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*The European Union and Peaceful
Settlement of Disputes in its
Neighbourhood: the Emergence of a New
Regional Security Actor?*

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I INTRODUCTION

MOST INFORMED OBSERVERS recognise that the words ‘conflict’ and ‘crisis’ are over-used when it comes to the European Union. Similarly, the perceived failure of the EU to punch its weight in both global and regional geopolitics is often criticised. Regrettably, the Union’s record in terms of the sustainable resolution of ‘frozen’, ‘simmering’ and ‘boiling’ conflicts, especially those in its neighbourhood, is indeed mixed at best. While the famous and ill-fated declaration of Luxembourg’s former Minister of Foreign Affairs, Jacques Poos, that Yugoslavia’s violent implosion in 1991 heralded ‘the hour of Europe’ may have been morally true, it certainly was not politically true. Neither the wars on the territory of the former Yugoslavia, nor more recent conflicts in the EU’s neighbourhood, have posed an existential threat to (parts of) the Union. Is it perhaps for this reason that the Member States have almost always failed the test of unity in the EU’s efforts to resolve conflicts on its borders?

This chapter examines the contribution of the European Union to the resolution of armed conflicts on its borders. The main frame for this analysis of legal and policy-related aspects of the EU’s contribution to conflict resolution will be the European Security Strategy (ESS),¹ with the European Neighbourhood Policy

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¹ See EU High Representative for the Common Foreign and Security Policy, *European Security Strategy: A Secure Europe in a Better World* (Brussels, 2003), as complemented by the High Representative’s *Report on the Implementation of the European Security Strategy—Providing Security in a Changing World*, doc 17104/08 (S407/08), endorsed by the European Council, Presidency Conclusions, doc 17271/08 (CONCL 5), point 30.

(ENP) as a sub-strategy to an integrated approach towards the EU's neighbours to the east and the south of its external borders.² The guiding research question will be what kind of role the European Union can and should play to peacefully settle disputes in its neighbourhood and thus to contribute to peace, stability and prosperity, while simultaneously serving its own interest in ensuring that countries on its borders are well-governed.³ In replicating the language of Article 33(1) of the United Nations Charter (UNC), this contribution is restricted to the analysis of the (potential) use of tools to peacefully settle disputes: 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.'

In order to answer the research question, this contribution will first sketch the international legal framework for the peaceful settlement of disputes as well as the (new) role and place of the EU in that framework (section II). Then, a quick scan will be made of unresolved and potentially violent disputes in the EU's neighbourhood and an overview will be given of the different sorts of instruments used by the European Union to resolve the 'frozen', 'simmering' and 'boiling' conflicts on its borders. Special attention will be paid to the potential and limits of the ENP as a tool for peaceful dispute settlement. The Union's role in the resolution of the conflict over South Ossetia and Abkhazia will be taken as a separate case study as the outcome of it seems to demand a new approach in the EU's dealings with other *de facto* states in the area of wider Europe (section III). In this light, some critical observations will be made about the lack of vision emanating from the ENP's spin-offs—the Union for the Mediterranean and the Eastern Partnership (section IV). Some concluding remarks about the need to strengthen the European Union's contribution to peaceful dispute settlement in its neighbourhood and to play its potential role as a new regional security actor will conclude this chapter (section V).

² See the Commission, 'European Neighbourhood Policy, Strategy Paper', COM (2004) 373 final. For a list of ENP reference documents, including the Action Plans see http://ec.europa.eu/world/enp/documents_en.htm. In May 2010, the Commission published a rather sobering evaluation of ambitions and activities during the first five years of the ENP. See the Commission, 'Taking stock of the European Neighbourhood Policy' COM (2010) 207.

³ The term 'neighbourhood' is used here with reference to the countries and territories associated with the ENP. The notion as applied here therefore excludes neighbouring countries whose relations with the EU are governed by other association processes (eg Turkey, Croatia and the Former Yugoslav Republic of Macedonia under the pre-accession process, the rest of the Western Balkans under the Stabilisation and Association Process, Russia, the EEA countries and the micro-states in Western Europe). For a theoretical framework centred on four 'pathways' of impact and its application to five cases of border conflicts in wider Europe (Cyprus, Ireland, Greece/Turkey, Israel/Palestine and various conflicts on Russia's borders with the EU), see the contributions to T Diez, M Albert and S Stetter (eds), *The European Union and Border Conflicts: The Power of Integration and Association* (Cambridge, CUP, 2008). For an analysis of the impact and effectiveness of EU contractual relations on conflict resolution in five ethno-political conflicts in the Union's neighbourhood (Cyprus, the Kurdish question in Turkey, Serbia/Montenegro, Israel/Palestine and Georgia's secessionist conflicts), see N Tocci, *The EU and Conflict Resolution: Promoting Peace in the Backyard* (London/New York, Routledge, 2007).

II THE INTERNATIONAL LEGAL FRAMEWORK FOR EU DISPUTE SETTLEMENT INITIATIVES

A International peaceful settlement of disputes

Ever since the conclusion of the United Nations Charter, the peaceful settlement of disputes has been guided by international rules. In fact, it is fair to say that the settlement of disputes forms the core objective of the post-1945 international legal order.⁴ Apart from adjudication procedures, the peaceful settlement of disputes has a number of political or diplomatic means at its disposal, often used in combination, and states have a free choice as to the mechanisms adopted for settling their disputes.⁵ In the absence of binding Security Council resolutions, all methods available are operative only with the consent of the particular states. As to the definition of a 'dispute', the textbooks continue to refer to a reference by the Permanent Court of International Justice in the 1924 *Mavrommatis Palestine Concessions (Jurisdiction)* case: 'a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons'.⁶ Obviously, this definition is much too broad for our purposes, and we will limit ourselves in this chapter to (potential) armed conflicts.

The above-mentioned instruments of Article 33(1) UNC, returned in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States:

states shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.⁷

While the obligation to seek settlement of their disputes is thus directed to *states*, 'resort to regional agencies or arrangements' is one of the means available to them. Indeed, this is where regional international organisations may come in and some of those organisations explicitly foresee this role in their constitutive treaties.⁸ Thus, Article XIX of the 1963 Charter of the (former) Organization of African Unity already referred to the principle of 'the peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration' and the (current)

⁴ *cf* also Art 2(3) UNC: 'All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.'

⁵ See more extensively MN Shaw, *International Law* (Cambridge, Cambridge University Press, 2008) 1010—24. See more in general JG Merrills, *International Dispute Settlement* (Cambridge, Cambridge University Press, 2005) as well as his 'The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory?' (2007) *Netherlands International Law Review* 361.

⁶ PCIJ (1924) Series A no 2, 11.

⁷ UNGA Res 2625 (XXV) of 24 October 1970, UN Doc A/8082, GA 25th session 121.

⁸ See on the concept of regional arrangements, A Abass, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Oxford, Hart Publishing, 2004). *Cf* also ThJW Sneek, 'The OSCE in the New Europe: From Process to Regional Arrangement' (1994) 1 *Indiana International & Comparative Law Review* 1.

