PREFACE

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This preface was written a few days after the Irish referendum that said 'no' to the Lisbon Treaty. Though it is highly tempting to concentrate on the negative repercussions of this referendum, this book also gives reasons for optimism.

First of all, the more historically oriented contributions in Part I of the book demonstrate the enormous consistency in the ideas underlying the development of the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP). From the very first ideas for a European Defence Community and the Fouchet Plan of the early sixties, through to European Political Cooperation, its partial codification in the Single European Act of 1987 and the increasingly developed provisions of the Treaty on European Union in its Maastricht, Amsterdam and Nice versions, the leading ideas and core institutions have been there from the very beginning.[1] It is difficult to imagine that this impressive continuity would be suddenly stopped short by the Irish referendum.

Another phenomenon that makes a great impression on the reader of this volume is the forceful 'take-off' of the CFSP and in particular the ESDP since the Treaty of Amsterdam. This take-off coincided with the creation of the post of Secretary-General/High Representative for the CFSP and the appointment of Javier Solana to that position. Especially since the beginning of the new century, we have been confronted not only with a stunningly increased number and variety of military uniforms in the Council building, but also with the deployment of new police and military operations in ever quicker succession, up to a point where by the end of last year there were about a dozen different operations active in the field. This has stretched the operational capacity of the combined armed forces of the Member States to a maximum. However, among the contributors to this book, there are realists who point out that, though these developments are spectacular, the EU is nevertheless still punching below its weight.[2]

It is also interesting to note that despite the separation between the Community and the Union Treaties, the Union is almost naturally infected with certain 'viruses' coming from Community law, such as the 'agency virus', leading to the creation of

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[1] See the contribution by de Zwaan to this volume, and P.J. Kuijper, 'Fifty Years of EC/EU External Relations: Some Reflections on Historical Continuity and the Dialogue between Judges and Member States', 31 *Fordham International Law Journal* (2008) (forthcoming).

[2] See the contribution by Biscop to this volume.

various Union agencies. The most prominent among them, the European Defence Agency, was actually created before the legal authority to do so was specifically laid down in the Lisbon Treaty. This reminds us that the intergovernmental character of the CFSP and ESDP, without control of legality by the Court, may in certain circumstances have a positive side. It gives the EU the flexibility to create practice – and law through that practice – that would be impossible in the Community system. It is in this way, for instance, that the *de facto* recognition of the legal personality of the Union through the Union's treaty-making practice came about.[3] This flexibility may still serve the Union well in the period of non-Lisbon that is to come.

The concept of neutrality is strikingly absent in this volume. It is mentioned only sporadically and in a historical context.[4] At the time of the accession of the Scandinavian countries and Austria it was nervously discussed among experts as a major stumbling block in the field of the CFSP and ESDP, but now it is hardly raised in that context anymore. It is my impression that it will probably still be important for internal Member State politics, but that already now there is a tendency to circumnavigate this obstacle. Member States are capable of acting in a rather 'grown-up' manner, if necessary for the greater good. In this respect it would seem that the ESDP's intergovernmental nature helps them to avoid a veto – especially where police and military actions are concerned – since it may often be unnecessary to block the decision to take such action when the contribution to the forces is voluntary. This is perfectly illustrated by Spain's position in the Kosovo case, when, contrary to its strong political convictions, it did not issue a negative vote in respect of the EULEX mission, as long as it did not need to contribute personnel to the mission. Perhaps the need for improving the CFSP part of the Lisbon Treaty, especially the provision taken from the OECD Convention and permitting decision making to go ahead even in the case of abstention, the consequence being that the abstaining country is not bound by the decision, is not that great after all.[5]

Another aspect of the ESDP that comes to the fore in this book and that it is important to highlight is the European Security Strategy (ESS). One author, in particular, stresses the relative importance of this document,[6] though another contributor is more sceptical.[7] Whatever one may think of the value or operational

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[3] It is by now fairly generally admitted that the European Union has at least a functional international personality related to its police and military operations. This would have been impossible in the Community context, where the strict construction of the Community's treaty-making power by the Court has prevented the Commission from interpreting Art. 300 TEC in line with Art. 100 Euratom and thus following a widespread practice of the Member States of concluding administrative agreements. See ECJ, Case C-327/91 *France* v. *Commission* [1994] *ECR* I-3641. It is interesting to note that in ECJ, Case C-91/05 *Commission* v. *Council* (Small Arms and Light Weapons/ECOWAS), judgment of 20 May 2008, nyr, the Court attaches more importance to practice as help to the interpretation of certain provisions than it has ever hitherto.

