extended to the "high seas" where most of the migrant deaths occur. "What we witnessed today in Brussels was a face-saving not a life-saving operation," said John Dalhuisen, Amnesty's Director for Europe and Central Asia([190]).
The extent of the European Union's intervention, on the other hand, was unprecedented and willing to move towards a real military commitment of the EU against human traffickers, as well as to re-open the debate on how the Union's borders need be considered and managed.

7. EUNAVFOR MED: a military response to the Migrants crisis

Due to the rising death toll and disruption caused by migratory movements towards Europe through the Central Mediterranean Route in 2014-2015, the European Union was forced to act and mitigate the greatest number of symptoms and causes of the Migrants crisis.
What the EU is facing is a highly multi-layered problem, as we have already shown: Member States need to find lodging and overall manage an unprecedented number of refugees in their own territory. These refugees need to cross borderlines between Europe and Africa/Middle East, crossings that, in particular in the Mediterranean, claim thousands of lives each year. These migratory flows, moreover, are organized by human traffickers and carried out by human smugglers.
The Frontex Operation Triton and Italian Operation Mare Nostrum were able to bring to justice several hundreds of smugglers ([191]), but in order to tackle traffickers, no operation under the umbrella of Justice and Home Affairs could possibly be sufficient and the European Union needed make recourse to the tools from its Common Security and Defence Policy.
On the high seas, in accordance with relevant domestic and international law, States may interdict vessels suspected of smuggling migrants, where there is flag State authorisation to board and search the vessel or where the vessel is without nationality, and may take appropriate measures against the vessels, persons and cargo.

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189 SPECIAL MEETING OF THE EUROPEAN COUNCIL *Statement* Art.3 (23rd April 2015)
190 AL JAZEERA *Mediterranean migrant deaths spur EU leaders to act* (24th April 2015)
http://www.aljazeera.com/news/2015/04/migrants-disaster-galvanises-eu-leaders-action-150423184223014.html
191 MARINA MILITARE ITALIANA website:
http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx

Measures may also be taken in the territorial or internal waters, territory or airspace of a State against vessels suspected of involvement in human smuggling or trafficking, with the consent of that State or pursuant to a UN Security Council Resolution, or both.

A State may take appropriate measures against persons present on its territory whom it suspects of smuggling or trafficking humans with a view to their possible arrest and prosecution, in accordance with international law and its domestic law ([192]).

Following the proposal of the High Representative of the Union for Foreign Affairs and Security Policy, Federica Mogherini, the European Council adopted therefore, on 22nd June 2015, a decision launching a European military operation in the southern Central Mediterranean ([193]) to be carried out in three phases:

- PHASE ONE: information gathering and patrolling in the high seas, supporting the detection and monitoring of migration networks
- PHASE TWO: boarding, searching, seizing and diverting vessels suspected of being used for human smuggling or trafficking in the high seas. Whereas a UN Security Council resolution or consent by concerned coastal States would give the mission mandate, these operations would be conducted inside territorial waters of non-EU States. Without that precondition, such action would be considered an act of war.
- PHASE THREE: if the EU were able to gain mandate from a UN Security Council Resolution or by the coastal State concerned, Operation EUNAVFOR MED would proceed to bombing vessels suspected of being used for human smuggling or trafficking even inside the land territory of that State.

Starting from 28th July 2015, Phase 1 of Operation EUNAVFOR MED is fully operational. It is funded by the 20 Member States that participate to it in various degrees and by a common 11.82 million Euros budget ([194]). Denmark opted out from the decision to launch the operation ([195]).

On the 3rd September, following a Mission Update briefing granted to the EU Political and Security Committee by Admiral Credendino on 26th August, Mogherini announced that the operation had filled all military objectives of Phase One and she proposed to EU Defence Ministers the transition to Phase Two.

With the full support of the EU towards combating this crisis, in 25 days the Council made a

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192 COUNCIL OF THE EUROPEAN UNION *Council Decision (CFSP) 2015/778 on a European Military Operation in the Southern Central Mediterranean* (EUNAVFOR MED) (18th May 2015)

193 FEDERICA MOGHERINI *Council Decision (CFSP) 2015/972 launching the European Military Operation in the Southern Central Mediterranean* (EUNAVFOR MED) (22nd June 2015)

194 EU NAVAL FORCE MED European Naval Force – Mediterranean http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med.pdf

195 COUNCIL OF THE EUROPEAN UNION *Council Decision (CFSP) 2015/778 on a European Military Operation in the Southern Central Mediterranean* (EUNAVFOR MED) (18th May 2015)

positive assessment on the transition (14th September) and Member States pledged additional assets to the EUNAVFOR MED force, enabling this more active phase.

Phase Two was symbolically appointed the name "Operation Sophia", as a memoire to one of the hundreds of children who died at sea in the Central Mediterranean Route, those same children whose lives the operation aims at protecting ([196]).

The UK drafted, therefore, a Resolution on behalf of the Union that was adopted by the UN Security Council on 9th October.

The UNSC Resolution, however, does not give mandate to the European Union to enter Libyan territorial waters: Operation Sophia is therefore conducted, to this day, only in international waters([197]).

The European Union's work on all dimensions of a comprehensive and systemic approach does not end today, though, with this military operation.

8. Counter-terrorism and border control: securitization or solidarity?

As noted in the first chapter, particularly since 9/11, terrorism has become one of the greatest security issues for the European Union, both for Justice and Home Affairs and CFSP.

In the year 2000, the European Council had launched a Common Strategy on the Mediterranean (one of the first acts of the kind ever to be launched), with which the European Union shared its vision for the Mediterranean region.

> *The Mediterranean region is of strategic importance to the EU. A prosperous, democratic, stable and secure region, with an open perspective towards Europe, is in the best interests of the EU and Europe as a whole ([198]).*

The Common Strategy was built upon the principles of the Barcelona Declaration ([199]), which, in 13 years brought to the establishment of the Union for the Mediterranean (UfM) with the aim to identify and promote regional cooperation projects that contribute to achieve economic, social,

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196 IMPETUS – MAGAZINE OF THE EU MILITARY STAFF, EEAS, BRUSSELS (Autumn/Winter 2015 Issue #20) pp.6-7

197 UNITED NATIONS SECURITY COUNCIL RESOLUTION 2240 (2015)

198 SANTA MARIA DE FEIRA EUROPEAN COUNCIL *Presidency Conclusions* Annex V: Common Strategy of the European Union on the Mediterranean region

199 The BARCELONA DECLARATION (short for "Final declaration of the Barcelona Euro-Mediterranean Ministerial Conference of 27 and 28 November 1995 and its work programme") established a multilateral cooperation between the EU and the countries of the Mediterranean basin. "This partnership represents a new phase in their relationship. For the first time it addresses economic, social, human and cultural aspects and questions of common security" http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ar15001

human and cultural collaboration as well as common security cooperation ([200]).

The fall of Northern African regimes due to the Arab Spring forced the UfM to exist only on paper, ending *de facto* what had become an institutionalized partnership programme of the EU and the absence of a strong authority enforcing the rule of State on its territory resulted in civil wars and a complete dismantlement of serious borders controls, particularly in Libya and Syria.

Overall, there is an underlying threat of terrorism-related travel movements especially due to the appeal of the Syrian conflict to both idealist and radicalised youths. The conflict in Syria has attracted thousands of foreign fighters, including EU citizens, dual- nationality holders and other third country nationals.

Turkey has become the country most often used by foreign fighters to enter or exit Syria primarily because of its geographical location plus the availability of legal and cheap travel options. It is possible that foreign fighters use irregular migration routes and/or facilitation networks (irrespective of whether this is recommended by terrorist structures or not), especially when the associated risks and costs are perceived as low in comparison to legal travel options.

Frontex is not currently in a position to identify, nor does it have any information that suggests, any nexus between terrorist travel and irregular migration routings and/or facilitation networks. Nonetheless, it cannot be excluded that EU-based fighters change their *modus operandi* of travel when faced with administrative and/or legal measures upon their return; or that may be reluctant to return home in fear of reprisal, which may induce them to resettle elsewhere ([201]).

Since immigrant flows can be a vehicle for terrorist infiltrations, border controls are not only necessary in EU frontline States, but also in countries of origin and transit of migrants, as well as other measures, like fight against smugglers and traffickers, bilateral agreements for effective return policies as well as an effective action against the root causes of migrations: wars and poverty. The June 2015 European Council appointed the HR Federica Mogherini, together with the Commission, to prepare a global package to support high-level dialogues with the main countries of origin of irregular migrants.

The Commission also announced its intention to propose a strengthening of Frontex so that it can initiate return missions ([202]).

A European return programme, however, still does not exist and serious implementation of the Common European Asylum System (CEAS) is deemed to be dubious by its own creator, Cecilia

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200 PARIS SUMMIT FOR THE MEDITERRANEAN *Joint Declaration* (13th July 2008)

201 FRONTEX *Annual Risk Analysis* (2015) p.49

202 EUROPEAN COUNCIL *Presidency Conclusions,* Art.5 (25th – 26th June 2015)

Malmström ([203]).

The Council has therefore appointed the Commission to make proposals on the creation of a European return programme in the context of the 2016 EU budget ([204]).

For what concerns cooperation with countries of origin and transit, the European Council declared its intention to build a true partnership reinforcing overall cooperation on stemming the flows of irregular migrants and building up some sort of development assistance and enhancement of European investment in Africa, providing social and economic opportunities that could address the root causes of migrations ([205]), a plan that was elaborated at the EU-Africa Summit of La Valletta of 11th and 12th of November 2015 and that entailed the creation of a dedicated European Trust Fund for Africa (EUTF).

The June European Council therefore, did not act only in a mere spirit of solidarity towards those Member States most afflicted by the Migrants crisis: it also tried to tackle the factors at the root of the phenomenon itself, because they perceive it as a security issue for the Union – a very pragmatic approach, sooner than one founded on solidarity.

The Migrants crisis has been securitized ([206]) by the European Union, perhaps transcending the simple scale of mutual assistance in the face of catastrophes.

9. Addressing the root causes of Migration: the Valletta Summit

By the time the EU-Africa Summit of La Valletta on Migration unravelled, the general approach of the Governments towards the issue of Migration had slightly changed and it clearly emerges from the text of the Action Plan itself that the Summit produced.

The European Union surrendered to the fact that current migration flows are not a *crisis*: they are the state of things, a systemic trend, so huge that it cannot be stopped: it can only be accommodated, made beneficial for the parties involved and reduced in its illegal component: no effort was made to give a halt to migration flows ([207]).

The Valletta Action Plan is funded on five priority domains:

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203 EUROPEAN COMMISSION *A Common European Asylum System* http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf

204 EUROPEAN COUNCIL *Presidency Conclusions,* Art.5 (25th – 26th June 2015)

205 EUROPEAN COUNCIL *Presidency Conclusions,* Art.6 (25th – 26th June 2015)

206 *Securitization* in international relations (Copenhagen School) describes the process of State actors transforming subjects into maters of security: an extreme version of "politicization" that enables extraordinary means to be used in the name of security. Cf BARRY BUZAN, OLE WAEVER, JAPP DE WILDE *Security: a new framework for analysis* (Boulder: Lynne Rienner Publishers, 1998) p.25

207 The Action Plan of the Valletta Summit is aimed at crushing the causes of *illegal* Migration, not the movement of people across countries *per se*. The perception of the Migrants crisis as a systemic issue is one that does not only emerge from the interpretation of the document produced by the Summit, but also by the personal opinions on the issue given by every single Diplomat from the African Union, European Union and Italian Embassy and Cooperation I have had the chance of speaking to during my traineeship in Addis Ababa

1. Development of the benefits of Migration and addressing of the root causes of irregular migration and forced displacement;
2. Legal Migration and mobility;
3. Protection and asylum;
4. Prevention of and fight against irregular migration, migrant smuggling and trafficking in human beings ([208])

The Valletta Summit Action Plan entails a transversal and variegated action in all the States of two entire Continents that is resumed in the Political Declaration the was hither produced:

> *We recognise the high degree of **interdependence** between Africa and Europe as we face common challenges that have an impact on migration: promoting democracy, human rights, eradicating poverty, supporting socio-economic development, including rural development, mitigating and adapting to the effects of climate change. We will pay particular attention to **stability** and **security**, which is currently threatened by terrorism, the arms trade and armed conflicts.*
> *We commit ourselves to address these challenges in a concerted manner, notably through early warning, conflict prevention and conflict resolution.*
> *Migration within Africa and Europe, from Africa to Europe and from Europe to Africa is a multi-faceted phenomenon. We commit to address **the root causes of irregular migration** and forced displacement resulting from state fragility and insecurity, as well as from demographic, economic and environmental trends. (...) Rekindling hope, notably for the African youth, must be our paramount objective.*
> *We acknowledge that further efforts should be made **to advance legal migration** and mobility possibilities ([209]).*

Moreover, the European Commission established the EUTF, made up of 1.8 billion Euros from the EU budget and the European Development Fund (EDF), to be complemented by contributions from EU Member States and other donors. To date, Member States' contributions amount to around 81.3 million Euros, but the EU expects more contributions to follow.
The Fund constitutes an important instrument for the implementation of the Action plan adopted at

[208] VALLETTA SUMMIT ON MIGRATION *Action Plan* (11th-12th November 2015)
[209] VALLETTA SUMMIT ON MIGRATION *Political Declaration* (11th-12th November 2015)

the Valletta Summit ([210]), but some representatives of the African civil society have deemed it insufficient in its limited financial extension for such a wide range set of problems ([211]).
However, the European strife to save lives and managing the Migrants issue is not only a matter of coordination between Europe and Africa, but also a matter of coordination *inside* the EU.

10. Strengthening ties between former pillars

In Europe, people can live in relative safety. National law enforcement authorities, such as police and customs officers, together with the relevant judicial authorities, play an important role in ensuring this ([212]). However, the growing trend of Europeans fighting abroad in groups affiliated with terrorism remains a huge security challenge for Europe, which calls for much closer cooperation between national police, immigration and border control authorities, and EU entities such as Europol and Frontex, the Union's police and external border management agencies, respectively. The overriding objective here is to prevent terrorism ([213]).
Moreover, since the causes of problems such as foreign fighters or migrants are to be found outside the borders of the EU, a deeper coordination in Justice and Home Affairs is only a prerequisite for further action: there is a strong need for greater coordination between all aspects of the Area of Freedom, Security and Justice and the Common Foreign and Security Policy.
As has been argued more in detail elsewhere ([214]), the context in which the external dimension of the AFSJ has been developed is broader than the traditional 'justice and home affairs' perspective that, *prima facie*, one would assign to it. Indeed, the security parcel embedded within the AFSJ is to be understood as belonging to the broader context of the European Security Strategy (ESS) ([215]).
Since 2003 and the adoption of the ESS the EU has emphasised how security threats have shifted from a traditionally military paradigm to a new one, in which factors such as transnational

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210 EUROPEAN COMMISSION *Fact sheet – A European Union Emergency Trust Fund for Africa* (Valletta, 12th November 2015)
211 FRIEDRICH EBERT STIFTUNG, ECDPM, SAL *Making Migration beneficial to Europe and Africa* (21st October 2015)
212 EUROPEAN COMMISSION *Borders and Security – building an open and secure Europe* p.7 http://ec.europa.eu/dgs/home-affairs/e-library/docs/brochure-borders-and-security/brochure_borders_and_security_en.pdf
213 EUROPEAN COMMISSION *Security in 2020: Meeting the challenge* p.11 http://ec.europa.eu/dgs/home-affairs/financing/fundings/research-for-security/docs/security_research_brochure_2014_en.pdf
214 WESSEL, MARIN, MATERA, MONAR *The EU's Growing external role in the AFSJ domain: factors, framework and forms of action* (Cambridge Review of International Affairs, 2013) p. 1.