African Union created a Peace and Security Council as a ‘standing decision-making organ for the prevention, management and resolution of conflicts’.⁹ Also the African regional organisations, the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) have been concerned with the peaceful resolution of conflicts in their region on the basis of established extensive mechanisms. Similar dispute settlement mechanisms may be found in regional organisations in other parts of the world. Article 23 of the Charter of the Organization of American States (OAS) provides that international disputes between Member States must be submitted to the Organization for peaceful settlement, and the OAS Permanent Council has played an important role in that area.¹⁰ Similarly the Arab League facilitates—although to a much lesser extent—the settlement of disputes between its members. Indeed, these organisations proclaim themselves as a ‘regional arrangement or agency’.¹¹ In Europe, the European Convention for the Peaceful Settlement of Disputes (Council of Europe, 1957), lays down the agreement that legal disputes are to be sent to the International Court of Justice and that other disputes are to be solved through conciliation and/or arbitration. In addition, mechanisms have been set up within NATO and the Organization on Security and Cooperation in Europe (OSCE). The latter organisation in particular established a number of conventions and mechanisms related to early warning, conflict prevention and crisis management—allowing for instance for the sending of observer and mediation missions to participating states.

The question is to what extent the European Union is in any way comparable to these other regional organisations. In fact, the question seems relevant to what extent the European Union may be seen as a ‘regional agency or arrangement’, in the sense of Chapter VIII of the UN Charter, which can or may be used by states to settle their disputes. In that respect it is striking that the above-mentioned regional organisations and mechanisms are directed at preventing or solving conflicts between their own members. The purpose of the present contribution, however, is to see what role the EU can and does play in the settlement of disputes between third, albeit neighbouring, countries.

⁹ See the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted on 9 July 2002.

¹⁰ See Merrills, *International Dispute Settlement* (n 5 above) 282.

¹¹ See also C Dominicé, ‘Co-ordination between Universal and Regional Organizations’, in NM Blokker and HG Schermers (eds), *Proliferation of International Organizations: Legal Issues* (The Hague, Kluwer Law International, 2001) 65–84. Cf also G Nolte, ‘Die “neuen Aufgaben” von NATO und WEU: Völker- und verfassungsrechtliche Fragen’ (1994) *ZaöRv* 95, 107. Nolte pointed to the fact that in the OAS a multinational force to deal with an internal conflict was only based on the *general purposes* of the treaty. There existed a new situation that could not have been foreseen at the time of the conclusion of the treaty. Similarly, the Arab League based troops in Lebanon from 1977–83, the Organization of African Unity in Chad from 1981–82, and the Economic Community of Western African States did the same in Liberia (from 1990).

B A stronger EU–UN relationship?

The relationship between the EU and the UN has been debated extensively over recent years.¹² Following the *Yusuf* and *Kadi* judgments by the Court of First Instance¹³ (2005) and the Court of Justice¹⁴ (2008), the legal relationship between UN law and EU law received renewed attention in the academic debate. One of the main issues in these cases was the hierarchy between UN and EU law, and in its ground-breaking judgment of 2008 the ECJ held that ‘the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights’.¹⁵ This implies that even UN Security Council Resolutions, when implemented by the EU, should not violate the fundamental rights that form a constitutional element of the EU legal order.

Nevertheless, the attention accorded to the United Nations and its principles in the new EU treaties is overwhelming. In fact the United Nations is referred to not less than 19 times in the current EU treaties (including the Protocols and Declarations). Irrespective of the ECJ’s judgment in the 2008 *Kadi* case, the EU obviously regards many of its actions as being part of the global governance programme. The United Nations and its Charter are presented as the guiding legal framework for the EU in its external relations. Article 3(5) TEU mentions ‘respect for the principles of the United Nations Charter’ which are to be pursued by the EU as part of ‘the strict observance and the development of international law’. Similar wordings reappear in Article 21 TEU of the general provisions on the Union’s external action. In fact, the promotion of ‘multilateral solutions to common problems’ should be done ‘in particular in the framework of the United Nations’. Finally, as reflected in the Preamble to the Treaty on the Functioning of the European Union (TFEU), UN law not only guides the external relations of the Union, but also its association with its overseas countries and territories (compare Articles 198–204 TFEU). The Member States announced that they intended to ‘confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations.’

¹² See for example J Wouters, F Hoffmeister and T Ruys (eds), *The United Nations and the European Union: an Ever Stronger Partnership* (The Hague, TMC Asser Press, 2006).

¹³ CFI, Cases T-304/01, *Yusuf and Al Barakaat International Foundation v Council and Commission* and T-315/01, *Kadi v Council and Commission*, 21 September 2005. See on these cases: RA Wessel, ‘Editorial: The UN, the EU and Jus Cogens’ (2006) *International Organizations Law Review* 1–6.

¹⁴ ECJ, Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, 3 September 2008. See also the special forum on this judgment in (2008) 2 IOLR and the introduction to this forum: RA Wessel, ‘The *Kadi* Case: Towards a More Substantive Hierarchy in International Law’, 323–27. More extensively on these issues: C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford, Oxford University Press, 2010).

¹⁵ Cases C-402/05 P and C-415/05 P (n 14 above) para 285.

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In the implementation of the EU Common Foreign and Security Policy (CFSP), a specific provision (Article 34(2) TEU) aims to ensure that CFSP outcomes are also taken into account by EU members in the UN Security Council: 'Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.' The new Treaty even foresees the possibility of the Union's position being presented not by one of the EU Member States, but by the High Representative of the Union for Foreign Affairs and Security Policy. In that event the Member States which sit on the Security Council shall forward a request to that end to the Security Council. Given the traditionally sensitive nature of the special position of (in particular the permanent) members of the Security Council, this provision can certainly be seen as a further step in facilitating the Union to speak with one voice. Obviously, the ultimate decision to accept a presentation by the High Representative lies in the hands of the Security Council.

In order to prevent these new diplomatic competences of the Union affecting the Member States' own powers, the latter adopted a special Declaration (No 14) during the Lisbon Intergovernmental Conference:

the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the United Nations.

Irrespective of the interpretative character of this type of Declarations they can never be used to evade the actual treaty provisions. The further development will therefore depend on the use by the Member States of the new treaty provisions allowing for a stronger diplomatic representation by the High Representative.

With the coming of age of the EU's Common Security and Defence Policy (CSDP), relations between the EU and the UN have also gained importance in that area. Article 42(1) TEU provides that the Union may use its civilian and military assets missions outside the Union for peace-keeping, conflict prevention and strengthening international security, and again this should be done 'in accordance with the principles of the United Nations Charter.'¹⁶ In fact, the Treaties foresee the possibility of EU missions operating in a UN framework. The preamble of Protocol 10 to the Treaties refers to the fact that 'the United Nations

¹⁶ Similar wordings return in the Protocol (No 10) on Permanent Structured Cooperation established by Art 42 of the Treaty on European Union.

Organisation may request the Union's assistance for the urgent implementation of missions undertaken under Chapters VI and VII of the United Nations Charter.' And Article 1 of the Protocol sees a 'permanent structured cooperation' between able and willing EU Member States in the area of CSDP being necessary 'in particular in response to requests from the United Nations Organisation'. Similarly, UN law forms the legal framework for actions in relation to the new collective defence obligation in Article 42(7) TEU: '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 [the provision on (collective) self-defence—SB/RAW].'

Finally, development cooperation (a shared competence between the Union and its Member States) will have to be based on decisions taken by and in other international organisations, including the UN. Article 208(2) TFEU provides that 'The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.' The same holds true for humanitarian aid operations, which are to be 'coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system' (Article 214(7) TFEU).