[4] See, for example, the contribution by van Eekelen and Blockmans to this volume.

[5] See Art. 31(1), 2nd subparagraph, new TEU and Art. 6(2) OECD Convention 1960.

[6] See the contribution by Biscop to this volume.

[7] See the contribution by Duke to this volume.

character of the present ESS, it represents a very good development, and 'mainstreaming' this document in all areas of foreign policy and defence would be of great importance. It would ensure that the Union's foreign and defence policy is actually laid down in policy papers and no longer in legally binding agreements. At the moment, one gets the impression that the tendency of the Community in the past – and possibly of the Union in the future – to conclude incredibly broad and complicated agreements with third countries (variously called Framework Agreements, Cooperation Agreements or Partnership Agreements) which also invariably have to be mixed, is driven in large part by the need to create internal Union/Community consensus on the policy in respect of a certain country or region rather than by the actual need to include all the different subjects in the agreement. It would be much healthier if overall Community/Union policy regarding a country or region could be laid down in policy papers derived from the ESS, allowing the Community/Union to conclude simpler and shorter agreements with third countries. Such agreements could be based on discrete Treaty provisions; they would not need to be mixed and would thus not require long drawn-out Member State ratifications.

This brings us to the coherence question. In his contribution, Frank Hoffmeister quite rightly reminds us what the most important stakes are when choosing between a Community and a CFSP action in the field of external relations. From a legal but also a political point of view, the question of whether the European Parliament will be co-legislator or will be approving an international agreement and whether the Court of Justice will be able to exercise its powers of judicial control and protection, is much more important than the issue 'Council or Commission'. It is remarkable how many of the other contributors continue to look at this choice in the light of this false dichotomy, even though many of them profess to reject this kind of bureaucratic 'wrangling'. In reality, the choice is not between Commission and Council, but between Community and Union. The Community is not identical to the Commission. First of all, the Member States determine the decision making in the Council and even if the Council decides to delegate execution or secondary legislation to the Commission, the Member States will again have considerable influence on the Commission through the committee system that invariably operates in such situations.[8] It is a question of simple mental hygiene to keep these facts in mind when discussing these issues.

It is to be hoped that the judgment in the *SALW/ECOWAS* case recently handed down by the Court of Justice[9] and the guidelines it contains for further action will be properly understood by the institutions. It would seem that the Court envisages that Union or Community acts can bear on both CFSP/ESDP and Community domains at the same time, as long as one of the aspects is clearly secondary to the other. If both are equal in importance, the act must be split up into a Community act and a Union one. The same rules apply to any implementing acts for a basic act.

[8] See, for instance, Art. 22 of the so-called Stability Instrument, Regulation (EC) No 1717/2006, *OJ* 2006 L 327/1, which is the financing regulation that is closest to the CFSP. See also the contribution by Hoffmeister to this volume.

[9] ECJ, Case C-91/05, *supra* n. 3. See the contribution by Kronenberger to this volume.

That is to say that if a CFSP act with ancillary Community aspects is implemented, the pre-dominating CFSP nature of the basic act does not automatically render an implementing act a CFSP act too. Once again, the principal/ancillary test will have to be carried out in order to determine whether the implementing act should have a CFSP or a Community legal basis. In choosing between the legal bases, it makes no difference whether the Community power in question is exclusive, potential or shared. All this is a consequence of the fact that the boundary protected by Article 47 TEU is a 'hard' one. In spite of the dire warnings from the Member States during the procedure, these guidelines from the Court seem workable and the institutions should be willing to apply them in good faith. Vincent Kronenberger is undoubtedly right in asserting that Article 40 TFEU (Lisbon), which turns the protection of Community law provided by Article 47 TEU (Nice) into a two-sided protection, would not make much of a difference. After all, Article 5 TEC – the principle of attribution of powers – already now makes it possible to stop the Community from encroaching on the CFSP/ESDP domain by an action for annulment.[10]