215 In relation to the inter-linkages between different policies in relation to the security of the EU, see F.LONGO, *Justice and Home Affairs as a New Dimension of the European Security Concept (*European Foreign Affairs Review, Vol. 18, No. 1, 2013) pp. 29-46, as well as the special issue of the *European Foreign Affairs Review*, *Issue 2/1* (2012) From a legal perspective, see M. CREMONA ET AL. *The External Dimension of the European Union's Area of Freedom, Security and Justice* (College of Europe Studies, Brussels: P.I.E. Peter Lang. 2011)

organised crime, terrorism and other humanitarian crises should be considered as security threats.

Since the adoption of the ESS the EU has promoted a holistic understanding of security that requires that the "[all] powers available to the Union, including external relations, should be used in an integrated way" so as to develop a single external policy in relation to the security of the Union. Thus, because of this shift in the notion of security threat, also the external dimension of the AFSJ is considered to be a vehicle to promote the fight against new security threats beyond the borders of the EU ([216]).

Before the Treaty of Lisbon, though, the European Union's structure was divided in pillars and a rift existed between JHA and CFSP, with AFSJ covering some grey areas between them sometimes in a very baroque and uncoordinated way.

This is the reason why, in 2011, after the dismantlement of the Pillars structure, the European Commission and the High Representative for Foreign Affairs and Security policy Catherine Ashton, produced a working paper on how to strengthen ties between Freedom, Security and Justice and the Common Security and Defence Policy ([217]).

One of the greatest stepping-stones of this post-pillars approach to intra-EU actors approach is the current Migrants crisis.

Cecilia Malmström's successor since 2014 as Migration, Home Affairs and Citizenship Commissioner, Dimitris Avramopoulos, produced in April 2015, with High Representative Federica Mogherini a joint declaration of the Foreign and Home Affairs Council proposing a ten point action plan on migration ([218]) which became the foundation of further decisions taken by the extraordinary European Council summit called three days later by Italian Prime Minister Matteo Renzi that gave the *impromptu* to all later action to tackle the Migrants crisis with a comprehensive approach ([219]).

Among the ten points we find the proposal for the strengthening of Frontex, for a military operation in the Mediterranean to tackle smugglers (that would become EUNAVFOR MED), the decision to make EUROPOL, Frontex, EASO and EUROJUST work together and meet on regular basis, the implementation of the Common European Asylum System and of the European fingerprints

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216 STEVEN BLOCKMANS Differentiated integration in the EU – from the inside looking out (Center for European Policy studies, 2014) pp. 83-85

217 EUROPEAN COMMISSION, HIGH REPRESENTATIVE FOR FOREIGN AFFAIRS AND SECURITY POLICY *Joint staff working paper – Strengthening ties between CSDP and FSJ actors – proposals for a way ahead* (5th May 2011)

218 EUROPEAN COMMISSION *Joint Foreign and Home Affairs Council: Ten point action plan on migration* (20th April 2015)

219 SPECIAL MEETING OF THE EUROPEAN COUNCIL *Statement* (23rd April 2015)

database EURODAC, cooperation between Commission and EEAS on European return policies and engagement with transit countries and even the proposal for an emergency relocation mechanism.

> *We need to show that same collective European sense of urgency we have consistently shown in reacting in times of crisis. The dire situation in the Mediterranean is not a new nor a passing reality. That is why the Commission will come forward with a comprehensive European Agenda on Migration in May to address the structural problems. The 10 actions we have agreed upon today are the direct, substantial measures we will take to make an immediate difference. All of these actions require our common effort, the European institutions and the 28 Member States. (…) This is what Europe taking responsibility is - all of us working together." ([220])*

The ten points proposal is first of all a theoretical step. Strengthening ties between the actors involved in two post-pillar departments of the European Union's apparatus is a theoretical political/functional action, whereas the Migrants crisis is a sum of very practical problems (identifications, settlements, saving people at sea, assisting frontline Member States in the management of the inflow, borders control, dismantlement of terrorist networks, attacking the causes of poverty and war in Africa and the Middle East).

We believe that analysing first the theoretical facet of the problem would have made the reader miss the point in a maze of political science concepts that seem not to have any contact with reality. The risk of focusing inwards on the organizational aspects of the EU is a very dangerous one, a characteristic feature of the Ashton Era ([221]).

Federica Mogherini was able to marry both the practical and theoretical approach, giving the Union the necessary political means to create the necessary practical means to tackle very real and pressing problems. This is the reason why this paragraph might seem to be built backwards, analysing the political choices after having analysed the practical choices that have been laid out thanks to a newly existing political/theoretical framework: Mogherini proved that it is through the intelligent management of European Law and the tools that are at the disposal of the Union, that the EU is able to efficiently tackle its problems. The good development and use of legal instruments can lay the basis for the formulation of successful policies.

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[220] EUROPEAN COMMISSION *Joint Foreign and Home Affairs Council: Ten point action plan on migration* (20th April 2015)

[221] MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN *European Union Politics* 4th edition (Oxford University Press, 2012) p. 248

The management of the Migrants crisis can be considered the greatest success of the dismantlement of the Pillars structure, but for the Union to function properly as a real solidarity environment, other problems still need to be solved.

11. A normative conflict: Dublin III vs the Emergency relocation mechanism

The June European Council approved the Italian Prime Minister's proposal of the emergency relocation mechanism that had already been debated and approved by the joint Foreign and Home Affairs Council in April.

> *In the light of the current emergency situation and of our commitment to reinforce solidarity and responsibility, and in line with its April decision in all its regards, including paragraph 3, the European Council agreed on the following interlinked measures to help 60.000 people:*
> *a) the temporary and exceptional relocation over two years from the frontline Member States Italy and Greece to other Member States of 40.000 persons in clear need of international protection, in which all Member States will participate;*
> *b) the rapid adoption by the Council of a Decision to this effect; ([222])*

"I will not accept a mean and selfish discussion on this. We founded Europe because we used to have ideals." ([223]) insisted Matteo Renzi in the attempt to convince his counterparts from the rest of the Union to approve the emergency mechanism.

The debate over this topic has, in fact, the utmost importance for the European Union, because it makes emerge one of what can be called its "contradictions": the Member States of the Schengen Area are divided by no frontier, being one borderless area, a division-less market, but each and every border with non-EU countries remains a national border, not a European border. An immigrate reaching Italy from the Central Mediterranean route can move to France, Belgium, even to Norway without meeting any barrier. But he can do so only as an outlaw, because of the Dublin III regulation.

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[222] EUROPEAN COUNCIL *Presidency Conclusions,* Art.4 (25th – 26th June 2015)

[223] LA STAMPA *L'UE litiga ancora sulle quote migranti. Renzi: "Ci fate solo perdere tempo"* (25th June 2015) http://www.lastampa.it/2015/06/25/esteri/migranti-tusk-non-c-consenso-tra-gli-stati-membri-sulle-quote-obbligatorie-836hNElqeKVpY2p8YQ4omL/pagina.html

REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 26 June 2013

establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

CHAPTER III

CRITERIA FOR DETERMINING THE MEMBER STATE RESPONSIBLE

Article 13

Entry and/or stay

1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, *the Member State thus entered shall be responsible for examining the application for international protection*. That responsibility shall cease 12 months after the date on which the irregular border crossing took place.

According to Dublin III, the Member State that a migrant enters first is the only one responsible for their asylum application and overall protection.

As shown by data collected by the Italian Internal Ministry, though, not all migrants reaching Italy by sea actually want to apply for international protection in Italy.

Of all 170.100 people who arrived in the southern European country, only 63.456 accepted to ask for asylum there. All others meant for the journey to continue on to the rest of the Union ([224]).

In such situation Dublin III has become more and more dead letter.

Migrants escaping war, who have faced the danger of a trip through Sahara, who have been at the mercy of violent smugglers, surrendering them all of their money, people who might have spent a period of inhuman detention in Libya, escaped the war raging there and survived the crossing of the Mediterranean Sea are supposed to abide the law and surrender their fingerprints so that they can be registered into the EURODAC web platform and be forced to go back to the country they first

[224] Data from Commissione Nazionale per il Diritto d'Asilo of the Italian Minister for Internal Affairs http://www.interno.gov.it/sites/default/files/quaderno_statistico_1990_-_2014_asilo.pdf#27

entered, even if, like Greece, it is going through a severe economic crisis and has no jobs for its nationals (let alone for migrants) and that is completely inadequate in giving adequate protection to refugees according to UNHCR.

Many of these migrants clench their fists and escape at first occasion, preferring becoming clandestine outlaws for some months in order to reach their country of choice ([225]) than being stuck in States where their possessions are set to fire ([226]) and where they are felt as invaders ([227]).

The decision over the migrants' quotas taken by the European Council in June 2015, therefore, overrides the Dublin Regulation mainly for two reasons: the first is solidarity towards those frontline Member States, particularly Italy and Greece, most affected by the unprecedented inflow of people; the second is a sort of responsibility dictated by pragmatism: if an imprecise number of migrants is able to avoid the entrance in the EURODAC database, more and more undocumented clandestine people will roam around Europe, whose choice would be between relying on criminal organizations to obtain falsified documents, and vanishing completely entering a world of crime and anonymity. Among these anonymous illegal aliens terrorists might hide and hit all corners of the Union relatively undisturbed. Not helping frontline States, then, would only make them more liberal in closing one eye and letting migrants slip through their fingers towards other countries of the Union, aggravating said situation.

Solidarity is, then, a responsible and pragmatic choice that defies the sense itself of existing EU rules. Such an approach, though, was not very welcome especially between Eastern European countries. Polish and the Czech Heads of State and Government insisted for the emergency resettlement mechanism to be founded on a voluntary basis, to which Renzi, supported by German Chancellor Merkel and French President Hollande answered "If you want it on a voluntary basis, you can cancel our agreement, we can do on our own."

To which HR/VP FASP Mogherini added "You all enthusiastically support our external strategy on migration, but if we do not take decisions on internal solidarity, our external credibility will crumble (…) If we are not able of relocating these migrants, it means we are not the great Europe

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[225] JIM YARDLEY, GAIA PIANIGIANI *Out of Syria, into the European maze* from NY Times online (November 2013) http://www.nytimes.com/2013/11/30/world/middleeast/out-of-syria-into-a-european-maze.html?pagewanted=all&_r=2

[226] Cf , as an example, what happened in Quinto di Treviso (Italy) in July 2015 - REPUBBLICA *Treviso, vince la protesta dei residenti: I 101 migranti lasciano Quinto* (17th July 2015) http://www.repubblica.it/cronaca/2015/07/17/news/treviso_profughi_sindaco_quinto-119267200/

[227] Cf, among others, propaganda from the third most voted Italian Political Party, Lega Nord http://www.leganord.org/index.php/seguici/eventi/stop-invasione

that should be able to go through high-level negotiations around the world" ([228]).

12. Solidarity vs Borders

According to the High Representative of the European Union, therefore, the solidarity issue over the Migrants crisis would determine whether the European Union actually exists in the world, whether it can appoint itself as a "great Europe", whether it really is an area of freedom, security and justice and a beacon able to give its light and inspire safety to the world.

The game is on.

The European Union has at the least proven having the necessary means to tackle an emergency such as the Migrants crisis in a way that is founded on a principle of solidarity.

What it lacks is high-level coordination and a clear political will of pursuing it.

The European Union of 15 years ago, the one that established the Solidarity Clause, believed so much in itself that it started the path towards the writing of its own Constitution. Today's European Union is much more disenchanted and, in order to get actions in movement in a solidarity mind set, the Heads of Government of Member States requiring them need to fight for them against strong opposition.

The measures the EU has taken this far have been mainly prompted by recurrent deaths at sea

Any action to help frontline Member States has been taken only after great insistence and with a UK opt-out. Even now, solidarity seems to have little to do with all decisions made to counter the crisis: pragmatism, fear of terrorist attacks and of widespread criminality seem to have prompted action way more than selfless solidarity.

The European Union has, however, refused to stay blind in front of the frightening death toll in the Central Mediterranean Route. Those deaths have given new reasons for the Union to act – and not only with palliative measures.

The Migrants crisis is not, though, just an issue concerning deaths at sea. The survivors of the crossings from every route need to be dealt with by each Member State.

Although Renzi was able to force the EU to launch the relocation mechanism – and to extend it to be able to relocate up to 120 000 migrants throughout the whole Union ([229]) – Member States such as Hungary started building walls of wired line and guards at its borders, to physically stop migrants

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228 REPUBBLICA *Vertice Ue sui migranti, è scontro: l'Est vuole boicottare l'intesa. Renzi: "Solidarietà o perdiamo tempo"* (25th June 2015) http://www.repubblica.it/esteri/2015/06/25/news/migranti_vertice_ue-117680785/

229 REPUBBLICA *Migranti: "Sì" al piano di ricollocamento per 120mila. Via libera a maggioranza, blocco Est contrario (*22nd September 2015) available at: http://www.repubblica.it/esteri/2015/09/22/news/migranti_ocse_europa-123412396/

from entering the country ([230]).

And that was just the beginning.

In a frenzy aggravated by the ISIS Paris Attacks of November 2015, several Member States ([231]) suspended the Schengen Agreement, reintroducing border controls and protect Nation States from the arrival of illegal migrants not registered in EURODAC from the outer countries of the EU, whose borders are not properly patrolled ([232]).

In particular in the case of France, this kind of move was made for fear of terrorist attacks that might be perpetrated by clandestine migrants taking advantage of the free movement possible in the Schengen Area ([233]), even though all ISIS attackers in Paris were actually EU citizens, some of them even from France ([234]).

Regardless of any political consideration on the matter, the Schengen crisis that derived from these choices and that led the Council to debating an actual two-year suspension of the whole Agreement by the end of January 2016 ([235]), puts in jeopardy the very existence of the European Union, as French Prime Minister Manuel Valls himself pointed out:

> *It's Europe that could die, not the Schengen area. If Europe can't protect its own borders, it's the very idea of Europe that could be thrown into doubt. It could disappear, of course - the European project, not Europe itself, not our values, but the concept we have of Europe, that the founding fathers had of Europe ([236]).*

In the last twenty years, the EU has developed numerous tools to be used in case of emergency and the Migrants crisis has pushed it to use many of them.