The extensive references to the UN system as the relevant international legal framework for the EU's external action seem to have reached an all-time high in a special Declaration (No 13) on CFSP, in which the binding nature of UN law *also for the EU as such* is underlined: the Intergovernmental Conference 'stresses that the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security.' It has been argued that the precise language of this text and the public nature in the context of the Lisbon Treaty may even amount to a unilateral act, which would make it difficult for the EU to argue that it would not be bound by the provisions of the UN Charter in its external operations.¹⁷

C The EU as a regional agency in the sense of the UN Charter

These (partly) new provisions raise the question of the formal status of the European Union in the global legal framework governing the peaceful settlement of disputes. In that respect the question has been raised to what extent the EU can be seen (and hence *used*) as a regional arrangement or agency in the sense of the

¹⁷ See F Naert, *International Law Aspects of the EU's Security and Defence Policy—with a particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp, Intersentia, 2010) 426.

UN Charter and the Declaration on Friendly Relations.¹⁸ According to Akehurst, ‘the difference between an agency and an arrangement would appear to be that an *agency* possesses an institutional superstructure . . . whereas an *arrangement* does not . . . In other words, an agency is simply a more highly developed form of an arrangement’.¹⁹ With regard to the EU, the existence of an ‘institutional superstructure’ is beyond any doubt. The question, however is, to which extent the institutional structure may also be used to fulfil a role as ‘regional agency’ is less easy to answer.²⁰

In any case, regarding the EU as a regional agency would explain the way in which the Union intends to attain its objective to ‘preserve peace, *prevent conflicts* and strengthen international security, in accordance with the purposes and principles of the United Nations Charter’ (Article 21(2) TEU).²¹ The Union’s ambitions in this area are formulated in the so-called ‘Petersberg tasks’, which are phrased as follows in Article 43 of the post-Lisbon EU Treaty:

The tasks . . . in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.

However, the TEU at this moment does not provide any additional clues for the Union to function as a regional agency. Neither did the Treaty expressly claim to fall within the ambit of Chapter VIII UNC. On the other hand, the concept of ‘regional arrangements and agencies’ is not defined by the Charter, and according to the (former) UN Secretary-General this was intentional:

The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of concern.²²

¹⁸ cf L Vierucci, ‘WEU: A Regional Partner of the United Nations?’ (1993) 12 *WEUISS Chaillot Paper*, who argued that the WEU (at the time the ‘military arm’ of the EU) could be seen as a regional arrangement.

¹⁹ M Akehurst, ‘Enforcement Actions by Regional Organizations with Special Reference to the Organization of American States’ (1967) 42 *British Yearbook of International Law* 177. Emphasis added.

²⁰ See below, section IID.

²¹ Emphasis added. The prevention of conflicts was added to the objectives by the Lisbon Treaty.

²² Report of the Secretary-General, *Agenda for Peace*, UN Doc A/47/277—S/24111.

The Secretary-General at the time even explicitly hinted at the possible ‘emergence’ of new regional arrangements in Europe:

[F]or dealing with new kinds of security challenges, regional arrangements or agencies can render assistance of great value. . . . This presupposes the existence of the relationship between the United Nations and regional arrangements envisaged in Chapter VIII of the Charter. The diffusion of tensions between States and the pacific settlement of local disputes are, in many cases, matters appropriate for regional action. The proviso, however, is that efforts of regional agencies should be in harmony with those of the United Nations and in accordance with the Charter. This applies equally to regional arrangements in all areas of the globe, including those which might emerge in Europe.²³

In its *Agenda for Peace*, the UN thus stressed the need for flexibility in the post-Cold War era, and the purpose of establishing closer links with regional organisations was not to set forth ‘any formal pattern of relationship between regional organisations and the United Nations, or to call for any specific division of labour’.²⁴

The above-mentioned references to the UN, including the implicit competence in Protocol 10 to the EU Treaties to act in response to a request of the UN to participate in the peaceful settlement of disputes (‘the United Nations Organisation may request the Union’s assistance for the urgent implementation of missions undertaken under Chapters VI’), indeed point to new characteristics of this organisation.²⁵ In fact, as we will see, the EU has already been active in assisting the United Nations in a number of operations. Based on this, as well as on the above-mentioned objectives in the EU Treaties, it would be difficult for the EU to deny that it is subject to Chapter VIII UNC, even in the absence of internal conflict management mechanisms.²⁶ The implications of the acceptance of a new role for the EU as a ‘Chapter VIII organisation’ are not to be disposed of too easily. According to Article 52 of the UN Charter, the activities of regional arrangements or agencies are to be consistent with the purposes and principles of the United Nations. Moreover, regional arrangements and agencies have a *primary* function in the pacific settlement of local disputes;²⁷ they shall make every effort in that respect before referring the dispute to the Security Council, but they ‘have autonomy in diplomacy, in peaceful settlement, and implicitly in the case of

²³ Report of the Secretary-General on the Work of the Organisation, *Secretary Gen Rep 21*, 1990, 21.

²⁴ *Agenda for Peace* (n 22 above) 10.

²⁵ A similar competence to act ‘in response to requests from the United Nations Organisation’ may be found in relation to the permanent structured cooperation ex Art 42(6) TEU.

²⁶ See also ND White, ‘The EU as Regional Security Actor within the International Legal Order’, in M Trybus and ND White (eds), *European Security Law* (Oxford, Oxford University Press, 2007) 329–49.

²⁷ Local disputes are commonly understood as disputes exclusively involving states which are parties to the regional arrangement or agency. Compare in that respect also Arts 34 and 35 UNC.

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consensual peacekeeping, subject to a reporting requirement.²⁸ Currently, nothing in the EU Treaties seems sufficient to enable the EU to fulfil this task internally. The Union's policies in this area are primarily (if not exclusively) related to threats to or breaches of the peace within or by states that are *not* members of the EU. This clearly distinguishes the EU from other regional arrangements and agencies, which see as their primary task the settling of disputes among their Member States.²⁹

Apart from possibilities for the peaceful resolution of conflicts, the Petersberg tasks foresee the possibility of the EU engaging in peace-making operations.³⁰ As is well-known, the Charter of the United Nations is quite clear on the prohibition on using force (Article 2(4)). Exceptions can be found in the provisions on (collective) self-defence (Article 51) and in actions by the Security Council on the basis of Article 42. In addition, Chapter VIII (Article 53) of the UN Charter allows the Security Council to 'utilize . . . regional arrangements or agencies for enforcement action *under its authority*'.³¹ Even for regional arrangements and agencies an authorisation of the Security Council to take enforcement action is necessary.³²

D New competences and institutional arrangements

The question then is to what extent the new ambitions of the EU are met by actual competences and institutional arrangements.³³ On 18 December 2007 the representatives of the 27 Member States of the European Union signed the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing

²⁸ White, 'The EU as Regional Security Actor within the International Legal Order' (n 26 above). Art 54 UNC provides that the Security Council shall at all times be kept fully informed of activities which are undertaken or are being contemplated under regional arrangements by regional agencies for the maintenance of international peace and security. This would include all activities by the EU related to the peaceful settlement of disputes.

²⁹ *ibid.*

³⁰ Peace-building activities fall beyond the scope of the present contribution. See on that issue: S Blockmans, J Wouters and T Ruys (eds), *The European Union and Peacebuilding: Policy and Legal Aspects* (The Hague, TMC Asser Press, 2010).