For the problem of the boundary to be drawn between the CFSP/ESDP and Community side of matters, a non-Lisbon period will therefore not make a big difference. However, a non-Lisbon period would be rather negative where it concerns the messy treaty-making power under Articles 24 and 38 TEU (Nice), in particular the horribly drafted paragraph 5 of Article 24.[11] The essential problem here is that – and it is not quite clear whether Wessel and Fernandez Arribas fully draw this conclusion in their highly interesting contribution – the same kind of intergovernmental procedure of concluding international agreements is applied to wholly different kinds of treaties. The method of concluding an agreement by unanimity without that agreement having any internal effect in the legal order of the Union and therefore not being part of the law of the land, whether in the Union or the Member States (as is normally the case in the Community), is very suitable for political and defence treaties, since in virtually all Member States foreign policy and defence are the prerogative of the executive, subject to only broad parliamentary oversight. However, it is totally unsuitable in the Third Pillar where the legislative prerogatives of national parliaments and the rights of individuals are often directly affected by any agreement concluded. Hence the frequent application of the impossible paragraph 5 when it concerns agreements in the Third Pillar or on the edge of the Second and Third Pillar.[12] The non-Lisbon era that we are now entering will exact a

[10] See the contribution by Kronenberger to this volume.

[11] See the contribution by Wessel and Fernandez Arribas to this volume. With paragraphs 5 and 6 of Art. 133 TEC, Art. 24(5) TEU must share the doubtful honour of being the worst drafted provision of the Nice Treaty. Especially its second half-sentence – 'the other Members of the Council may agree that the agreement shall nevertheless apply provisionally' – shows that the provision still vacillates between laying down a power of the Union and establishing a power of the Member Sates in the Council to conclude a bundle of Member States' agreements. In theory, this provision can lead to a situation where, even if 'the other Member States' form a small minority, they could decide that the agreement will provisionally apply to the whole Union.

[12] An example of the latter is the Agreement on the Processing and Transfer of PNR data to the US Department of Homeland Security, which was first concluded as a Community agreement and later as

heavy toll on the Union, both in respect of proper and efficient treaty making and as regards the rights of parliaments and courts under the Third Pillar. Obviously, the well-known institutional amendments, such as the double-hatted High Representative, the role of the long-term President of the European Council in the field of the CFSP and the European External Action Service (EEAS), will be seriously missed in a possible non-Lisbon era. However, the continued application of Article 24 TEU in its present form, also to Third Pillar agreements, may well be the most debilitating non-amendment in practice. It has been argued in the Irish press that precisely these important institutional changes in the CFSP/ESDP domain could be introduced without Treaty amendment. This may be true, in particular as regards the long-term Presidency of the European Council; perhaps changes in the relevant Rules of Procedure would be sufficient and, as we have seen earlier, the absence of judicial review in the CFSP provides a certain flexibility. However, a double-hatted High Representative and his EEAS would certainly have repercussions on the relevant Treaty provisions and the Staff Regulations (which could be changed, but not easily). Hence, any attempt to introduce them under the present Nice version of the TEU may expose them to judicial scrutiny under the EC Treaty or Article 47 TEU that could derail such informal initiatives. However, as is clear from the contributions to this book, there has been such long-term support for the development of the CFSP/ESDP that it is difficult to imagine that in the long run the ideas underlying the Lisbon Treaty would not be enacted in one form or another. Moreover, this volume also illustrates the short-term dynamism that is presently driving the CFSP/ESDP forward and that, given the further external challenges awaiting the Union in the short run, will help to overcome the handicaps to be imposed by the non-Lisbon situation.

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a Third-Pillar one. See ECJ, Joined Cases C-317/04 and C-318/04 *Parliament* v. *Council and Commission* (PNR), judgment of 30 May 2006, nyr. The second (Third-Pillar) version can be found in *OJ* 2007 L 204/18.