From this situation, though, some questions arise: what is the deaths threshold that needs surpassing

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230 REPUBBLICA Migranti: "Sì" al piano di ricollocamento per 120mila. Via libera a maggioranza, blocco Est contrario (22nd September 2015) available at: http://www.repubblica.it/esteri/2015/09/22/news/migranti_ocse_europa-123412396/

231 The Schengen Agreements were suspended (for as up to 25th January 2016) by Germany, Sweden, Austria, France, Denmark and, out of the EU, but in the Schengen Area, Norway.

232 FINANCIAL TIMES EU Ministers eye temporary Schengen suspension (3rd December 2015) available at: ttp://www.ft.com/intl/cms/s/0/137322ca-999d-11e5-9228-87e603d47bdc.html#axzz3yF5WgXlb

233 EXPRESS *Dream of borderless Europe over as France 'calls for Schengen suspension' in wake of Paris* (16th Novembr 2015) available at: http://www.express.co.uk/news/politics/619871/borderless-Europe-France-Schengen-suspension-Paris-terror-attacks

234 THE GUARDIAN *EU ministers order tighter border checks in response to Paris attacks* (20th November 2015) available at: http://www.theguardian.com/world/2015/nov/20/eu-ministers-order-tighter-border-checks-in-response-to-paris-attacks

235 TELEGRAPH *EU leaders consider two-year suspension of Schengen rules* (22nd January 2016) available at: http://www.telegraph.co.uk/news/worldnews/europe/eu/12115654/EU-leaders-consider-two-year-suspension-of-Schengen-rules.html

236 ibid.

before the Union decides to get involved with a "comprehensive set of solutions"?

Are the measures undertaken so far away to save lives or a way to save the face, the image of the Union *vis à vis* the rest of the world?

And will the fears and political decisions concerning the Migrants crisis lead to a dissolution of the Schengen Area and of the Union or to a reinforcing of the EU itself, through closer cooperation and integration?

The Treaty on the Functioning of the European Union puts at the disposal of all Member States, in case of emergency, the Solidarity Clause, which, if invoked, may activate "all available tools of the Union" in what is supposed to be a short period of time, so short, in fact, to be considered effective in times of crisis.

Even if the Clause has never been invoked yet, to face the overall Migrants crisis the Union has indeed used all instruments at its disposal from military to civil means, acting inside Member States as well as outside, engaging in emergency measures, attacking transnational criminal organizations and trying to commit to the uprooting of the causes themselves of departures. Before this kind of comprehensive action was taken, though, more than 4 000 people have needed to die attempting the crossing ([237]).

If the Union is proverbially slow in taking action, however, it is necessary to note that it seems to be learning from its mistakes. There has been a strongly documented boost in the overall borders control of the Union, with increasing Frontex and EUROPOL activities. The Common Security and Defence Policy tools were also put in the game to wage war to human smugglers and traffickers with the military operation EUNAVFOR MED, the first European military operation on its own borders. Stronger and more capillary coordination has been built between Home Affairs and CFSP, contributing to leaving the "Pillars mind set" to the past not only on paper. Common Asylum regulations are being implemented effectively all across the Union and the resettlement mechanism launched by the European Council in June 2015 might be a first step towards a surpass of the mentality behind the Dublin III regulation.

Whether this kind of change is permanent or not remains to be seen and conflicting evidence exists about it. The European Union is not only composed by Institutions and Member States: its citizens play an important role in the shaping of the Governments that ultimately shape European policies. The rise of nationalist, anti-European and/or anti migrants parties all around the Continent is a fact, be it Orban's Fidesz in Hungary, Le Pen's Front National in France, Farage's UKIP in the UK,

[237] BBC News online The Mediterranean's deadly migrant routes (22nd April 2015) http://www.bbc.com/news/world-europe-32387224 (Data referred to the period between January 2014 and April 2015)

Salvini's Lega Nord in Italy or Golden Dawn in Greece – just to mention some of them. In August 2015 Hungary has built a wall of barbed wire at its borders to prevent illegal aliens to cross it ([238]), Nigel Farage has stated that the United Kingdom needs to exit the EU of it wants to control its borders ([239]), while Matteo Salvini makes statements that clearly go against all principles of the European Union: "If I were Head of Government, I would give the order not to let any migrant descend on Italian soil" or "I ask to all Mayors, Governors and Counsellors of Lega Nord to say "NO", by all necessary means, to any new arrivals. We are ready to occupy every hotel, hostel, school or military barrack to be dedicated to presumed refugees" ([240]). He also claims that these false (according to him) refugees are part of an on-going invasion that needs to be stopped.

As slow to act and learn as it is, the European Union's apparatus remains to this day a partial bulwark against this kind of stances. Nonetheless, it cannot be exempt from critics.

The deal on the resettlement of 40.000 migrants across all Member States of the Union (except UK) was obtained only after thousands of deaths and years of inadequate responses. The perceived lack of solidarity in the Union *vis à vis* the Migrants crisis is an existing issue that could break the foundations of the Union ([241]). The unity of internal borders and the disunity of external ones is a principle that is being challenged more and more since the burst of the emergency, in particular by the resettlement mechanism, common Frontex patrols and the CSDP mission EUNAVFOR MED. Whether this change will be permanent is yet to be seen.

In the raging fight between solidarity and borders the European Union will show us if it is a breaking lighthouse or a functioning one.

This far the impression is that the lighthouse has all tools for proper functioning, yet the workers who are supposed to make it work need strong incentives to keep to the job and risk making it useless after all. Hopefully, this scenario will never come to pass and workers will remind themselves that their predecessors built a lighthouse for good reasons.

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238 REPUBBLICA *E l'Ungheria ha già alzato il suo muro: "Mai più un profugo nei nostril confini"* *http://m.repubblica.it/mobile/r/sezioni/esteri/2015/08/13/news/budapest_il_filo_d_acciaio_annunciato_a_giugno_da_orban_per_respingere_i_migranti_in_arrivo_dai_balcani_e_quasi_pronto_ i-120893599/*

239 TELEGRAPH *We can't control our borders while remaining in the EU* (21st May 2015) *http://www.telegraph.co.uk/news/uknews/immigration/11622247/Nigel-Farage-We-cant-control-our-borders-while-remaining-in-the-EU.html*

240 CORRIERE DELLA SERA *Salvini ai sindaci: "Nuovi immigrati? Sindaci, non accoglieteli"* http://www.corriere.it/politica/15_aprile_14/immigrati-salvini-occupare-alberghi-b7e48ac4-e287-11e4-89b8-6515027f356a.shtml

241 See in LA STAMPA *L'UE litiga ancora sulle quote migranti. Renzi: "Ci fate solo perdere tempo"* (25th June 2015) *http://www.lastampa.it/2015/06/25/esteri/migranti-tusk-non-c-consenso-tra-gli-stati-membri-sulle-quote-obbligatorie-836hNElqeKVpY2p8YQ4omL/pagina.html*

Matteo Renzi stated:" *If this is your idea of Europe, you can keep it. There either is solidarity or you're just waiting our time"*

CHAPTER III

The Collective Defence Clause and the Ukrainian crisis

1. From CT to Lisbon: the texts of the Collective Defence Clause

The Solidarity Clause is not the only mutual assistance provision in the Lisbon Treaty, nor is it the only reference to "solidarity". The word appears in an unprecedented number of places in the consolidated Treaties ([242]).

Working Group VIII on European Defence, in fact, during its work at the beginning of the Millennium, did not only produce a hybrid Home Affairs/CSDP Solidarity Clause, but also a strictly military one, which raised lots of controversies – a fact that was impossible to hide even in the final document that the Working Group presented to the IGC ([243]).

Solidarity could indeed be interpreted with a wider meaning, entailing the need for all Member States to help any other one of them should a natural or man-made catastrophe or a massive terrorist attack occur, yet it could also be interpreted with a strictly defence-related purpose, particularly by a working group whose task was to individuate necessary reforms in that field: according to this interpretation of solidarity, the European Union should have committed to creating a EU-built in collective defence mechanism that would bind all Member States to help any other one of them that would suffer a military aggression from a third country.

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[242] See FRANK HOFFMEISTER *Das prinzip der Solidarität zwischen den Mitgliedstaaten im Vertrag von Lissabon* in INGOLF PERNICE (ed.) *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?* (Baden Baden, 2008) et SARA MYRDAL, MARK RHINARD *The European Union's solidarity clause: Empty letter or effective tool?* (Swedish Institute of International Affairs, Occasional UI Papers n° 2, 2010) p.10

[243] MICHEL BARNIER *Final report of Working Group VIII – Defence* (Brussels, 16th December 2002)

Not everyone, though, welcomed the proposal for a mutual defence clause.

For some members of the IGC and of WG VIII, the threat of "armed aggression" was completely out-of-date, even if politically relevant, and they pushed for the Union to focus on other threats that were perceived as more real and imminent, such as terrorism – a line of thought that led, as previously analysed, to the creation of the Solidarity Clause ([244]).

The idea of a provision concerning armed aggression, however, endured in the debate highlighting some identity issues of the European Union on problems concerning Defence and the Union's approach to it.

At the beginning of the 21st Century, the Union's CFSP and ESDP were rapidly overlapping and absorbing many of the functions of the Western European Union, such as, for example, the Petersberg Tasks.

The 1948 Treaty of Brussels instituting the WEU (modified in 1954) already contained a collective defence provision in Articles IV and V.

BRUSSELS TREATY (1948) AS MODIFIED BY THE PARIS AGREEMENTS (1954)

ARTICLE IV

In the execution of the Treaty the High Contracting Parties and any organs established by Them under the Treaty shall work in close co-operation with the North Atlantic Treaty Organisation. Recognising the undesirability of duplicating the military staffs of NATO, the Council and its Agency will rely on the appropriate Military Authorities of NATO for information and advice on military matters.

ARTICLE V

If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.

244 SARA MYRDAL, MARK RHINARD The European Union's solidarity clause: Empty letter or effective tool? (Swedish Institute of International Affairs, Occasional UI Papers n° 2, 2010) p.3

Several members of WG VIII suggested that Member States that so wished could share between themselves the obligations laid down by the Brussels Treaty relating to mutual assistance, thus bringing to an end the Western European Union ([245]).

Such a collective defence clause was considered unacceptable by some members for reasons connected with the non-aligned status of certain Member States, and by others who considered that collective defence was covered by the Atlantic Alliance.

Under those circumstances, those members of the Group who were in favour of the collective defence clause thought that it would be sensible to allow those Member States wishing to intensify their cooperation, and in particular to take over the commitments of the WEU Treaty, to do so within the framework of the Union rather than outside the Union ([246]).

The proposal of WG VIII, therefore, implied an opt-in mechanism as not to commit all members, in particular neutral ones (Austria, Finland, Ireland and Sweden), that feared that such a provision would force them to abandon military neutrality in order to defend the other countries of the Union.

WEU was not, however, the only defence community EU Member States had taken part in.

Article V of the North Atlantic Treaty regulated existing NATO provisions on collective defence.

NORTH ATLANTIC TREATY

Washington D.C. 4th April 1949

ARTICLE V

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

245 MICHEL BARNIER *Final report of Working Group VIII – Defence,* art. 61 (Brussels, 16th December 2002)

246 MICHEL BARNIER *Final report of Working Group VIII – Defence,* art. 62-63 (Brussels, 16th December 2002)

Incorporating the WEU provisions in the CT could have meant that the EU was moving towards military autonomy from NATO, a notion that was not welcomed by the most pro-NATO European governments, such as the one of the United Kingdom, that saw in the Atlantic Alliance the principal hub for European collective defence. This point of view reinforced the idea that an opt-in mechanism was necessary.

To avoid such an outcome, Finland, Sweden, Ireland and Austria backed an Italian proposal stating that the clause would not prejudice 'the specific character of the security and defence policy of certain member states' nor existing NATO relationships. In return, all EU states agreed to drop the opt-in provision and fully commit themselves to the mutual defence clause ([247]).

The final text of the Clause, affirming for the first time a military solidarity between Member States of the European Union as such, appeared in the final text of the CT at Article I – 41.7 among the specific provisions relating to the common security and defence policy and remained utterly unchanged in the Lisbon Treaty, in Article 42.7 of the Treaty on the European Union.

TREATY ON THE EUROPEAN UNION

ARTICLE 42

7. If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter.

This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

The similarities with Article V of the North Atlantic Treaty are obvious, although Article 42.7 TEU does not explicitly mention "the use of armed force". It also grants neutrality, not prejudicing "the specific character of the security and defence policy of certain Member States" and it recalls that

[247] SARA MYRDAL, MARK RHINARD *The European Union's solidarity clause: Empty letter or effective tool?* (Swedish Institute of International Affairs, Occasional UI Papers n° 2, 2010) p.3

NATO is the foundation and the forum for the implementation of the collective defence for those States that are members to the Atlantic Alliance.

2. The EU's collective defence as more than just a military alliance?

The collective defence clause creates an obligation to all EU Member States to aid and assist by all means in their power any other Member State victim of armed aggression in its territory.

There are, however, various reasons why this provision does not make the Union a military alliance between its members.

Firstly, the European Union is not involved in any way in the activation of the Clause.

The clause's activation falls upon each Member State individually and does not depend on the Union as a whole. Article 42.7 TEU does not aim to transferring any competences at Union level, but rather creates a strong responsibility among Member States to act if such event should ever occur.

Any intervention would be therefore dependent on internal political consensus, since it would be national Governments that would need to decide at which degree to act ([248]). The first sentence of the Clause, would in fact strongly bind all Member States to a full commitment of all of their national resources (implicitly military as well as civilian), but the second sentence makes this obligation shadier, since it states that "this shall not prejudice the specific character of the security and defence policy of certain Member States". This specification, aimed at granting neutrality to neutral States, can be interpreted in many ways. Italy's Constitution, for example, rejects the use of war as an act of offence and as a means of resolution of controversies ([249]). If a EU non-NATO Member State should suffer an act of armed aggression, Italy would have no legal obligation to consider it an attack to its soil – as would be if it were a NATO member – nor to deploy its military strength, since the TEU does not overtly specify it.

It could participate to a EU-sponsored military operation, but since it would be an issue with defence implication, it would require unanimity among all Member States to be launched, which

[248] THEODORE KONSTADINIDES *Civil protection in Europe and the Lisbon "Solidarity Clause": a genuine legal concept or a paper exercise* (Uppsala Faculty of Law, 2011) p.19

[249] COSTITUZIONE ITALIANA Art. 11

> *L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo.*

might become an obstacle in case of conflicting alliances ([250]) or any sort of unwillingness by any Member State to approve any sort of military resolution that could lead to an escalation of the conflict at a European level.

In case of military conflict, anyway, NATO Member States should give precedence to their commitment to the Atlantic Alliance, not to the EU hub, since this is a duty clearly stated in the TEU.

The EU, moreover, does not possess any strong military readiness nor any joint military planning, since it never let CSDP and CFSP evolve into a common European Defence with a common European Army, since there has never been any consensus on the matter, as was specified many times throughout all of the St.Malo Process ([251]).

Working Group VIII had, in fact, proposed to surpass this lack of consensus by inviting the European Council to produce a political declaration on solidarity and common security in order to identify risks of any sort that threaten the Union, including terrorism, and the means of dealing with them.

"The European Security and Defence Union that would be produced by this development would also contribute to the strengthening of the European pillar of the Alliance" ([252]).