³¹ Emphasis added. See also White, 'The EU as Regional Security Actor within the International Legal Order' (n 26 above) 333. Art 53 mentions one exception: measures against renewal of aggressive policy on the part of an enemy state (that is, any state which during the Second World War was an enemy of any signatory of the present Charter). The definition of 'enemy state' highlights the outmoded nature of this provision.

³² It is interesting to note that Abass, *Regional Organizations and the Development of Collective Security* (n 8 above) xxi nevertheless points to 'a gradual but powerful drive towards a decentralized collective security [as] a process whereby regional organizations assume the legal competence to authorize enforcement actions under their constituent instruments, and beyond the formalistic framework of Chapter VIII'.

³³ See more extensively S Blockmans and RA Wessel, 'The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?' (2009) 14 *Journal of Conflict and Security Law* 265–308; also published as CLEER Working Paper 2009/1.

the European Community.³⁴ With its entry into force on 1 December 2009, we have new, consolidated versions of both the EU Treaty (TEU) and the EC Treaty (renamed the Treaty on the Functioning of the European Union—TFEU). Strengthening the Union's role in the world was one of the reasons for the conclusion of the Lisbon Treaty.³⁵ In addition, Article 8 of the TEU explicitly refers to the Union's relations with the countries in its neighbourhood: 'The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.'

Keeping in mind that a regional agency should have a primary function in the pacific settlement of local disputes, any effective role of the EU as a crisis manager and dispute settler in its neighbourhood calls for speedy and effective decision-making. In that respect the Lisbon Treaty introduced only minor changes. The Council—in its configuration as 'Foreign Affairs Council'³⁶—is the key decision-making organ, but, unlike the other Council configurations, is chaired not by Member State representatives, but by the High Representative (HR; currently Baroness Ashton) (Article 18(3) TEU). Also in the new Union unanimity continues to form the basis for CFSP decisions, 'except where the Treaties provide otherwise' (Article 24(1) TEU). In that respect it is interesting to point to the fact that apart from the previously existing possibilities for Qualified Majority Voting (QMV) under CFSP,³⁷ it is now possible for the Council to adopt measures on this basis following a proposal submitted by the HR (Article 31(2) TEU). Such proposals should, however, follow a specific request by the European Council, in which, of course, Member States can foreclose the use of QMV. In addition QMV may be used for setting up, financing and administering a start-up fund to ensure rapid access to appropriations in the Union budget for urgent financing of CFSP initiatives (Article 41(3) TEU). This start-up fund may be used for crisis management initiatives as well, which would potentially speed

³⁴ Throughout this contribution, references to provisions of the Lisbon Treaty have been based on the corrected consolidated versions of the TEU and the TFEU, as published in [2010] OJ C83/01.

³⁵ See more extensively Blockmans and Wessel, 'The European Union and Crisis Management' (n 33 above).

³⁶ According to Art 16(6) TEU, 'The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission. The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.'

³⁷ These exceptions recur in Art 31(2) TEU and apply as follows: —when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Art 22(1); —when adopting any decision implementing a decision defining a Union action or position; —when appointing a special representative in accordance with Art 33.

up the financing process of operations.³⁸ Overall, however, it is clear that any action on the part of the EU will continue to depend on the consent of its Member States.

On the other hand, the key role of the Member States is put into perspective on a number of occasions. Before Lisbon, most proposals in the area of CFSP came from Member States, with the Presidency having a particularly active role. Article 30(1) TEU lays down the new general rule that 'Any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission's support, may refer any question relating to the common foreign and security policy to the Council and may submit to it initiatives or proposals as appropriate.' It is in particular this new role of the Commission that may trigger new possibilities for the EU in its external affairs, including the peaceful settlement of disputes in its neighbourhood. Whereas the Commission so far has largely refrained from making use of its competence to submit proposals on issues in the area of foreign, security or defence policy (Article 22 TEU), the creation of the competence to submit joint proposals with the HR may enhance its commitment to this area.

This is strengthened by the fact that the person holding the position of HR at the same time acts as a member (and even a vice-president) of the Commission (Article 17, paras 4 and 5). This combination of the functions of HR and Vice-President of the Commission is, without doubt, one of the key innovations of the Lisbon Treaty.³⁹ The potential impact of this combination on the role of the EU in international affairs lies in the fact that there could be a more natural attuning of different external policies, in particular where borders between policies are fuzzy, such as in crisis management. At the same time, the continued separation between CFSP and other Union issues may very well lead to a need for different legal bases for decisions, and hence for the use of distinct CFSP and other Union instruments. This holds true not only for the outcome of the decision-making process, but also for the process itself, in which sincere cooperation between the Council and the Commission, supported by the HR/VP and the

³⁸ See also DG for External Policies of the Union, Policy Department, 'The Lisbon Treaty and its Implications for CFSP/ESDP', Briefing Paper, European Parliament, February 2008, 3. Nevertheless, for some Member States, resort to the EU budget may remain attractive, even if this means delaying the EU's response. See R Whitman and A Juncos, 'The Lisbon Treaty and the Foreign, Security and Defence Policy: Reforms, Implementation and the Consequences of (non-)Ratification' (2009) 14 *European Foreign Affairs Review* 25, 39.

³⁹ More extensively: C Kaddous, 'Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty', in S Griller and J Ziller (eds), *The Lisbon Treaty: Constitutionalism without a Constitutional Treaty?* (Vienna, Springer, 2008) 206. Cf also Whitman and Juncos, 'The Lisbon Treaty and the Foreign, Security and Defence Policy' (n 38 above) 32; and J Paul, 'EU Foreign Policy after Lisbon: Will the New High Representative and the External Action Service Make a Difference?' (2008) 2 *Centre for Applied Policy Research (CAP) Policy Analysis*.

new and hybrid EU External Action Service,⁴⁰ will remain of crucial importance.

Indeed, successful crisis management by the EU depends on successful leadership. Most of the relevant institutional changes in the Lisbon Treaty relate to the position of the High Representative of the Union for Foreign Affairs and Security Policy. The name change reflects the fact that it has become clear that the HR indeed represents the Union and not the (collective) Member States. The HR's competences are clearly laid down in the EU Treaty and form part of the institutional framework. Although the term 'Foreign Minister', which was used in the Constitutional Treaty, has been abandoned, the new provisions make clear that the HR will indeed be the prime representative of the Union in international affairs. Even the President of the European Council (note: not the European *Union*) exercises that position's external competences 'without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy' (Article 15, para 6(d)). The HR is appointed by the European Council (with the agreement of the President of the Commission) by QMV. This again underlines the HR's role as a person who can act on behalf of the Union and who is perhaps competent to act even in the absence of a full consensus among the Member States. The HR is to 'conduct' the Union's foreign, security and defence policy, contributing proposals to the development of that policy, and presiding over the Foreign Affairs Council (Article 18 TEU). In addition, the HR's de facto membership of the European Council is codified in Article 15 TEU (although strictly speaking it is stated that the HR only 'takes part in the work' of the European Council). The HR is to assist the Council and the Commission in ensuring consistency between the different areas of the Union's external action (Article 21 TEU), and together with the Council, ensures compliance by the Member States with their CFSP obligations (Article 24(3) TEU). All in all, the position of HR has been upgraded to allow for stronger and more independent development and implementation of the Union's foreign, security and defence policy, which—potentially—allows for a more coherent and more effective role for the EU in peaceful dispute settlement in the Union's neighbourhood.