Even though progress on the subject has been made with the creation of the Solidarity Clause and by strengthening ties between AFSJ and CSDP, the EU still lacks a European Security and Defence Union.

Obviously, the EU defence cooperation capacities can change over time considering the potential of the European Defence Agency (Article 45 TEU ([253])) and the use of the newly-introduced

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250 What would happen, reasoning by absurd, if in the EU there were both NATO States and States allied with Russia in the event of a war between NATO and Russia? Later on this dissertation will broadly discuss a similar eventuality.

251 See Chapter 1.

252 MICHEL BARNIER *Final report of Working Group VIII – Defence,* art. 60 (Brussels, 16th December 2002)

253 LISBON TREATY ON THE EUROPEAN UNION; Art. 45

> *1. The European Defence Agency referred to in Article 42(3), subject to the authority of the Council, shall have as its task to:*
> *(a) contribute to identifying the Member States' military capability objectives and evaluating observance of the capability commitments given by the Member States;*
> *(b) promote harmonisation of operational needs and adoption of effective, compatible procurement methods;*
> *(c) propose multilateral projects to fulfil the objectives in terms of military capabilities, ensure coordination of the programmes implemented by the Member States and management of specific cooperation programmes;*
> *(d) support defence technology research, and coordinate and plan joint research activities and the study of technical solutions meeting future operational needs;*
> *(e) contribute to identifying and, if necessary, implementing any useful measure for strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure.*
> *2. The European Defence Agency shall be open to all Member States wishing to be part of it. The Council, acting by a qualified majority, shall adopt a decision defining the Agency's statute, seat and operational rules. That decision should take account of the level of effective participation in the Agency's activities. Specific groups shall be set up within the Agency bringing together Member States engaged in joint projects. The*

permanent structured cooperation in defence, which features high among the Treaty of Lisbon provisions.

Having said that, mutual assistance at EU level still has to be compromised with the broader security commitments of the Member States in NATO, especially those related to collective self-defence under Article 5 of the Washington Treaty 1949 ([254]), making therefore intra-EU coordination a secondary hub for defence for many of the Union's Member States.

Another reason why the collective defence clause does not give the European Union comparable to a military alliance is, according to two commentators ([255]), the origin itself of the clause, conceived as an extension of a broader vision of the Solidarity Clause.

They found "peculiar" that the two clauses were decided to be separated in the Treaties, rather than be kept together among the CSDP provisions in the TEU ([256]).

They failed however to take into account the specific peculiarities of the collective defence clause vis-à-vis the Solidarity Clause.

The first, for instance, applies only in the event of an armed aggression on the territory of a Member State of the Union and not in any other possible scenario, while the second has several possible uses.

Secondly, where the Solidarity Clause requires great coordination between Member States and the Institutions of the Union, the collective defence clause is completely intergovernmental.

However, a fundamental similarity between them remains intact: both Article 42.7 TEU and Article 222 TFEU have introduced commitments among Member States to realize the whole spectrum of threat scenarios identified in the European Security Strategy. The list of "threat scenarios" needs to be regularly updated through threat assessment reports put together by the European Council. This will determine the future use of the clauses, which may – in some cases – involve a parallel activation of Article 42.7 TEU and Article 222 TFEU in cases where the threat is ambiguous ([257]).

Agency shall carry out its tasks in liaison with the Commission where necessary.

254 THEODORE KONSTADINIDES *Civil protection in Europe and the Lisbon "Solidarity Clause": a genuine legal concept or a paper exercise* (Uppsala Faculty of Law, 2011) p.19

255 STEVEN BLOCKMANS is Senior Research Fellow in EU Law at the TMC Asser Institute, The Hague; RAMSES WESSEL is Professor of the Law of the European Union and other International Organizations, Centre for European Studies, University of Twente, The Netherlands. From *The European Union And Crisis Management: Will The Lisbon Treaty Make The Eu More Effective? (*Paper presented at the international conference The European Union and Global Emergencies, Durham European Law Institute, 8-9 May 2009)

256 See W. WESSELS and F. BOPP, The Institutional Architecture of CFSP after the Lisbon Treaty - Constitutional breakthrough or challenges ahead? (CEPS Challenge Paper No.10, 2008) p.10

257 THEODORE KONSTADINIDES Civil protection in Europe and the Lisbon "Solidarity Clause": a genuine legal concept or a paper exercise (Uppsala Faculty of Law, 2011) p.20

3. The individuation of threats and risks for the EU: a missing link between JHA and CFSP

The current situation on the creation on the part of the EU of concrete threat and risk assessments in the field of the Common Foreign and Security Policy is widely influenced by the outcomes of the Ashton Era and of the European stalemate as a whole.

The priorities of the action of the European External Action Service have been developed at a bureaucratic level with the opening of new EU diplomatic corps around the world, with the launch of several civilian and military operations, but the targets of the EEAS have remained unaltered since the first development of the European Security Strategy (ESS) back in 2003.

The European Council itself, however, recently admitted that the European security environment has changed dramatically ([258]), but the objectives of the EU's projection to the world have not – or, at the very least, no document has been produced as yet by the European Commission and the High Representative to assert that it has and what the common European response should be.

The 2003 ESS operates at grand strategic levels, "connecting large means and large ends" ([259]).

As Sven Biscop (Chair to the jury of the annual European Defence Agency) observed, however, the European Security Strategy needs revising:

> *The ESS mostly gives us a method: the EU deals with foreign policy in a preventive, holistic and multilateral way. In other words, the ESS tells us how to do things, but not really what to do. The choice for this particular method is a crucial strategic decision, but because the EU and the Member States have not translated it into clear priorities, it has not generated sufficient action. Nor has it had a real impact on the development of means and capabilities, on which the ESS remains vague as well. That is not to say that the EU is inactive – far from it. But without clear strategic objectives connecting its actions, it underperforms. (…) By contrast, other global powers often have a much clearer idea of their interests and objectives and thus act in a much more purposive and resolute manner. In interaction with these powers, the EU is bound to come up short if it retains it current mostly reactive outlook. ([260])*

He therefore suggests not only to update the European Security Strategy, but also make future updates more clear on how to pursue the objectives it underpins. The EU does not have as clear an

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258 EUROPEAN COUNCIL *Presidency Conclusions,* II.Security and Defence Art. 10 (25th – 26th June 2015)

259 J.L. GADDIS *What is Grand Strategy?* (Karl von der Heyden Distinguished Lecture, 26th February 2009)

260 SVEN BISCOP *A new External Action Service needs a new European Security Strategy* (Security Policy Brief – EGMONT Royal Institute for International Relations, November 2011) p.1

idea of what its interests and objectives are supposed to be as other global powers and this makes the Union "underperform".

The lack of a ESS update might be considered one of the consequences of the European stalemate in the years between 2005 and 2009: if the Union had not been able to successfully reform its Treaties and recover from its constitutional crisis, creating a comprehensive strategy for CFSP would have been difficult, particularly since the EEAS was still in the making – and had been in the making since the ICG proposed its creation at the beginning of the Century.

In the years after the Reform Treaty produced in Lisbon, HR/VP Catherine Ashton focused inwards on the organizational aspects of the job and insufficient time developing the EU's international visibility and external action ([261]) and she herself admitted that there was no agreed long-term vision of the future of CSDP ([262]).

This did not mean that the EU has failed to produce any sort of security strategies since 2003.

The Justice and Home Affairs Council adopted in February 2010 an Internal Security Strategy (ISS) that was approved by the European Council a month later.

Its complete title was "Internal Security Strategy for the European Union – Towards a European security model" and it was meant to be a completion of the original ESS at an internal level.

The document presenting the ISS defined its objectives: setting out the common threats and challenges the Union faced which made it more and more important for EU Member States and institutions to work together in order to tackle new challenges which went beyond their national, bilateral or regional capability; setting out the EU's common internal security policy — and the principles underpinning it — in a comprehensive and transparent way; defining a European security model, consisting of common tools and a commitment to: a mutually reinforced relationship between security, freedom and privacy; cooperation and solidarity between Member States; involvement of all the EU's institutions; addressing the causes of insecurity, not just the effects; enhancing prevention and anticipation; involvement, as far as they are concerned, of all sectors which have a role to play in protection - political, economic and social; and a greater interdependence between internal and external security ([263]).

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261 MICHELLE CINI & NIEVES PÉREZ-SOLORZANO BORRAGÁN European Union Politics 4th edition (Oxford University Press, 2012) p. 248

262 CATHERINE ASHTON Final report by the High Representative and Head of EDA on the Common Security and Defence Policy (15th October 2013)

263 JUSTICE AND HOME AFFAIRS COUNCIL Internal Security Strategy for the European Union – Towards a European security model (25th – 26th February 2010) p.12

The main common threats individuated by the JHA Council were terrorism, in any form, serious and organized crime, cybercrime, cross-border crime, violence itself, natural and man-made disasters and road traffic accidents ([264]). Many of these challenges are transnational in nature and clearly transcend the internal vocation of the ISS; a fact foreseen by the JHA Council itself, which, as reported, noted that a need existed for a greater interdependence between internal and external security.

> *A concept of internal security cannot exist without an external dimension, since internal security increasingly depends to a large extent on external security. International cooperation by the EU and its Member States, both bilaterally and multilaterally, is essential in order to guarantee security and protect the rights of our citizens and to promote security and respect for rights abroad. The EU's policies with regard to third countries need to consider security as a key factor and develop mechanisms for coordination between security and other related policies, such as foreign policy, where security issues must increasingly be taken into account in an integrated and proactive approach ([265]).*

This call for cooperation, though, did not produce the auspicated outcome, at least judging by the fact that, in December 2014, the Justice and Home Affairs Council was still insisting on the growing need for the creation of stronger links between internal and external security: "internal security should be more systematically addressed as part of the EU external relations policies, and strong coherence should be ensured in any foreign policy with regard to security-related issues. ([266])" is what can be read in the document the JHA Council produced to address the European Council on the development of a renewed European Union Internal Security Strategy.

By 2014, therefore, the European Union still lacked a comprehensive way to identify threats and risks in a way that could integrate both an internal and external perspective. The Juncker Commission, with the input of its Vice President Federica Mogherini finally started changing that.

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264 JUSTICE AND HOME AFFAIRS COUNCIL Internal Security Strategy for the European Union – Towards a European security model (25th – 26th February 2010) pp.13-15

265 JUSTICE AND HOME AFFAIRS COUNCIL Internal Security Strategy for the European Union – Towards a European security model (25th – 26th February 2010) p.29

266 JUSTICE AND HOME AFFAIRS COUNCIL CONCLUSIONS Development of a renewed European Union Internal Security Strategy (4th December 2014) p.6

4. The Commission's jump: European Agenda on Security and EU Global Strategy

In December 2014 the JHA Council pleaded with strength for the Commission to act taking into account some fundamental principles in order to develop a new and improved Internal Security Strategy. It made a very clear point on the fact that the Commission needs to address future security challenges not only by keeping identifying the main common threats and challenges to the Union, but also strengthening a comprehensive and coherent approach both horizontally (law enforcement, integrated border management, judicial authorities, customs, civil protection agencies, administrative and other relevant authorities, academia, non-governmental organisations, private sector) and vertically (international and EU level cooperation, regional, Member States' national, regional and local policies) as well as developing and promoting links between the internal and external dimensions of security, also in cooperation with third countries and other partners such as Interpol ([267]).

This new call from the JHA Council did not fall unheard.

Taking into account the conclusions of the June 2014 European Council, that highlighted the moment of political renewal begun after the May 2014 elections of the European Parliament, which happened precisely while the Member States of the Union were emerging from years of economic crisis and in a growing public disenchantment with politics, which was considered the right time to set out the new focus of the Union ([268]), the European Commission decided to launch not a new Internal Security Strategy, but rather a European Agenda on Security.

The Commission underlined the fact that it is Member States that have the front line responsibility for security, but it also conceded they could no longer succeed fully on their own.

> *The European Agenda on Security must therefore be a shared agenda between the Union and Member States. The result should be an EU area of internal security where individuals are protected in full compliance with fundamental rights. (…) To this end, the Agenda sets out a shared approach for the EU and its Member States that is comprehensive, results-oriented and realistic. To maximise the benefits of existing EU*

[267] JUSTICE AND HOME AFFAIRS COUNCIL CONCLUSIONS Development of a renewed European Union Internal Security Strategy (4th December 2014) pp. 4-6

[268] EUROPEAN COUNCIL Presidency Conclusions Annex I – Strategic Agenda for the Union in times of change (26th – 27th June 2014)

measures and, where necessary, deliver new and complementary actions, all actors involved have to work together based on five key principles ([269]).

The five key principles on which all EU actors need to found their work for the implementation of the European Agenda on Security are the true innovation of the approach, because they are an *impetus* coming from the Commission as a whole itself and, when they coincide with Commission's competences, they can be considered as serious commitments and not mere calls or pleadings for action coming from sectorial councils.

The principles are:

1. Full compliance with fundamental rights;
2. More transparency, accountability and democratic control;
3. Better application and implementation of existing EU legal instruments
4. A more joined-up inter-agency and a cross-sectorial approach
5. Bring together all internal and external aspects of security

The principles that are more relevant to this reasoning are the fourth and, particularly, the fifth.

The fourth principle of the European Agenda on Security is aimed to coordinate policy and action on the ground given the increasing nexus between different types of security threats. In particular, the European Commission aims at maximising the contribution of all European agencies in JHA and beyond through inter-agency cooperation, coordination with Member States and also in complementarity with the European Neighbourhood Policy ([270]).

The fifth principle is founded on the idea that internal security and global security are mutually dependent and interlinked. The EU response must therefore be comprehensive and based on a coherent set of actions combining the internal and external dimensions, to further reinforce links between Justice and Home Affairs and Common Security and Defence Policy.

The European Commission, through this principle, has decided to maximise the added value of existing policy dialogues conducted with enlargement and neighbourhood countries, key strategic partners and relevant international organizations, using at the best of their capabilities existing EU delegations around the world and therefore considering a priority the deployment of security experts in European Neighbourhood Policy countries and other targeted non-EU countries.

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[269] EUROPEAN COMMISSION Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Agenda on Security (Strasbourg, 28th April 2015)

[270] ibid, p.4

With these repeated mentions of the European Neighbourhood Policy (ENP) countries in the European Agenda on Security, the European Commission gave an unprecedented importance to States with strong ties to the Union that are not actual Members, making them part of a new overall conception of European Security.

In the current year, 2016, the enlargement countries with a candidate status are Albania, FYROM, Montenegro, Serbia and Turkey, while the Neighbourhood Policy countries are, for the Southern Neighbourhood Morocco, Algeria, Tunisia, Libya, Egypt, Israel, Palestinian National Authority, Jordan, Syria and Lebanon and for the Eastern Partnership Armenia, Azerbaijan, Belarus ([271]), Moldova, Georgia and Ukraine, having the latter three also signed Stabilization and Association Agreements (SAAs) with the EU in 2014 ([272]).

This appearance of the ENP countries in the security spectrum of the Union in 2015 reflects the changed European security environment of these years, a situation that has also greatly influenced another innovation in the approach to security of the European Commission, which is the European Global Strategy, a document that HR/VP Mogherini will prepare by June 2016.

In her report, published in June 2015, on the current global environment, she defines the issues that she is going to tackle with the forthcoming EU Global Strategy and she argues: "the European Union does not have the luxury to turn inwards. We have a responsibility to protect our citizens while promoting our interests and universal values. (…) the EU has all the means to be an influential global player in future – if it acts together. In a world of incalculable risk and opportunity, crafting effective responses will hinge on the Union's ability to adjust, react and innovate in partnership with others. We need a common, comprehensive and consistent EU global strategy."

To set the priorities for the new EU global strategy the High Representative launched a reflection process that will bring together EU institutions, Member States and Civil Society. "We need to forge a new social contract with European citizens also through foreign policy." ([273]).

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271 Algeria is currently negotiating an ENP action plan, while Belarus, Libya and Syria still remain outside most of the structures of ENP due to the aftermath of the Arab Spring (http://eeas.europa.eu/enp/about-us/index_en.htm - 25th August 2015)

272 EUROPEAN COMMISSION Webpage on European Neighbourhood Policy and Enlargement negotiations http://ec.europa.eu/enlargement/

273 FEDERICA MOGHERINI Global Strategy to steer EU external action in an increasingly connected, contested and complex world available at http://eeas.europa.eu/top_stories/2015/150627_eu_global_strategy_en.htm

Recent development is therefore showing signs of change in the Union's approach to its external dimension, with greater attention to global issues and, in particular, to the global role of its Neighbourhood Policy.

5. The European Union's Eastern Neighbourhood Program

After the 2004 enlargement that brought ten new Member States inside the European Union, upgrading it from being a Union of 15 members to one of 25 members (many of which coming from the former Eastern side of the iron curtain and even from the former USSR), the EU launched the European Neighbourhood Policy (ENP).

This chapter does not aim to being a thorough description of the history and development of the ENP, but to give some fundamentals on how its existence has brought many States that are geographically close to the Union also closer to it at an economic and political level, which is fundamental data for the understanding of how can ENP countries figure in Mogherini's European Global Strategy.

Through its European Neighbourhood Policy (ENP), the EU works with its southern and eastern neighbours to achieve the closest possible political association and the greatest possible degree of economic integration. This goal builds on common interests and on values — democracy, the rule of law, respect for human rights, and social cohesion. The ENP is a key part of the European Union's foreign policy.

The ENP is a jointly owned initiative and its implementation requires action on both sides, by the neighbours and by the EU. Of the 16 ENP countries only 12 are currently fully participating as partners in the European Neighbourhood Policy, having agreed on ENP action plans ([274]).

The action plans build on existing legal agreements with the EU – partnership & cooperation agreements (PCAs) or association agreements (AAs).

Implementation is monitored through committees set up by these agreements. Once a year, the European External Action Service and the European Commission publish ENP progress reports assessing the progress made towards the objectives of the Action Plans and the Association Agendas. The European External Action Service and the European Commission publish yearly ENP progress reports.

[274] See reference (246)

At the last review of its European Neighbourhood Policy in 2010-11, the EU introduced the *more-for-more principle*: the EU will develop stronger partnerships and offer greater incentives to countries that make more progress towards democratic reform – free and fair elections, freedom of expression, of assembly and of association, judicial independence, fight against corruption and democratic control over the armed forces ([275]).

The ENP is complemented by economic cooperation policies with a greater political and social dimension, such as the Eastern Partnership, the Euro-Mediterranean Partnership and the Black Sea Synergy ([276]).

The Eastern Partnership (EaP) is a joint initiative of the EU and six eastern European partner countries (Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova (hereinafter referred to as 'Moldova') and Ukraine) that aims to bring these countries closer to the EU.

It builds on existing bilateral relations between the EU and its partner countries and covers the eastern dimension of the ENP.

It follows two parallel and mutually reinforcing tracks: bilateral and multilateral. The bilateral dimension aims at fostering closer bilateral relations between the EU and each eastern partner country, while the multilateral dimension provides a forum for dialogue and exchange, through thematic platforms and flagship initiatives.

The Eastern Partnership is broad-based and involves not only governments, but also civil society and other parties concerned. It made, moreover, significant progress in 2014. The new Association Agreements signed with Georgia, Moldova and Ukraine are already being provisionally applied. For Georgia and Moldova, provisional application already includes the Deep and Comprehensive Free Trade Area (DCFTA), while for Ukraine provisional application of this part of the agreement has been postponed until the end of 2015. The AA/DCFTAs involve ambitious political, economic and social reform agendas, drawing the eastern partner countries concerned closer to the EU ([277]).

Participating to the Eastern Partnership does not imply any intention to enter the EU, differently from the signing of an Association Agreement, which is meant to establish conditions for enhanced

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[275] EUROPEAN EXTERNAL ACTION SERVICE website (European Neighbourhood policy): http://eeas.europa.eu/enp/about-us/index_en.htm

[276] EUROPEAN COMMISSION website (European Neighbourhood policy): http://ec.europa.eu/economy_finance/international/neighbourhood_policy/index_en.htm

[277] EUROPEAN COMMISSION *JOINT STAFF WORKING DOCUMENT – Implementation of the European Neighbourhood Policy - Eastern Partnership implementation Report – Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Implementation of the European Neighbourhood Policy in 2014*

economic and trade relations leading towards a country's gradual integration in the EU's internal market – among other important provisions ([278]).

ENP reforms in Ukraine and the signing itself of the Association Agreement have, however, been carried forward in a very intricate environment, in the very difficult political, economic, social and military context of armed conflict, meaning what the EU considers "the illegal annexation of Crimea and Sevastopol by the Russian Federation and the subsequent destabilization of eastern Ukraine" ([279]).

The fact that the security context of Ukraine was in jeopardy made the country a very special hub for the EU Common Security and Defence Policy.

Ukraine is a ENP country in the Eastern Partnership and after the outburst of the crisis it has also signed an Association Agreement with the Union.

> *In terms of external security, the EU must not restrict itself just to cooperation between the law-enforcement agencies of Member States and other countries, especially EU neighbours. It is necessary to build relationships with other countries through a global approach to security, working closely with them and, when necessary, supporting their institutional, economic and social development. (…) Bilateral, multilateral and regional approaches among Member States should be developed, where appropriate, to address specific threats ([280]).*

The recent approach to security pleaded by the JHA Council and finally embraced by the European Commission as a whole in recent months marks a change in attitude of the Union, that is becoming more and more interested in the external security of its neighbourhood, through a cooperation that is no more restricted to law-enforcement agencies, but that is becoming more and more pervasive, tackling security at an institutional, economic and social level. This sort of approach, in a wider sense, is not new to EU-ENP relationships as a whole, yet it does represent novelty if considered as

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278 OFFICIAL JOURNAL OF THE EUROPEAN UNION Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part

279 EUROPEAN COMMISSION *JOINT STAFF WORKING DOCUMENT – Implementation of the European Neighbourhood Policy in Ukraine Progress in 2014 and recommendations for actions* – Accompanying the document *Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Implementation of the European Neighbourhood Policy in 2014*

280 JUSTICE AND HOME AFFAIRS COUNCIL *Internal Security Strategy for the European Union – Towards a European security model* (25th – 26th February 2010) p.29

part of an external security approach for the Union – and not just for the region involved, as might have been the case with the former Yugoslavian Republics.

The relationship between the Union and the Eurosphere is evolving: it is not the simple use of soft power, but an emerging security model and this evolution is entailing and might eventually entail new unprecedented scenarios.

6. The Ukrainian crisis: the newly found geopolitical weight of the Eurosphere

The Ukrainian crisis is a game-changing event for the European Union, challenging much of what the EU had grown to think of itself, of its purpose, of its vocation.

High Representative Federica Mogherini surrendered to this notion in her report on the "Global Strategy to steer EU external action in an increasingly connected, contested and complex world", produced at the end of June 2015:

> *We used to think that greater interdependence would automatically bring about peace and prevent war. Now we know that while a more connected world is full of opportunities, it is also putting the nation state under unprecedented strain. By generating vulnerabilities and fragmented identities, this is giving rise to tensions and, at times, leading to more conflict. It is becoming a more dangerous world. Fragile states and ungoverned spaces are becoming more widespread. Nowhere is this clearer than closest to home. To the east, our neighbours suffer from economic, political and energy-related vulnerabilities. Russia has actively destabilised some of them by undermining their freedom, sovereignty and security. Beyond the imperative of fostering democracy, human rights (including the rights of minorities) and good governance, the conflict over Ukraine underlines the need to bolster the statehood prerogatives of our neighbours. These include recognised and protected borders, a sustainable fiscal capacity, as well as functioning customs services and police and military forces. What is at stake is peace on our continent ([281]).*

The EU realized in the last couple of years that greater interdependence, a Union with a pan-European vocation, does not automatically prevent wars. In fact, the outstretch of the Eurosphere is

[281] FEDERICA MOGHERINI *Global Strategy to steer EU external action in an increasingly connected, contested and complex world* available at http://eeas.europa.eu/top_stories/2015/150627_eu_global_strategy_en.htm

the cause of an armed aggression, the destabilization of a European country and the return of the looming shadow of war in Europe. Peace in the continent is at stake.

The contingent cause of the start of the Ukrainian crisis is, in fact, to be found in the fact that Ukrainian President Yanukovych needed to decide whether to enter the Russia-led Eurasian Economic Union ([282]) or sign an Association Agreement with the European Union.

The European Commission deemed the signing of the AA incompatible with a possible entrance of Ukraine in the Customs Union, even while applauding closer economic Ukrainian-Russian relations and underlining that the Association Agreement and the Deep and Comprehensive Free Trade Agreement (DCFT) were not directed towards or against Russia ([283]).

The European Union's motivations for the political involvement in Ukraine were clearly in line with the Union's objectives, meaning creating an area of peace, freedom, security, justice and free market through greater and greater interdependence. The Russian-led Customs Union, however, was perceived even by some members of the Ukrainian Government – in particular the second greatest Ukrainian party, led by Arseniy Yatsenyuk - to be a way for Russia to build a new sphere of influence and resurrect in some ways the USSR ([284]), making any choice made by Ukraine a move in a geopolitical game between spheres of influence.

Surprisingly, after months of negotiations, Yanukovich's cabinet, on 21st November 2013, decided not to sign the Association Agreement and chose instead for his country to enter the Customs Union: this choice was contested with strength by pro-EU Ukrainians, who started what came to be known the EuroMaidan protests, with more than 800 000 people rallying in Kiev to protest against the abandonment of closer ties with the EU and that, by February 2014 led to days of uninterrupted violent clashes that killed more than 100 people (19th-20th February), the reaching of a political agreement between the President and the opposition on the way out of the crisis (21st February), to the sudden departure of President Yanukovich, his ousting by the Parliament for failing to perform his duties and his declaration of an on-going *coup d'état* (22nd February).

One of the first acts of the new transition Government led by Arseniy Yatseniuk was to ban Russian as the country's second language.

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[282] Also known as "Customs Union"

[283] KAREL DE GUCHT *Statement by EU Trade Commissioner on Ukraine at the press conference after the Informal Foreign Affairs Council/Trade* (28th February 2014, Athens) http://eu-un.europa.eu/articles/en/article_14662_en.htm

[284] KYIV POST *Yatseniuk: Prosecution of Tymoshenko, Lutsenko hinders Ukraine-EU integration* (4th December 2012) http://www.kyivpost.com/content/ukraine/yatseniuk-prosecution-of-tymoshenko-lutsenko-hinders-ukraine-eu-integration-317116.html

After less than two weeks, unidentified gunmen in uniforms appeared in Crimea and seized all key buildings and military assets; the Russian flag replaced the Ukrainian one in many government buildings and a referendum was called to ask Crimeans whether they wanted to live under the new Ukrainian Government or secede and become part of the Russian Federation – and the Crimean people chose the latter ([285])([286]).

The human rights situation deteriorated drastically for people living in Crimea and Sevastopol after what the EU considered an illegal annexation, as well as in the areas controlled by illegal armed groups in eastern Ukraine.

Fundamental freedoms, in particular freedom of assembly, freedom of association, freedom of expression and freedom of the media were not guaranteed in those regions.

The number of internally displaced persons and refugees increased, exceeding 1.4 million ([287]).

The Crimean Tatar community was particularly affected. The Mejlis (the Assembly of Crimean Tatars) was evicted from its premises, two Mejlis leaders were banned from entering the peninsula, a number of its activists were persecuted and several young male Crimean Tatars were reported to be kidnapped, tortured and killed ([288]).

Ukraine's capacity for providing humanitarian assistance to internally displaced persons proved insufficient.

Petro Poroshenko was elected President of Ukraine on 25th May 2014. Following parliamentary elections of 26th October 2014, a new government led by Prime Minister Yatsenyuk was formed on 3rd December, on a reform platform.

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285 BBC *Ukraine crisis timeline* (13th November 2014) http://www.bbc.com/news/world-middle-east-26248275

286 EUROPEAN COMMISSION *JOINT STAFF WORKING DOCUMENT – Implementation of the European Neighbourhood Policy in Ukraine Progress in 2014 and recommendations for actions* – Accompanying the document *Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Implementation of the European Neighbourhood Policy in 2014* (Brussels, 25th March 2015) p.2

287 EUROPEAN COMMISSION *JOINT STAFF WORKING DOCUMENT – Implementation of the European Neighbourhood Policy in Ukraine Progress in 2014 and recommendations for actions* – Accompanying the document *Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Implementation of the European Neighbourhood Policy in 2014* (Brussels, 25th March 2015) p.3

288 EUROPEAN COMMISSION *JOINT STAFF WORKING DOCUMENT – Implementation of the European Neighbourhood Policy in Ukraine Progress in 2014 and recommendations for actions* – Accompanying the document *Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Implementation of the European Neighbourhood Policy in 2014* (Brussels, 25th March 2015) p.8

The European Union actively participated to the management of the crisis at various degrees, working at a diplomatic level, with economic and financial aids, even with the launch of a civilian CSDP operation.

High-level political dialogue between the EU and Ukraine was intense during 2014.

Ukraine signed the political provisions of the Association Agreement on 21st March 2014 and signed the provisions in the remaining parts on 27th June 2014.
On 16th September 2014, the Ukrainian Parliament ratified the Association Agreement and the European Parliament gave its consent, enabling the provisional application of the relevant provisions of the agreement on 1st November 2014 and the Deep and Comprehensive Free Trade Area section of the agreement on 1st January 2016.
In 2014 the EU and Ukraine took part in diplomatic efforts to reach a sustainable political solution to the conflicts on Ukrainian territory, in particular the Geneva Joint Declaration of 17th April 2014, the ad hoc presidential meeting in Minsk in August 2014 and the high-level meeting in Milan in October 2014. Ukraine was active in seeking political solutions in other formats, including the Normandy format (the Berlin Declaration in July 2014) and the Trilateral Contact Group (the Minsk Protocol and Memorandum in September 2014) ([289]).
This kind of involvement of Brussels can be considered as the simple application of existing and defined commitments of the Union towards a ENP/AA country or as the acceptance on the part of the EU that the Eurosphere has become some sort of "sphere of influence" to be protected by external threats. Waiting for History to give a clear answer, current trends can be analysed to understand what the Union's possibilities currently are and to which degree exactly is Brussels ready to commit itself in the protection of its Eastern Partners threatened by Russian military interventions.