⁴⁰ See Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ* 2010 L 201/30. For background and analyses, see, for instance, B Crowe, *The Chatham House Report, The European External Action Service: Roadmap for Success* (London, Chatham House, 2008); S Vanhoonaeker and N Reslow, 'The European External Action Service: Living Forwards by Understanding Backwards' (2010) *EFA Rev* 1–18; S Duke, 'Providing for European-level Diplomacy after Lisbon: The Case of the European External Action Service' (2009) *The Hague Journal of Diplomacy* 211–33; S Duke and S Blockmans, 'The Lisbon Treaty stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) establishing the organisation and functioning of the European External Action Service', *CLEER Legal Brief*, 4 May 2010 (available at www.cleer.eu); and C Hillion and M Lefebvre, 'Le service européen pour l'action extérieure: vers un diplomatie commune?', *Fondation Robert Schuman Policy Paper* no 169, 17 May 2010.

III THE EU AND PEACEFUL SETTLEMENT OF DISPUTES IN ITS NEIGHBOURHOOD

A Disputes in the European Union's neighbourhood

The above analysis not only has theoretical value. The Union's neighbourhood is littered with potential and actual flash points for conflict. What follows is a quick overview.

- *Abkhazia* and *South Ossetia*: both breakaway republics are located within the internationally recognised borders of Georgia, as defined in, inter alia, UN Security Council Resolution 1808 of 15 April 2008, supported also by Russia until President Medvedev's decision on 26 August 2008 to endorse the unanimous votes of Russia's Federation Council and State Duma to recognise the independence of the two entities in the wake of the August 2008 war between Georgia and Russia.⁴¹
- *Nagorno-Karabakh*: the unrecognised but de facto independent and predominantly Armenian republic which, under international law, is officially part of Azerbaijan.⁴² The statelet fought a bloody 'war of independence' in the early 1990s. Russia, the US and France, which serve as co-chairs of the so-called 'Minsk Group' under the auspices of the OSCE,⁴³ are relatively united and have advanced proposals to resolve the conflict between Azerbaijan and Armenia. But both parties to the conflict seem to believe that time is on their side with a status quo. Sporadic fighting should be understood in this context.⁴⁴
- *Transnistria*: the unrecognised but since 1990 de facto independent republic which lies within the internationally recognised borders of Moldova, wedged between the river Nistru and the border with Ukraine.⁴⁵ A 1200-strong Russian military contingent has been present in Transnistria since the 1992 ceasefire agreement between Moldova and Transnistria. The status of this contingent is disputed. Russia insists that its troops are serving as peacekeepers authorised under the 1992 ceasefire and will remain until the conflict is fully resolved.⁴⁶

⁴¹ Statement by President of Russia Dmitry Medvedev, 26 August 2008, available at www.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml. See sub-section E, below.

⁴² See T Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia: A Legal Appraisal* (The Hague, Kluwer Law International, 2001).

⁴³ EU Member States Germany, Italy, Portugal, the Netherlands, Sweden and Finland are also participating in the process.

⁴⁴ See 'Karabakh casualty toll disputed', BBC, 3 March 2008.

⁴⁵ In the wake of the August 2008 war in Georgia, Abkhazia and South Ossetia have 'recognised' Transnistria as an independent state, and plan to establish diplomatic relations in return for reciprocal recognition.

⁴⁶ 'NATO must recognize Russia's compliance with Istanbul accords', *Interfax*, 14 June 2007.

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- *Palestinian territories*: the proposed establishment of an independent state for the Palestinian people in the Gaza Strip, which is currently controlled by Hamas, and parts of the West Bank, which is administered by the Palestinian National Authority, is caught in a protracted negotiation process under US leadership of the Quartet on the Middle East (including Russia, the EU and the UN). The precise borders of this state are subject to debate with Israel. The right of the Palestinian people to a state is recognised by approximately 100 countries.⁴⁷ Armed conflict is a daily reality in the region.
- *Western Sahara*: this sparsely populated territory has been on the UN list of Non-Self-Governing Territories since the 1960s, when it was still a Spanish colony.⁴⁸ The Western Sahara was partitioned between Morocco and Mauritania in April 1976, with Morocco acquiring the northern two-thirds of the territory. When Mauritania, under pressure from the Polisario Front's independence fighters, which proclaimed the Sahrawi Arab Democratic Republic (SADR) earlier that year, abandoned all claims to its portion in August 1979, Morocco moved in an attempt to occupy that sector. Backed by Algeria, the SADR is a de facto state which currently controls about 20 per cent of the entire territory of Western Sahara which it claims.⁴⁹ The republic is currently recognised by 43 states, mostly African, Asian and Latin American countries. It is not a member of the Arab League but has been a full member of the African Union (AU, formerly the Organization of African Unity) since 1984.⁵⁰ Morocco is the only African country which is not a member of the AU. Moroccan 'territorial integrity', including Western Sahara, is explicitly recognised by the Arab League and by 25 states.⁵¹ In both instances, recognitions have over the past two decades been extended and withdrawn according to changing international trends. In April 2007, the UN—which has had a peacekeeping force on the ground since 1991—asked the parties to enter into direct and unconditional negotiations to reach a mutually accepted political solution to the conflict.⁵² So far, these efforts remain without result.

The EU has not been able to play its role as a regional security actor and sustainably resolve any of these 'frozen', 'simmering' and 'boiling' conflicts on its

⁴⁷ Institute for Middle East Understanding (2008), 'How many countries recognize Palestine as a state?', available at <http://imeu.net/news/article0065.shtml>.

⁴⁸ The list is available at www.un.org/Depts/dpi/decolonization/trust3.htm. See further T Whitfield, *Friends Indeed? The United Nations, Groups of Friends, and the Resolution of Conflict* (Washington DC, United States Institute of Peace Press, 2007) 191.

⁴⁹ See P Baehr and L Gordenker, *The United Nations at the End of the 1990s* (New York, St Martin's Press, 1999) 129.

⁵⁰ See www.africa-union.org/root/AU/memberstates/map.htm.

⁵¹ See 'Arab League supports Morocco's territorial integrity', *Arabic News*, 8 January 1999.

⁵² Report of the Secretary-General on the situation concerning Western Sahara, UN Doc S/2007/202, 13 April 2007.

borders. This is not a problem of lack of effort though. EU Special Representatives have been sent to Moldova, the South Caucasus, Georgia and the Middle East by the Union's High Representative and all have been mandated to work towards the peaceful settlement of the respective disputes.⁵³ ESDP/CSDP missions of various kinds have been deployed: for instance, a police operation to the Palestinian territories (EUPOL COPPS), EU border assistance missions (EUBAM) to Ukraine/Moldova (over Transnistria)⁵⁴ and to Rafah (Palestinian territories), a judicial reform mission to Georgia (EUJUST THEMIS)⁵⁵ and an EU Monitoring Mission to Georgia (EUMM).⁵⁶ Restrictive measures have been adopted to force, eg, the leadership of Transnistria to the negotiating table.⁵⁷ Financial and technical assistance has been given to projects in the breakaway regions in Georgia to prevent these societies from falling further behind, economically.⁵⁸

Yet, for all the would-be incentives and restrictive measures listed above, none of these instruments appears as a particularly strong leverage for securing sustainable dispute settlement on the EU's outer periphery. The same observation applies to the European Neighbourhood Policy, which serves as the European Security Strategy's regional sub-set for the neighbouring countries to the east and the south of the Union's borders.