7. Protecting a AA country: the Lithuanian line and the EU Global Strategy

The new relationship between the European Union and Ukraine is regulated and established by the Association Agreement that entered into force on 1st November 2014.
While the entrance into force of the mostly economic provisions of the DCFTA has been postposed to 2016, the political provisions of the AA are therefore already active and many of them have important security-related aspects, which can give an idea of the developing relations in terms of

[289] EUROPEAN COMMISSION *JOINT STAFF WORKING DOCUMENT – Implementation of the European Neighbourhood Policy in Ukraine Progress in 2014 and recommendations for actions* – Accompanying the document *Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Implementation of the European Neighbourhood Policy in 2014* (Brussels, 25th March 2015) p.11

security between the EU and the Eurosphere – or at least AA countries, which remain anyway outside the Union until accession.

The Association Agreement identifies in Article 4 the aims of political dialogue in all areas of mutual interest, also highlighting which exactly are the areas of mutual interest between the two political entities.

Among the aims of political dialogue figures the promotion of the principles of independence, sovereignty, territorial integrity and inviolability of borders, which can therefore be considered an area of interest of the Union ([290]).

Article 7.2 on Foreign and Security Policy also adds: "Ukraine, the EU and the Member States reaffirm their commitment to the principles of respect for independence, sovereignty, territorial integrity and inviolability of borders, as established in the UN Charter and the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe, and to promoting these principles in bilateral and multilateral relations." ([291]), showing that these issues are not only an area of interest for the EU, but issues for whose respect a commitment on the part of the Union is deemed required.

This commitment is only being reaffirmed, since respect for International Law already was one of the commitments of the EU (and theoretically of every single Subject of International Law), but in the Ukrainian case it has been given a stronger significance in at least one occasion.

Lithuanian President Dalia Grybauskaite said Russia's meddling in Ukraine, since it is seeking closer ties with the EU, amounts to a direct confrontation that requires stronger sanctions.

"Russia is practically in the war against Europe," she said in English.

Grybauskaite said the EU should impose a full arms embargo, including the cancelling of already agreed contracts.

British Prime Minister David Cameron also warned that Europe shouldn't be complacent about Russian troops on Ukrainian soil.

"Countries in Europe shouldn't have to think long before realizing just how unacceptable that is," he said. "We know that from our history. So consequences must follow." ([292])

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290 *ASSOCIATION AGREEMENT Between the European Union and its Member States, of the one part, and Ukraine, of the other part* (29th May 2014) Art.4 g)

291 *ASSOCIATION AGREEMENT Between the European Union and its Member States, of the one part, and Ukraine, of the other part* (29th May 2014) Art 7.2

292 FOX NEWS online *EU orders preparation of 'urgent' Russia sanctions as Ukraine troops give more ground* (31st August 2014) available at: *http://www.foxnews.com/world/2014/08/31/european-union-orders-urgent-preparation-new-russia-sanctions*

Considering the Russian invasion of Ukraine as an invasion of the European Union by extension as a ENP country moving towards the ratification of an Association Agreement, however, is clearly not a possible scenario because of the text of the AA itself.

ASSOCIATION AGREEMENT

Between the European Union and its Member States, of the one part, and Ukraine, of the other part

Article 9

Regional stability

1. The Parties shall intensify their joint efforts to promote stability, security and democratic development in their common neighbourhood, and in particular to work together for the peaceful settlement of regional conflicts.

2. These efforts shall follow commonly shared principles for maintaining international peace and security as established by the UN Charter, the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and other relevant multilateral documents.

The settlement of regional conflicts must be conducted, on the part of the parties contracting the Agreement, only on peaceful grounding, because any action on that line must be conducted following the common shared principles for maintaining international peace and security.

Considering the Russian invasion of Ukraine as an all-out attack to the European Union cannot be considered a move towards maintaining international peace and is not justified nor legitimized even by the closer cooperation on security and defence launched by the AA.

Existing provisions, however, can justify a greater, if not a massive European military presence in the country because of Article 10 of the Agreement.

ASSOCIATION AGREEMENT

Between the European Union and its Member States, of the one part, and Ukraine, of the other part

Article 10

Conflict prevention, crisis management and military-technological cooperation

1. The Parties shall enhance practical cooperation in conflict prevention and crisis management, in particular with a view to increasing the participation of Ukraine in EU-led civilian and military crisis management operations as well as relevant exercises and training activities, including those carried out in the framework of the Common Security and Defence Policy (CSDP).

2. Cooperation in this field shall be based on modalities and arrangements between the EU and Ukraine on consultation and cooperation on crisis management.

3. The Parties shall explore the potential of military-technological cooperation. Ukraine and the European Defence Agency (EDA) shall establish close contacts to discuss military capability improvement, including technological issues.

For what concerns the Ukrainian conflict, existing EU-Ukraine agreements allow the Union to use all tools at its disposal short of war to help the Eastern European country, even up to military operations on Ukrainian soil.

Obviously, if the Lithuanian line of thought should ever prevail inside the European Council, this notion could change or be extended to its wider meaning. For example, since the annexation of Crimea is considered illegal by the Union, a CSDP military operation could be launched there and could be considered by Russia as a military aggression by the European Union.

In order to understand, however, what the European stance on the extent of possible interventions is at the moment and will be in the foreseeable future, the report on the EU Global Strategy by HR Mogherini can be useful.

"Although the December 2013 European Council underlined that "Defence matters", the current level of ambition and capability targets are not tailored to the degraded strategic environment"([293]).

In the report, the High Representative gives a direction to future development of CFSP/CSDP also by focusing on some tools at the Union's disposal that have not been used so far.

[293] FEDERICA MOGHERINI *Global Strategy to steer EU external action in an increasingly connected, contested and complex world* available at http://eeas.europa.eu/top_stories/2015/150627_eu_global_strategy_en.htm

Twice she mentions the "battle groups" and Article 44 TEU (on the implementation of a task force by a group of Member States) that have never been used nor activated.
She regrets the fact that the EU's capability development process remains mostly bottom-up, relying on voluntary contributions by Member States, implying that the Union should be more active on the field of capability development and on the construction of a real Common Defence.
"The EU is not a military alliance" she concludes, "The Union cannot afford, however, to ignore the "D" in its CSDP" ([294]).
Mogherini calls therefore for an upgrade of the EU's defence capabilities, because the Union is completely inadequate before a more connected, contested and complex world.
It needs to develop foreign policies that respond firmly to destabilising actions on its borders, while also engaging Russia to restore a sustainable European security architecture.
"Our policy towards Russia needs to prevent new dividing lines by combining a firm response to destabilising actions at and within our borders with engagement to rebuild a sustainable European security order with which all are at ease, while seeking common approaches to global issues ([295])."
The future EU Global Strategy, therefore, rejects completely the Lithuanian line aiming at following the ones that are the traditional European values of peace and cooperation.

8. The European diplomatic management of the Ukrainian crisis

In 2014, the hot year of the Ukrainian crisis, 21 years had past since the establishment of a Common Foreign and Security Policy of the European Union and, as outlined in the previous chapters, the EU had worked inside its framework in many different ways, using many of the tools made available in the course of its years.
The European role in the management of the crisis, though, did not at all unravel only through the Union's channels, even if the crisis itself was caused by a clash between spheres of influence, the Russian one and the European Union's.
Leaving in the background the incidental causes of Russian annexation of Crimea and the Donbass upheaval, one could argue – as Russian President Vladimir Putin did – that the need for Russian intervention was justified by the huge economic loss Russia and the Eurasian Customs Union would suffer in the event of a Ukrainian accession to the European Union, a loss at a first stage of 3 billion

[294] ibid.
[295] ibid.

USD ([296]). According to Putin, it was the EU's carelessness in dealing with Russian particular interests that triggered the on-going crisis, which was therefore a result of the policies and political choices and evaluations of the European Union. Not of Germany, not of France, nor any other Member State, but of the EU as a whole, as a strategic actor and a regional player.

The Union could have been expected, therefore, to play a central, prominent role in the management of a crisis caused, unconsciously or not, by its own policies, yet the capabilities-expectations gap of the EU remained wide, as will be argued by merely explaining the European role in the diplomatic management of the crisis.

On 14th April 2014, Representatives from Russia, Ukraine, EU and USA made a Joint Statement on Ukraine in Geneva, taking "initial concrete steps to de-escalate tensions and restore security for all citizens" and thus agreeing on the launch of an OCSE Special Monitoring Mission which would have a leading role in the monitoring of the conflict and the subsequent implementation of eventual ceasefires ([297]).

No specific agreement was taken in Geneva that day and the text of the Declaration was rather vague and open to interpretation. Many concrete issues went completely unmentioned, namely Russian annexation of Crimea, massive concentration of Russian troops along the Eastern Ukrainian border, the legal legitimacy of Kyiv's Government, EuroMaidan's role in the crisis as well as Russia's request for a federal Ukraine, making the whole Geneva Declaration a document with little more than a cosmetic value.

Later in 2014, on 6th June, on the occasion for the 70th anniversary of the D-Day, Ukrainian President Poroshenko, Russian President Vladimir Putin, French President François Hollande and German Chancellor Angela Merkel met in Château de Bénouville, Normandy and briefly discussed Ukraine together.

That short meeting inspired the launch of the "Normandy Format", which saw sitting at the same negotiation table Representatives of Russia, Ukraine, France and Germany, completely excluding the European Union and all other Member States.

By the beginning of July, the Ministers of Foreign Affairs of the four countries produced a Joint Declaration re-instating the need to implement the objectives of the Geneva Declaration – again with no agreed details ([298]).

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296 VLADIMIR PUTIN *Speech at the meeting of the Customs Union Heads of State with President of Ukraine and European Union representatives* (26th august 2014) available at http://en.kremlin.ru/events/president/transcripts/46494

297 EUROPEAN UNION EXTERNAL ACTION SERVICE *Geneva Statement on Ukraine* (17th April 2014) available at: http://eeas.europa.eu/statements/docs/2014/140417_01_en.pdf

298 FOREIGN AFFAIRS MINISTERS OF THE NORMANDY FOUR *Berlin Conference on Ukraine: Joint Declaration by the Foreign Ministers of France, Germany, Russia and Ukraine* (2nd July 2014) available at: *http://www.new-york-*

The European Union entered again the negotiation process at the Minsk Presidential Meeting, on 26th August 2014, which saw the Heads of State of Ukraine, the EU and the Customs Union sitting at the same table to discuss the Ukraine's AA and the crisis and humanitarian disaster raging in the South and the East of the country.

During the meeting, Putin stated that European countries "have already developed the Ukrainian market rather well, and would like to get hold of whatever is left and squeeze out everyone else"([299]), verbally attacking in his whole speech the way "European partners" had caused and subsequently managed the crisis, denying also any Russian active role in the conflict, that he defined being purely "internal" in nature. To the press, High Representative Ashton defined the resulting discussion as "cordial, but positive" ([300]).

The first agreement to halt hostilities in Donbass was reached in Minsk on 2nd September 2014, with no role whatsoever on the part of the European Union, through the work of the so-called "Trilateral Contact Group" composed by Representatives of Ukraine, Russia and OSCE.

The produced Minsk Protocol did not have as a goal to address all issues between the conflicting parties, but *inter alia* "the commencement of an inclusive political dialogue, the establishment of a sustainable ceasefire combined with an effective control of the Ukrainian-Russian border as well as an economic rehabilitation of the areas affected by the armed conflict" ([301]).

Other issues were subsequently tackled at the Milan high-level meeting, held at the margins of the Asia-Europe Meeting of the 16th and 17th October. The summit was attended not only by the Normandy Four, but also by UK's Prime Minister Cameron, President of the European Commission Barroso, President of the European Council Van Rompuy, Italian Prime Minister Matteo Renzi, also covering the role as President of the Council of the European Union and Mogherini as Italian Minister of Foreign Affairs, but more importantly, as soon-to-be appointed High Representative of the EU.

For the first time since the Geneva Declaration, the European Union was represented at a high-level meeting on Ukraine, discussing important issues that the Minsk Protocol had mostly left off, such as gas supplies. The summit, as Van Rompuy stated to the press, did not find any political solution to the crisis and only set some guidelines for the management of gas transit from Russia to Europe via Ukraine.

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un.diplo.de/Vertretung/newyorkvn/de/__pr/Press_20releases/2014/20140702-four-fms-on-ukraine.html?archive=2990796

299 VLADIMIR PUTIN *Speech at the meeting of the Customs Union Heads of State with President of Ukraine and European Union representatives* (26th august 2014) available at http://en.kremlin.ru/events/president/transcripts/46494

300 RUSSIA TODAY *Russia can't set ceasefire conditions in Ukraine's internal conflict – Putin* (26th august 2014) available at *https://www.rt.com/news/182976-putin-poroshenko-ukraine-talks/*

301 TRILATERAL CONTACT GROUP *Press Statement* (2nd September 2014*) http://www.osce.org/home/123124*

Some concrete steps were made only with another round of meetings held later on the same day, in the Normandy Format, the result of which was revealed to Renzi during a bilateral meeting with Putin ([302]).

Events that occurred during the winter between 2014 and 2015 led to the collapse of the Minsk Protocol and to the need of reviving it and implementing it anew. Again, the OSCE organised new talks between the conflicting parties, but this time France and Germany got involved as well, recreating the Normandy Format in the shaping of the peace talks.

The participation of the two EU Member States was triggered by USA's proposals to send armaments to the Ukrainian Government, a choice that Merkel deemed not at all useful for the finding of a peaceful settlement. Hollande came to state that the management of the Minsk peace process by the Normandy Four would be the last chance for peace, implying that if the particular negotiation format would fail in finding a solution to the conflict and in implementing it, all-out war between Russia and Ukraine would be inevitable – giving the ground also for a global escalation([303]).

Currently, at the beginning of 2016, the Minsk II deals are still standing and being implemented (albeit several violations of the ceasefire happening every week ([304])) crowning the "Normandy Four" as the only format that was successful in halting the escalation of violence and at the least freezing the Ukrainian crisis.

At a merely diplomatic level, therefore, it is apparent that the EU has delegated by consensus the management of a crisis with the Union's interests at its core to France and Germany, relegating all other Member States to a secondary position and condemning them to political irrelevance in the management of the issue and most importantly, deciding to willingly step down from one of the most crucial geopolitical arenas of Europe and of our years, in favour of two "champions" – and this after more than two decades of crisis management in the whole extension of the Eurosphere, being content of covering only a marginal role in the drafting of cosmetic declarations and attending non-decisive summits.

9. The European Council's stances on the Ukrainian crisis

In the 90s, the European Council had been very active in the framing and development of what eventually became the CFSP and the CSDP, yet the European stalemate subsequent to the rejection

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302 AVVENIRE *A Milano prove di disgelo per l'Ucraina* (17th October 2014)
http://www.avvenire.it/Mondo/Pagine/putin-a-milano-vede-poroshenko.aspx

303 BBC NEWS ONLINE *Ukraine crisis: "last chance" for peace says Hollande* (7th February 2015)
http://www.bbc.com/news/world-europe-31185027

304 MINISTRY OF DEFENCE OF UKRAINE *http://www.mil.gov.ua*

of the CT and, later on, the European Debt Crisis, made European Defence a secondary issue, barely discussed about.

The Arab Springs and the EuroMaidan protests, though, forced it back into the agenda, to the point that, in December 2013, the European Council held a thematic debate on Defence, the first since the entry into force of the Lisbon Treaty, which produced a document starting with two meant-to-be iconic words: "Defence matters".

> ***I. COMMON SECURITY AND DEFENCE POLICY***
> *1. Defence matters. An effective Common Security and Defence Policy helps to enhance the security of European citizens and contributes to peace and stability in our neighbourhood and in the broader world. But Europe's strategic and geopolitical environment is evolving rapidly. Defence budgets in Europe are constrained, limiting the ability to develop, deploy and sustain military capabilities. Fragmented European defence markets jeopardise the sustainability and competitiveness of Europe's defence and security industry ([305]).*

The European Council went on defining a number of priority actions built around three axes: increasing effectiveness, visibility and impact of CSDP, enhancing the development of capabilities and strengthening Europe's Defence industry.

The Ukrainian crisis kept the European Council focused on Defence throughout all of the year 2014, yet it also exposed the weaknesses (and at the same time some of the strengths) of that particular European Institution.

The March 2014 European Council expressed the Union's full support to Ukraine and its commitment to the remainder of the Association Agreement and Deep and Comprehensive Free Trade Area. It also urged the Council of the European Union to rapidly agree on financial assistance and on a future agreement with the IMF regarding conditionality for Ukraine and it asked the Commission to evaluate legal consequences in the absence of any steps towards de-escalation on the part of Russia and pro-Russian rebels ([306]).

Other than calls for action, however, it also used its prerogative to give direction to the European Union's policies, in particular with two statements:

> *The European Council firmly believes that there is no place for the use of force and coercion to change borders in Europe in the 21st century ([307]).*

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305 EUROPEAN COUNCIL *Presidency Conclusions,* Art.1 (19th-20th December 2013)

306 EUROPEAN COUNCIL *Presidency Conclusions* (20th-21st March 2014)

307 EUROPEAN COUNCIL *Presidency Conclusions* Art.30 (20th-21st March 2014)

This sentence, obvious as it might seem, smashed in advance the Lithuanian line and is the foundation of the policy of non-recognition of Russian annexation of Crimea, as well as representing an official and clear interpretation, on the part of the European Union, of what had happened in Ukraine: a use of force and coercion by Russia to exert its will on a European country, taken up to the point of changing borders of another State part of the European continent.
In March 2014, the European Union also stated that it was its own special responsibility to preserve peace and stability in Europe, committing itself to play a central role in the management of the crisis:

> *The European Union has a special responsibility for peace and stability in Europe. It will remain at the forefront of efforts to facilitate and engage in a meaningful dialogue involving Ukraine and Russia, including through the establishment of a multilateral mechanism, with a view to finding a political solution ([308]).*

What really happened during the peace talks and the diplomatic management of the crisis, though, shows a different truth: the European Union, in the twilight of the Ashton Era, did not play any significant role – even if it meant to.
In the subsequent meetings, the European Council made only expression of support, condemnations, calls for action, launches of sanctions, congratulations and generic statements, until the Minsk II Agreements were produced and it bound the duration of sanctions against Russia to their implementation, to be completed by the end of the Year 2015 ([309]).
In later sub-chapters the management of sanctions against Russia will be discussed, but to the purposes of this particular analysis on the European Council's role in the management of the Ukrainian crisis, focus should be put on the fact that many EU sanctions are linked to the Minsk II Agreements' implementation, therefore to a deal that was not negotiated by the European Union, but by the Normandy Four, seeing the involvement of France and Germany only, which did not act on behalf of the Union *per se*, but as separate entities.
The EU, therefore, implicitly accepted – in the particular case of the Ukrainian crisis - to bind its Foreign Policy choices to terms and conditions set by the Governments of Paris and Berlin, which says much on the balance of power existing inside the Union.

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308 EUROPEAN COUNCIL *Presidency Conclusions* Art.31 (20th-21st March 2014)
309 EUROPEAN COUNCIL *Presidency Conclusions* (19th-20th March 2015)

Federica Mogherini, who had been covering her role as HR/VP only for a handful of months at the beginning of the collapse of the Minsk Protocol, seems determinate to change this approach to crisis management by the European Union.

"The European Union has all the means to be an influential global player in future – if it acts together" ([310]) she declared in in her report on the "Global Strategy to steer EU external action in an increasingly connected, contested and complex world", implicitly asserting that the Union cannot delegate to a couple of Member States the management of European security, if it wants to be cover an influential global role.

The brief sentence is also impregnated with a sense of realism and an admission of defeat, in the use of the words "in future": Mogherini is arguing that, currently, the EU is not considered to be "an influential global actor", an argumentation she reiterated by stating, in the same document, that "*although the December 2013 European Council underlined that 'defence matters', the current level of ambition and capability targets are not tailored to the degraded strategic environment.*"([311]).

The implied critic to the European Council is clear: the "Defence matters" statement of 2013 has not been followed by a real commitment on making it matter, having it preferred to delegate the management of Peace and Security in Europe to other actors, be them France and Germany, NATO or OSCE. The new HR has her mind set on changing the *status quo*: whether she will succeed is still unclear.

10. The use of sanctions by the European Union

Whatever the limits of the European Council and the EEAS vis-à-vis the Union's relations with the other actors involved in the Ukrainian crisis, the EU was not a merely passive player and acted through other ways that the Treaties provided, namely – in particular – restrictive economic measures.

Sanctions against third countries, individuals or entities, are an essential EU foreign policy tool that the Union uses to pursue objectives in accordance with the principles of the Common Foreign and Security Policy. Certain EU measures are imposed by Resolutions adopted by the UN Security Council under Chapter VII of the UN Charter. The EU may however decide to apply autonomous measures in addition to the UN's measures or adopt restrictive measures autonomously.

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[310] FEDERICA MOGHERINI *Global Strategy to steer EU external action in an increasingly connected, contested and complex world* available at http://eeas.europa.eu/top_stories/2015/150627_eu_global_strategy_en.htm

[311] ibid.

In general terms, the EU imposes its restrictive measures to bring about a change in policy or activity by the target country, part of a country, government, entities or individuals. They are a preventive, non-punitive, instrument which should allow the EU to respond swiftly to political challenges and developments.

The measures are supposed to target the policies or actions that have prompted the EU's decision to impose sanctions and the means to conduct them, and those identified as responsible for these policies or actions. Such targeted measures should minimise adverse consequences for those not responsible for such policies and actions, in particular the local civilian population, and for those carrying out legitimate activities in or with the country concerned. The political objectives and criteria of the restrictive measures should be clearly defined in the legal acts.

Restrictive measures must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy in full conformity with the jurisprudence of the EU Courts ([312]).

The use of sanctions on the part of the European Union derives from Article 215 of the Treaty on the Functioning of the European Union.

TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

TITLE IV

RESTRICTIVE MEASURES

Article 215

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

[312] As defined in the EUROPEAN EXTERNAL ACTION SERVICE website: http://eeas.europa.eu/cfsp/sanctions/index_en.htm

Albeit the TFEU conceives restrictive measures to be adopted by qualified majority voting of the Council of the European Union, their adoption under the CFSP Chapter is to be unanimous, as per Article 31 TEU.

TREATY ON THE EUROPEAN UNION

Article 31

1. Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded.

When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted.

The decision to adopt sanctions is therefore strictly intergovernmental in nature and eludes any kind of veto or intervention by the European Parliament, attesting itself to be a procedure completely out of any direct democratic control ([313]).

In the midst of the Ukrainian crisis, the EU decided to tread the road of restrictive economic sanctions to discourage Russia from getting further involved in the conflict in Donbass and in order to condemn the annexation of Crimea, deemed as committed in violation of the Ukrainian Constitution and of International Law.

These sanctions were given substance by more than 19 EU Regulations and 17 Decisions, coming to comprise more than 36 EU legal acts. The Regulations, adopted on the basis of joint proposals from the EU High Representative for Foreign Affairs and Security Policy and the European Commission, contain the details on the precise scope of the measures decided upon by the Council and their implementation.

The Union, via these instruments, decided to implement a series of so-called "intelligent sanctions", such as the freezing of goods and activities owned by individuals particularly connected to the Russian Government, commercial restrictions in the fields of technology and armaments as well as

[313] FABRIZIO MARRELLA *Le sanzioni economiche e la Russia – Parte 1: le sanzioni economiche contro la Russia e l'adempimento dei contratti internazionali* (p.5)

more general limitations to the access to the European stock market on the part of Russian citizens([314]).

In addition to those sanctions, the EU also threatened of excluding Russia from the SWIFT inter-banking system.

Russia did not wait long before responding with various counter-sanctions, by threatening to close Russian airspace to European flight companies and to halt or at the very least disrupt gas supplies to the entire European Continent ([315]).

"Cross retaliation" by the Moscow Government also resulted in a peculiar deviation of commercial flows from the European Union to China and Latin America and in economic losses for both parties involved.

Italian Prime Minister Matteo Renzi, in December 2015, timidly tried to convince the European Council to open a debate on an anticipated revision of the sanctions, but all such calls were ignored by his other European counterparts that extended their duration up to far into the Year 2016, keeping them linked to the full implementation of the Minsk II Agreements ([316]).

EU sanctions in the framework of the Ukrainian crisis are, in fact, of two different types.

Some of them are connected to the conflict in Donbass and, therefore, to the implementation of the Minsk II Agreements; the others are connected to the policy of non-recognition of Russian annexation of Crimea and Sevastopol as determined by the European Council.

Only two Regulations and as many Decisions are aimed against the peninsula that the EU considers part of Ukraine and Russia its own, therefore sanctions aimed *strictly* against Moscow, concerning armaments, dual use and technologies for the petrol sector do not apply to the territories of either Crimea nor Sevastopol.

This latter kind of restrictions will keep being therefore implemented until the European Council will decide otherwise with a political act, whereas the former will, theoretically, be kept in place until what is to this day their natural deadline, meaning July 2016.

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[314] COUNCIL OF THE EUROPEAN UNION *COUNCIL REGULATION (EU) No 833/2014 of 31 July 2014concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*

[315] FABRIZIO MARRELLA *Le sanzioni economiche e la Russia – Parte 1: le sanzioni economiche contro la Russia e l'adempimento dei contratti internazionali* (pp. 10-11)

[316] IL GIORNALE *L'Europa prolunga le sanzioni Putin colpito, Renzi affondato* (22nd December 2015) available at *http://www.ilgiornale.it/news/politica/leuropa-prolunga-sanzioni-putin-colpito-renzi-affondato-1206874.html*

11. EUAM Ukraine: the only CSDP response to the crisis

With the signing of the Association Agreement, Ukraine started a long and winding path that might, one day, lead to its accession into the European Union. Normally, States that aim to applying for membership start a reform process leading to the strengthening of the rule of law, to a general liberalization of the market and grants for all fundamental freedoms – conditions that need to be respected in order to be considered as applicants.

The Ukrainian case, obviously, went towards the diametrically opposite direction, willingly or not, by engaging into an armed conflict, suppressing revolts with the use of force and having to face all and more of the problems that have been aforementioned.

In the deteriorating and not easy to handle context of the Ukrainian crisis, Kyiv's authorities, among many other provisions that are not the subject of this dissertation, requested the European Union's support to the civilian security sector reform.

The Council of the European Union, therefore, answered by establishing, on 22nd July 2014, the EU Advisory Mission for Civilian Security Reform Ukraine (EUAM Ukraine), an unarmed, non-executive civilian mission, with a two-year mandate starting at the reaching of full operational capabilities ([317]), which occurred on the 1st July 2015 ([318]). Two days later, Mr. Kalman Mizsei was appointed Head of Mission ([319]), but on 7th January 2016 he was replaced by Mr. Kestutis Lancinskas, a senior Lithuanian police official ([320]).

The mandate of EUAM Ukraine is articulated in activities of support, advisory and mentorship to Ukrainian authorities on civilian security sector reform strategies, aiming to the strengthening of the rule of law, also through the development of effective and accountable law enforcement bodies.

Of the utmost importance, according to the agenda of the mission, were issues concerning human rights, gender rights and a serious fight against corruption ([321]).

This was the only kind of CSDP response given to the Ukrainian crisis, albeit the existence of the Lithuanian line and the strong and critical public stances made by Donald Tusk, Chair of the

317 COUNCIL OF THE EUROPEAN UNION *Press release: EU establishes mission to advise on civilian security sector reform in Ukraine* (22nd July 2014)

318 *http://www.euam-ukraine.eu/en/about_euam/the_mandate*

319 COUNCIL OF THE EUROPEAN UNION *Press release: Head of Mission for EU advisory mission in Ukraine appointed* (24th July 2014)

320 EUROPEAN EXTERNAL ACTION SERVICE/EUAM UKRAINE NEWS PAGE *EU appoints ne head of Ukraine mission* (8th January 2016) – available at: http://www.euam-ukraine.eu/en/public_information/news/886/

321 EUROPEAN EXTERNAL ACTION SERVICE/EUAM UKRAINE WEBSITE document available at: https://s-media-cache-ak0.pinimg.com/originals/a4/88/62/a48862f342eed47b761d708a5374fd8f.jpg

Council of the EU, which tagged Russia as an "enemy of the European Union", in clear contrast with the more appeasing stance of HR/VP Mogherini ([322]).

Forces exist, inside the European Union, which would manage the clash in Ukraine in a way that goes beyond diplomacy and civil missions, pushing towards a more direct confrontation with Putin's Russia. At the moment, though, these warmongering voices have had no impact whatsoever in the actual shaping and development of EU policies, as EUAM's mandate proves.

Currently, however, the EU is composed of more or less democratic States ([323]) and is therefore susceptible, in some ways, to the will of the people and to the Governments the European citizens are going to empower: the type of approach used in European crisis-management might change in the future and, today as well, the policies of single Member States do sometimes greatly differ from the ones of the Union.

As always, the future remains unpredictable.

12. A hybrid multi-level management of CFSP emerging

Summing up all threads, the Ukrainian crisis can be used as a chance to try and understand the European Union's current approach to its own Common and Foreign Security Policy.

According to Treaties, the CFSP is fruit of the decisions made by the European Council and it is carried out in numerous ways by several bodies and representatives (the HR/VP, EDA, the EEAS, the PSC and so on).

Factual reality, however, goes well beyond the limits set up by theoretical interpretation of European Law: CFSP appears to be regulated not by the sole impetus of the European Council, but in a hybrid way that sees more than just one actor involved, responding to several inputs.

Theoretically, EU foreign policy is supposed to be the fruit of compromise and mediation between the national stances of all 28 Member States.

When the European Council, unanimously, approves sanctions against Russia and the territories of Crimea and Sevastopol, it is exerting its power according to the provisions of the Treaties, being a decision taken by the predisposed EU Institution, composed by the Heads of State and Government of all Member States.