⁵³ The mandates of these missions are included in the Joint Actions underpinning them. The Joint Actions are available at www.consilium.europa.eu/cms3_fo/showPage.asp?id=268&lang=EN&mode=g.

⁵⁴ See sub-section C, below.

⁵⁵ And the 'invisible' civilian ESDP operation in Georgia, ie the reinforced EUSR Support Team, comprising a Rule of Law follow-up to EUJUST THEMIS and a Border Support Team, facilitated entirely through European Commission programmes.

⁵⁶ For a complete and up-to-date list, see the website of the Council of the EU.

⁵⁷ Council Common Position 2008/160 of 25 February 2008 restricting the admission of persons responsible for preventing progress in arriving at political settlement of the Transnistrian conflict [2008] OJ L51/23.

⁵⁸ ECHO has been present in Georgia since 1993 to meet the needs of the most vulnerable communities. With the allocation of €2 million for people most affected by the unresolved conflict between Abkhazia and Georgia (internally displaced people, returnees and other vulnerable groups in Abkhazia), the total of the Commission's humanitarian aid funding totalled €104 million for Georgia at the end of 2007. Under the Partnership and Cooperation Agreement with Georgia, TACIS assistance has been granted for small-scale rehabilitation projects in South Ossetia (and Azerbaijani regions 'liberated' from Armenian occupation), such as the restoration of a hydroelectric plant in Inguri (close to Abkhazia). Assistance has also been given through other channels, such as Tempus, Traceca (Transport Corridor Europe-Caucasus-Asia) and Inogate (Interstate Oil and Gas Transport to Europe).

B ENP: Not in itself a dispute settlement mechanism

Since the formalisation of the ENP in 2004,⁵⁹ political dialogue with partners has occupied a central place in the EU's relations with its neighbouring countries.⁶⁰ However, the ENP's principal contribution to international peace is through the promotion of local democracy, regional cooperation and socio-economic progress, all of which can only indirectly contribute to a more positive climate for peaceful dispute settlement. The former External Relations and ENP Commissioner Benita Ferrero-Waldner admitted as much when she observed that the ENP is 'not in itself a conflict prevention or settlement mechanism'.⁶¹ Nonetheless, the ENP is also premised on a more direct contribution to stability in the EU's neighbourhood. In June 2003, the General Affairs and External Relations Council noted the importance of 'shared responsibility for conflict prevention and conflict resolution' among ENP partners and the EU.⁶² In a 15-item list of 'incentives' to implement ENP goals, it prioritised more effective political dialogue and cooperation, intensified cooperation to prevent and combat common security threats, and greater cooperation in conflict prevention and crisis management.⁶³ The Commission's 2004 ENP Strategy Paper notes a similar ambition and adds specific areas of activity beyond political dialogue, namely 'the possible involvement of partner countries in aspects of CFSP and ESDP, conflict prevention, crisis management, the exchange of information, joint training and exercises and possible participation in EU-led crisis management operations'.⁶⁴

Putting flesh on the bones, the Action Plans envisage 'new partnership perspectives' over a broad range of activities. This includes a commitment by ENP partners to 'certain essential aspects of the EU's external action, including

⁵⁹ Commission, 'European Neighbourhood Policy' (Strategy Paper) COM (2004) 373 final. For further details on the ENP, see http://ec.europa.eu/world/enp/index_en.htm. For an academic assessment, see, eg, the contributions to S Blockmans and A Łazowski (eds), *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration* (The Hague, TMC Asser Press, 2006); and M Cremona and C Hillion, 'L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy' (2006) 39 *EUI Working Papers, LAW*.

⁶⁰ See M Smith and M Webber, 'Political Dialogue and Security in the European Neighbourhood: The Virtues and Limits of 'New Partnership Perspectives'' (2008) 13 *EFA Rev* 73, 77–78.

⁶¹ See B Ferrero-Waldner, 'Political reform and sustainable development in the South Caucasus: the EU's approach', Speech at the Bled Strategic Forum 'Caspian Outlook 2008', SPEECH/06/477, 28 August 2006; and, more generally, B Ferrero-Waldner, Benita, 'The European Neighbourhood Policy: The EU's Newest Foreign Policy Instrument' (2006) 11 *EFA Rev* 139–42.

⁶² GAERC, Council Conclusions of 16 June 2003, Press Release no 10369/03 (Presse 166) 33.

⁶³ *ibid.*

⁶⁴ See COM (2004) 373 (n 59 above), under 'A more effective political dialogue'. Currently, Ukraine is one of five and the only of the ENP countries to have concluded a framework agreement on the participation in EU crisis management operations. In April 2010, the Council authorised the HR to open negotiations with a view to concluding such agreements with another 20 countries, among which were Egypt and Morocco as the only ENP countries. See Council conclusions, 26 April 2010, 8979/10 (Presse 90).

... the fight against terrorism and the proliferation of weapons of mass destruction (WMD), as well as efforts to achieve conflict resolution.’⁶⁵ Ferrero-Waldner observed that these Action Plans offered the opportunity for ‘deeper political integration [through] more frequent and higher level political dialogue.’⁶⁶ This would serve to both strengthen democratic governance in partner states and promote ‘our common foreign policy priorities, like making multilateral institutions more effective, and in addressing our common security threats.’⁶⁷

But in spite of these lofty objectives, the reality on the ground remains that, so far, the European Union has been unable to achieve a great deal in its neighbourhood in the sphere of sustainable dispute settlement. This is partly due to the fact that the agenda for the implementation of the ENP’s objectives is set by both the EU, on the one hand, and the respective partner country, on the other. Politically sensitive actions to resolve conflict will therefore only be included in the Action Plans if the countries for which they are drawn up agree to them. In practice, the outcome of this political process varies widely. For instance, the Action Plans for Georgia, Israel and the Palestinian territories define several specific priority actions which ought to contribute to the settlement of the disputes over Abkhazia and South Ossetia,⁶⁸ and the Middle East conflict respectively,⁶⁹ while the one for Morocco does not mention the dispute over the Western Sahara at all.⁷⁰ Another problem is that the parties to the existing disputes, as well as the big international players otherwise involved in the dispute settlement mechanisms (eg the US and Russia), simply do not wish to shift negotiations away from the existing platforms (provided for by, eg, the UN and the OSCE) to the relatively new and weak structures of the ENP, where their own roles would be diminished. These attitudes not only thwart the European Union’s ambitions at playing a bigger role in the resolution of conflicts over the *de facto* states in its neighbourhood, they

⁶⁵ Commission, ‘Commission proposals for Action Plans under the European Neighbourhood Policy (ENP)’, COM (2004) 795 final. The Action Plans are ‘benchmarked roadmaps’ in bringing about needed reforms to bring the neighbours closer to the EU. See J Solana, ‘The role of the EU in promoting and consolidating democracy in Europe’s East’, Address at the Common Vision for a Common Neighbourhood Conference, Vilnius, 4 May 2006.

⁶⁶ B Ferrero-Waldner, ‘The European Neighbourhood Policy: bringing our neighbours closer’, Speech at the 10th Euro-Mediterranean Economic Transition Conference ‘Giving the Neighbours a stake in the EU internal market’, Brussels, SPEECH/06/346, 6 June 2006.

⁶⁷ *ibid.*

⁶⁸ The EU-Georgia Action Plan, under Priority area 6, ‘Promote peaceful resolution of internal conflicts’, lists seven priority actions.

⁶⁹ The EU-Israel Action Plan, at 6, lists eight priority actions to strengthen political dialogue and to identify areas for further cooperation to deal with the Middle East conflict. The EU-Palestinian Authority Action Plan, at 4, declares it a priority action that ‘intensified efforts [will be made] to facilitate the peace process and bring about the implementation of the Quartet Roadmap to a permanent two-state solution to the Israeli-Palestinian conflict.’

⁷⁰ The EU-Morocco Action Plan, at 1, only declares that ‘Cross-border cooperation and shared responsibility for the establishment of an area of peace and stability, including crisis management and the prevention and resolution of conflicts in the region, also form part of the new European neighbourhood policy’, and, at 7—under ‘actions’ (note that the qualifying term ‘priority’ has been dropped), that the EU and Morocco will ‘Contribute to UN regional conflict resolution efforts.’

also continue to undermine bilateral relations with the de jure states implicated in the disputes. As a result, the European Union's institutional involvement in the existing dispute settlement mechanisms on its borders continues to vary widely:

- the EU (represented by the HR/VP) is a full participant in the Quartet for the Middle East conflict;⁷¹
- the EU participates as an observer in the so-called '5+2 talks' for Transnistria;⁷²
- the European Commission has been an observer in the Joint Control Commission for South Ossetia; and
- none of the institutions but individual EU Member States participate in the so-called 'Minsk Group' for Nagorno-Karabakh and the UN Friends of Georgia, the forum which deals with Abkhazia.

C The 'carrot' of EU membership: theoretically only for some ENP countries

The only positive examples of the EU acting as a provider of peaceful dispute settlement pre-date the ENP and relate to another of the EU's transformation processes for neighbouring states: the Stabilisation and Association Process, ie the pre-accession process for the countries of the Western Balkans.⁷³ In the Western Balkans, the testing ground par excellence of CFSP and ESDP, the European Union, by way of its High Representative, supported by his staff at the Council, was instrumental in brokering a peace deal between the government of Macedonia and the Albanian separatists in Macedonia (FYROM) in 2001 and in hammering out the Belgrade Agreement (2002) to prevent the Federal Republic of Yugoslavia (FRY) from violently falling apart and having a knock-on effect on the precarious balance reached in Kosovo.⁷⁴ In both cases, the EU's High Representative—who played a key role in the settlement of the disputes—used the prospect of the conclusion of a Stabilisation and Association Agreement (SAA) and eventual EU membership as a strong lever to persuade the adversarial parties in each country to engage in negotiations to reform the Constitution and establish equal rights for their respective communities. The SAA would establish legal obligations for the countries concerned to approximate their legislation to the EU *acquis* and to cooperate with the other countries of the Western Balkans.

⁷¹ See I Black, 'Israel faces new pressure as Lady Ashton visits Gaza', *The Guardian*, 18 March 2010, and L Harding, 'Quartet blasts Israel over East Jerusalem settlements', *The Guardian*, 19 March 2010.

⁷² The five being Russia, Ukraine, OSCE, the EU and the US, the two being Moldova and Transnistria.

⁷³ Commission, 'Stabilisation and Association Process for Countries of South-Eastern Europe: Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia and Albania' COM (99) 235 final.

⁷⁴ For backgrounds, analysis and references for further reading, see S Blockmans, *Tough Love: The European Union's Relations with the Western Balkans* (The Hague, TMC Asser Press, 2007) 189–207.

But at the same time it involved the perspective of the establishment of a free trade area between the EU and the countries concerned, provisions on cooperation in a wide range of fields, including justice and home affairs, and the provision of financial assistance to help them achieve the objectives of the SAA.

The alluring promises of the conclusion of an SAA and future membership serve the EU's strategic interests in stability, security and sustainable conflict resolution.⁷⁵ Such prospects have helped to increase prosperity and growth opportunities in destitute countries and regions, to improve links with vital transport and energy routes across borders, and to increase the EU's weight in the immediate neighbourhood, as indeed in the world. The consistent implementation of the renewed consensus on enlargement, as defined by the December 2006 European Council,⁷⁶ gains importance in the light of recent challenges to stability in the eastern neighbourhood of the EU. While it is clear that the 'carrot' of the prospect of EU membership is lacking in the context of the ENP, those 'European' states that could theoretically fulfil all EU membership conditions mentioned in and attached to Article 49 TEU could perhaps be swayed more easily than their non-European brethren in the ENP to resolve their internal and/or cross-border disputes.⁷⁷

For Moldova, whose 'Europeanness' feeds an aspiration for future EU membership that seeks to overcome the Union's current reluctance to include it in any other group than that for which the prospect of accession to the Union has been excluded, accession negotiations will, in any way, not begin until the situation

⁷⁵ There is, however, one notable exception to this success story of 'soft power': Cyprus. For historical backgrounds, political realities and legal analyses, see F Hoffmeister, *Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* (Leiden, Martinus Nijhoff Publishers, 2006); and M Brus, M Akgün, S Blockmans, et al, *A Promise to Keep: Time to End the International Isolation of the Turkish Cypriots* (Istanbul, TESEV, 2008).

⁷⁶ *EU Bulletin*, December 2001, point I.25.1.

⁷⁷ According to Art 49 TEU, 'any European state' which respects the values set out in Art 2 TEU (liberty, democracy, respect for human rights and fundamental freedoms and the rule of law) and is committed to promoting them may apply to become a member of the Union. The June 1993 European Council Summit at Copenhagen developed more stringent criteria to measure the level of preparedness of both candidate countries and the EU. EU membership conditionality has been further upgraded into a multi-dimensional instrument geared towards reform and integration of the weak states of the Western Balkans. See F Hoffmeister, 'Changing Requirements for Membership', in A Ott and K Inglis (eds), *Handbook on European Enlargement—A Commentary on the Enlargement Process* (The Hague, TMC Asser Press, 2002); K Smith, 'The Evolution and Application of EU Membership Conditionality' in M Cremona (ed), *The Enlargement of the European Union* (Oxford, Oxford University Press, 2003); C Hillion, 'The Copenhagen Criteria and their Progeny' in C Hillion (ed), *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing, 2004); S Blockmans, 'Consolidating the Enlargement Agenda for Southeastern Europe', in S Blockmans and S Prechal (eds), *Reconciling the Deepening and Widening of the European Union* (The Hague, TMC Asser Press, 2007); and S Blockmans, 'Raising the Threshold for Further EU Enlargement: Process, Problems and Prospects', in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (The Hague, TMC Asser Press, 2009).

regarding Transnistria has been fully resolved.⁷⁸ However, such a settlement is impossible without—at the very least—the acquiescence of the Russian government, given its political, diplomatic, economic and military ties with that region.⁷⁹ Yet, the 2005 EU-Russia Road Map for a Common Space of External Security is not very detailed as far as it concerns ‘the settlement of regional conflicts, *inter alia* in regions adjacent to EU and Russian borders’.⁸⁰ Despite the EU’s insistence, Russia has not proved ready to engage in a more concrete plan for common action in the shared—and troubled—security space.⁸¹