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[322] EU OBSERVER *Tusk takes up EU post, tells Russia to get out of Ukraine* (2nd December 2014) *https://euobserver.com/institutional/126740*

[323] Cf the opening of infringement procedures by the EU Commission against the Governments of Hungary and Poland - BERNARD GUETTA *Bruxelles mette sotto osservazione il Governo polacco* (Internazionale, 14th January 2016) available at: http://www.internazionale.it/opinione/bernard-guetta/2016/01/14/commissione-europea-indagine-governo-polonia

The decision to activate and implement sanctions such as the ones directed to Crimea is completely coherent and in line with the spirit and the basic interpretation of the roles imparted by the Treaties: the European Council recognizes the Russian annexation of Crimea as illegal, so it launches restrictive measures bound to the non-recognition of the specific situation.

The sanctions against Russia, on the other hand, are not bound to a decision made by the European Council itself, but to the implementation of the Minsk II Agreements, which have seen, in their production, no role whatsoever on the part of any EU Institution.

The only actors linked to the Union involved in the definition of the Agreements were France and Germany that, as previously argued, acted carrying out their own national interests and not on behalf of the EU, having no official nor unofficial mandate from Brussels.

The European Council, therefore, has bound a very important one of its CFSP decisions to an act (the implementation of Minsk II) that is completely out of any control of the Union, indissolubly linking a legal act of a European Institution to the particular will of two specific Members, *de facto* making the Foreign Policy of the entire EU coincide with the Foreign Policies of the Governments of Paris and Berlin for what concerns the conflict in Donbass, basically forcing all Member States, through the European Council, to give up part of their sovereignty in favour of France and Germany.

Both kinds of CFSP management appear to exist, but they are not the only ones. The last years have seen the role of the HR/VP emerge stronger, active and present in the international arena: in her first year in office, she has taken part to 411 bilateral high level meetings, 72 forums and 93 EU institutional meetings.

Canonically, she can exert the power appointed to her by the Treaties also by launching (through the EEAS, chairing the Peace and Security Council, which prepares the details for the Foreign Affairs Council to approve) military and civilian missions such as EUNAVFOR MED and, by launching the European Global Agenda, she means to reinforce Defence and her own role as director of the common EU line to be followed in Foreign Policy and in the formulation of the European Agenda on Security in collaboration with the former JHA organs – which therefore take part to the overall formulation of the CFSP and of the CSDP, in a holistic approach that has already been analysed.

Through these tools, Mogherini seems to aspire to upgrade the HR/VP to a role of creator of guidelines to be followed by the entire EU, which is supposed to be a prerogative of the sole European Council.

The amount of actors taking part to the definition of the EU transcends therefore the original conception of CFSP, which saw only the European Council at its core (with a support/advisory role by other actors), having become a EU competence managed in a hybrid level by:

- The European Council - canonically;
- A collaboration between the Council and the EEAS in the management of CSDP operations
- A strengthening political input by the HR/VP – through the Global European Agenda
- A coordinated input of FAC and JHAC – through the European Agenda on Security
- The acquiescence towards the *de facto* management of EU policies by non-mandated Member States

This hybrid management might denote a holistic and really pan-European and trans-sectorial evolution of CFSP, which would be a long-awaited change in the overall conception of Foreign Affairs of the European Union, but it does not take into account the wider picture: in order for such approach to work there needs to exist a closer political integration that, currently, the Union does not have.

If the foreign policies of the single Member States keep diverging from the ones of the Union, the two entities are going to disconnect more and more, with the risk – even in the CFSP – of replicating the approach used in the sanctions against Russia (which bound 28 States to an Agreement negotiated by only a couple of them) that saw the position of strong Members being imposed to all of the others.

A gradual weakening of the European Council in favour of other less intergovernmental Institutions and bodies is a natural step towards closer integration, but what we seem to be living these days is a weakening of the European Council (and of its intergovernmental methods) towards a strengthening, on one side of European Institutions and bodies, but, on the other side, also of national Governments.

Again, the capabilities-expectations gap re-emerges, between "what the EU has been talked up to do and what it is actually able to deliver" ([324]).

If the divergence between Member States and European Union is going to widen more, it could break the functioning of the European Council and, therefore, of the entire CFSP apparatus.

[324] CHRISTOPHER HILL *The capability-expectations gap or conceptualizing Europe's international role* from Journal of Common Market Studies (1993) pp. 305-328

The EU is at a crossroad on Defence as much as on solidarity: will it chose to continue with an intergovernmental approach, risking to become ineffective, or will it give greater weight to the EU's management of CFSP and CSDP, making it more and more a Union's prerogative, through a closer political union?

The lighthouse is going to work only if it is one great light in one tall tower. All other solutions lead to the darkening of the European lighthouse, to the end of Neighbourhood, of the Eurosphere and of the project of a true European Common Defence.

CONCLUSIONS

1. Theory against practice: the only time the Clauses were used

When drafting the European Constitutional Treaty, the European Convention – and in particular Working Group VIII – discussed the possibility of creating a "mutual defence clause" to be used in order to mobilize all Member States in a solidarity-driven effort in case of an armed aggression against any one of them.

As previously analysed, such clause was created as an intergovernmental and bilateral tool (Article 42.7 TUE), but it was not deemed to be sufficient, for the perceived main threats of the early years of the 21st Century, when this discussion was held, were other ones, such as natural and man-made disasters and clearly, in the aftermath of 9/11, terrorist attacks, that were clearly mentioned in what became Article 222 TFUE, the Solidarity Clause, which is able to activate all the tools at the Union's disposal, including the military apparatus of Member States.

Neither of the clauses were activated for years after their entrance into force and their existence was almost completely ignored in the midst of the European Debt Crisis, but unfortunately, on 13th November 2015, one of the disasters that they were meant to cope with happened: a group of terrorists affiliated to the Islamic State launched a series of coordinated attacks in Paris, killing 130 people ([325]).

In the immediate aftermath of the terrorist attacks, French President Hollande securitized the issue going for a very strong and symbolic narrative of the event, by stating that France had been a victim of an "act of war" perpetrated by ISIS and that, from that moment on, France was "at war" – against

[325] RTE NEWS Paris attacks death toll rises to 130 (20th November 2015) available at: http://www.rte.ie/news/2015/1120/747897-paris/

a non-State actor such as a terrorist group, but nonetheless ([326]).

On the same day, he also announced that he would ask for assistance in his war to the rest of the European Union.

Victim of a terrorist attack that, admittedly, was part of a threat of overwhelming magnitude, involving the whole world in its danger ([327]), President Hollande could have easily requested the activation of the Solidarity Clause, that was created exactly for that kind of situation, in order to activate all instruments at the Union's disposal.

Instead, he chose to request the activation of the Mutual Defence Clause.

Its activation implies a literal interpretation of Hollande's words on France being victim of an "act of war" by the Islamic State, since it can only be activated in the event of an "armed aggression on its territory" ([328]).

Since the definition of "aggression" given by the UN General Assembly implies that it is an act that can only be carried out by a State ([329]), one could argue that the European Union, by activating Article 42.7, is implicitly recognizing ISIL as an independent State actually capable of armed aggression.

However, in activating the clause, the Council also bypassed another explicit provision necessary for its activation. Its text, in fact, clearly states that: "Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation".

Being France a member of NATO, it should have worked in the framework of the North Atlantic Alliance, before requesting the activation of the clause in the EU Treaties.

Such step was never taken and was completely ignored.

Interpretation of the clause was, therefore, really liberal and it might not necessarily imply an implicit recognition of ISIS as an actual State.

Thanks to the intergovernmental and bilateral nature of the Clause, all Member States retained the possibility to refuse to give any kind of direct military support to France ([330]).

In fact, behind the choice of activating that particular clause, there was no real legal reason: it was, as admitted both by French Defence Minister Jean-Yves Le Drian and HR/VP Federica Mogherini,

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326 BBC NEWS Paris attacks: Hollande says "France is at war" (16th November 2015) available at http://www.bbc.com/news/world-europe-34836367

327 ibid.

328 *Art. 42.7* of the TREATY ON THE EUROPEAN UNION

329 UN GENERAL ASSEMBLY *Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX)*

330 EUROPEAN COUNCIL ON FOREIGN RELATIONS *Article 42.7: an explainer* (19th November 2015) *http://www.ecfr.eu/article/commentary_article_427_an_explainer5019*

a "political act" ([331]). For France, it was a convenient way to call on European solidarity and a framework for this solidarity to be expressed, when Paris had faced domestic criticisms for acting alone in its interventions in Mali (2013) and the CAR (2014).

Moreover, Article 42.7 specifies "aid and assistance by all the means" in the power of member states, which could prove useful if France makes a choice to call for civilian forms of support with a view to internal security and not only overseas military operations ([332]).

In fact, on 21st January 2016, the European Parliament used France's activation of the mutual defence clause as a pretext to explicitly call for the creation of a European Defence Union.

EUROPEAN PARLIAMENT RESOLUTION OF 21 JANUARY 2016 ON THE MUTUAL DEFENCE CLAUSE (ARTICLE 42(7) TEU) (2015/3034(RSP))

The European Parliament

18. Considers the activation of the mutual assistance clause a unique opportunity to establish the grounds for a strong and sustainable European Defence Union; is of the opinion that only with an autonomous security and defence capability will the EU be equipped and ready to face the overwhelming internal and external security threats and challenges

331 EUROPEAN EXTERNAL ACTION SERVICE *Remarques introductives de la Haute Représentante et Vice-Présidente Federica Mogherini lors de la conférence de presse avec Jean Yves Le Drian, Ministre de la Défense Français, 17 novembre 2015* available at http://eeas.europa.eu/statements-eeas/2015/151117_01_fr.htm

332 EUROPEAN COUNCIL ON FOREIGN RELATIONS *Article 42.7: an explainer* (19th November 2015) *http://www.ecfr.eu/article/commentary_article_427_an_explainer5019*

2. A severe example of capability-expectation gap

The main threat to the European Union's Common Foreign and Security Policy and its Common Security and Defence Policy remains to this day the huge extension of its capability-expectation gap.

In the case of the Paris attacks, the European Parliament itself strongly condemned the inefficiencies in the management of the tools given by the Treaties for CFSP and CSDP.

EUROPEAN PARLIAMENT RESOLUTION OF 21 JANUARY 2016 ON THE MUTUAL DEFENCE CLAUSE (ARTICLE 42(7) TEU) (2015/3034(RSP))

The European Parliament

7. Recalls its invitation, in previous resolutions, to the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy to propose practical arrangements and guidelines for ensuring an effective response in the event that a Member State invokes the mutual defence clause, as well as an analysis of the role of the EU institutions should that clause be invoked; considers it regrettable, however, that no analysis and no guidelines were available when the mutual defence clause was activated for the first time, leading to the current situation requiring ad hoc measures, ad hoc management and ad hoc cooperation;

Also in the other events analysed in this Thesis, however, the European Union has not been able to live up to what it could be expected by it.

In its management of the Migrants crisis and of the Ukrainian crisis, the EU has often chosen to ignore the Treaties or to not avail of them at their full capacity, preferring to use tools that were more convenient to single Member States.

It has a severe difficulty in acting as an actor with a single voice and when it has, the Union's policies have not been coincident with the aggregate of the policies of the Member States.

These capability-expectation gaps are the fruit of the absence of a common European political line, in these cases concerning Defence, Security and conflict management.

This kind of weakness had not emerged as clearly as today between the end of the 20th Century and the beginning of the 21st, because the EU's focus at the time was on Treaty reform and the outer Eurosphere.

It had become an effective strategic actor, a European lighthouse, functioning well in the limits of its capabilities.

The Arab Springs and the subsequent Migrants crisis, as well as the clash between perceived spheres of influence that is the Ukrainian crisis or the Paris attacks, however, brought challenges and dangers much closer to home, touching directly the national interests of Member States.
This does not mean that European Union does not remain a strong security provider.
As Federica Mogherini said, at the European Defence Agency annual conference:

> *If there is one world power, which has the tools to face complex threats, well, that is the European Union.*
> *Of course we have gaps to fill (...). But let me focus first on what makes us strong. Our partners worldwide increasingly see us not just as a big free trade area – but as a global security provider. We can be and we are a unique security provider. No other world power can mobilise the same variety of foreign policy instruments: diplomatic, development, cooperation tools – and indeed military tools. I don't think Europe can only rely on its soft power. The real challenge is to make full use of all our assets, 'hard' and 'soft', in the most effective and coherent way ([333]).*

Currently, the Union seems to be living a transitional process: the hybrid management of the conflict in Ukraine makes all possible approaches coexist, but which approach will prevail?
The one that Mogherini is preparing, envisaging a greater role of European diplomacy and a holistic approach to European security? A Union whose policies are dictated by a couple of Champions-Member States? Or a complete irrelevance of the Union in the international arena?
The Migrants crisis seems to be giving a clearer *aut aut*: the choice is between a closer union, with greater bonds of solidarity and a European management of external borders against the dissolution of the Schengen Area (that might even degenerate into an end of the European Union).
The management of the Paris Attacks, though, seems to point out that, when the need of the EU is pressing, hasted political choices are made which are not in line with EU Treaties and that seem not to have any kind of coherence at a EU level. At the same time, those same reactions prompted the European Parliament to encourage the Council to start the European Defence Union.
THIS is exactly the kind of crossroad that the European Union, the European lighthouse, is facing.
It always has, but today the stakes are higher and one mistake, one wrong turn might entail the end of the Union as we know it.

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333 FEDERICA MOGHERINI *Remarks by Federica Mogherini at the European Defence Agency's Annual Conference* (16th November 2015) available at: http://www.federicamogherini.net/remarks-by-federica-mogherini-at-the-european-defence-agencys-annual-conference/?lang=en

Presently, the European Union's hybrid management of CFSP makes it look internally incoherent, detached from its components and, ultimately, weak – weaker than it was in the past when this internal incoherence was not perceived as much, because the stakes were less high and the problems the EU faced were easily handled. The current management of CFSP is inherently unsustainable in the long run.

However, the way the Migrants crisis was managed proves that the European Union *does* have the means to tackle any crisis and that it is (theoretically) able to marry an intelligent development and use of European law in order to face crises of unprecedented width.

Not always, though, do the aggregate policies of Member States equate to the special interests of the Union as a whole – behaviour dictated mostly by political reasons – risking, instead of creating refined and coherent policies, of being torn apart by a centrifuge force.

Whether the European Union will choose greater integration, pulling out sovereignty from the European Council and Member States and directing it towards the Commission or the Parliament, or else whether it will chose its own downgrade is not yet clear, but the choice is clearly between the two – because today the European lighthouse is, at the least, malfunctioning, even if it has all the tools to work properly, and it seriously risks being damaged beyond repair.

What it needs to function is the political will to make it do so. If the European citizens will not empower and encourage their Member States to instil fuel in its fire, its light will grow dim and it will waver and fade and the broken European lighthouse will fall into decay, a memoir of a time when Europe had chosen peace, freedom, security and justice – and had failed at preserving and developing them, stumbling in the gap between capabilities and expectations.

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