While the EU claims to be increasingly involved in the resolution of the conflict over Transnistria, its impact remains rather limited due to the conflict’s own dynamics and Moscow’s opposition. In March 2005, the Council of the EU appointed Adriaan Jacobovits de Szeged as EU Special Representative (EUSR) for Moldova.⁸² The EUSR, who had been a Special Envoy for the Transnistrian conflict for the OSCE Chairman-in-Office under the Dutch Presidency in 2003, was mandated by the EU to (continue to) assist in the resolution of the conflict. One of his tasks is to oversee the activities of the EU Border Assistance Mission (EUBAM) Ukraine/Moldova.⁸³ This EUBAM was deployed on the Ukrainian/Moldovan border in November 2005, after Commission President Barroso and High Representative Solana received a joint letter by the Ukrainian and Moldovan Presidents inviting the EU to support their efforts in fighting smuggling and trafficking through Transnistria.⁸⁴

As noted above, the EU participates as a mere observer in the so-called ‘5+2 talks’ for Transnistria. This status obviously limits the Union’s leverage over the parties to the dispute. While one of the key objectives of the EU-Moldova Action Plan under the ENP is to further support a viable solution to the Transnistria conflict, *inter alia* by ‘consider[ing] ways to strengthen further [the European Union’s] engagement’,⁸⁵ recent developments in Moldova have been frustrating the EU’s efforts to settle the dispute in a ‘European’ way. In a declaration signed

⁷⁸ See, eg, O Schmidtke and C Chira-Pascanut, ‘The Promise of Europe: Moldova and the Process of Europeanization’, in O Schmidtke and S Yekelchik (eds), *Europe’s Last Frontier? Belarus, Moldova, and Ukraine between Russia and the European Union* (New York/Basingstoke, Palgrave Macmillan, 2008).

⁷⁹ See S Yekelchik, ‘Out of Russia’s Long Shadow: The Making of Modern Ukraine, Belarus, and Moldova’, in Schmidtke and Yekelchik, *Europe’s Last Frontier* (n 78 above).

⁸⁰ 15th EU-Russia Summit Conclusions, Press release no 8799/05 (Presse 110), 10 May 2005, 39.

⁸¹ According to Nicu Popescu, solving this most ‘solvable’ of conflicts in the shared neighbourhood would set a positive precedent in building the Common Space of External Security. See N Popescu, ‘The EU in Moldova—Settling Conflicts in the Neighbourhood’, EUISS Occasional Paper, no 60 (2005) 43.

⁸² Council Joint Action 2005/265/CFSP appointing a Special representative of the European Union for the Republic of Moldova [2005] OJ L81/50.

⁸³ Council Joint Action 2005/776/CFSP, amending the mandate of the European Union Special representative for Moldova [2005] OJ L292/13, and prolonged since then.

⁸⁴ See A Skvortova, ‘Moldova’, in Blockmans and Łazowski, *The European Union and Its Neighbours* (n 59 above) 563–64.

⁸⁵ See EU-Moldova Action Plan, 2. At 9–10, five priority actions are listed under this heading.

jointly by the Moldovan President Vladimir Voronin and the Transnistrian leader Igor Smirnov in April 2007, Moldova for the first time recognised the political leadership of the breakaway province as a legitimate entity.⁸⁶ And despite the EU's claims to the contrary, Russia tends to consider Kosovo's independence as a precedent for the breakaway regions on its border including Transnistria. Many observers have been critical of Moscow's apparent deviousness in evading any serious peace and reconciliation negotiations, either under UN or OSCE auspices.⁸⁷

D The independence of Kosovo: precedent or excuse?

The argument that Kosovo represents a *casus sui generis* because it has been governed by international sanction for almost a decade after a forceful humanitarian intervention put an end to a situation of internal colonialism, and because an all-inclusive process of international status negotiations proved unsuccessful,⁸⁸ represents no legally acceptable justification for breaching standing public international law (on the inviolability of international borders and the prohibition of interference in another state's domestic affairs) and bypassing the UN Security Council as the supreme authority on such matters.⁸⁹ However, the recognition of Kosovo as a sovereign and independent state by almost 70 states world-wide (among which were 22 out of 27 EU Member States) does provide evidence that *opinio juris* is shifting from the concept of 'state security' to the notion of 'human security', meaning that a growing body of states considers that, under the given circumstances, human rights and fundamental freedoms of individuals and the principle of external self-determination of peoples should outweigh the orthodoxies of international law.⁹⁰ Yet, the consequences of the application of a simplified version of that rationale (eg omitting the condition of lengthy international governance) are potentially harmful, in Kosovo and the EU's neighbourhood, as well as for the international order based on states. Indeed, it did not take long before this liberal interpretation of the traditional concepts of international law backfired on the EU⁹¹ and the US. Contrary to the

⁸⁶ Voronin allegedly acted under pressure from the Kremlin. See 'A thaw in the river', *The Economist*, 19 April 2007.

⁸⁷ See N Popescu, "'Outsourcing' De Facto Statehood: Russia and the Secessionist Entities in Georgia and Moldova' (2006) 109 *CEPS Policy Brief*.

⁸⁸ See M Weller, 'Negotiating the Final Status of Kosovo' (2008) 114 *EUISS Chailot Paper*; and J Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (London/New York, IB Tauris, 2009).

⁸⁹ See M Weller, *Contested Statehood: Kosovo's Struggle for Independence* (Oxford, Oxford University Press, 2009).

⁹⁰ See C Borgen, 'Kosovo's Declaration of Independence: Self-determination, Secession and Recognition' (2008) 12 *ASIL Insight*, available at www.asil.org/insights/2008/02/insights080229.html; and the legal commentaries available online at www.kosovocompromise.com.

⁹¹ Also because of the decision of the Council of the EU to dispatch an EU Special Representative, and the Union's biggest rule of law operation to date: see Council Joint Action 2008/124/CFSP of 4

logic applied by Moscow during the final status talks, Russia was quick to switch position and use the West's recognition of Kosovo's independence as a precedent for establishing legal links with the breakaway regions in Georgia.

E Caucasian squabbles: a new 'hour of Europe'?⁹²

Judgements about the European Union's reaction to the flare-up of conflict over the breakaway regions of South Ossetia and Abkhazia in August 2008, Russia's incursion into Georgia, and its unilateral recognition of the two de facto states, have varied—from the cartoon of EU leaders held together in a wobbly red jelly on the cover of the *Economist* of 6 September 2008, to the earlier assessment that 'Without the European Union's intervention and rapid reaction on the part of the French president the Russians would already have made Tbilisi theirs'.⁹³ The reference here is to the diplomatic initiative of Nicolas Sarkozy, who—as holder of the EU's Presidency in the second half of 2008—visited Moscow and Tbilisi, brokered the initial ceasefire agreement on 12 August 2008, and then pushed hard for Russia to observe the terms. In a rare display of unity, the EU Member States followed up at their emergency summit on 1 September—only the third in its history—by sticking together in an unprecedented condemnation of Russian

February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2004] OJ L42/92. UNSC Res 1244 (1999), which provided for the interim administration by UNMIK, remained in place due to Russian resistance to other options discussed in the Security Council. Secretary-General Ban Ki-Moon became involved in order to break the deadlock by presenting a six-point plan to the UNSC in a letter on 12 June 2008. On 26 November 2008, the Security Council approved this proposal which provided for the deployment of a status-neutral EULEX under a continued 'UN umbrella', with Resolution 1244 staying in force. This solution had a direct and severe impact on EULEX's mandate: UNMIK would stay in Kosovo and remain the official counterpart for the Serbs. This mainly had repercussions for Kosovo's Serb-dominated north, where UNMIK would continue to play a leading role, thus increasing the risk of a de facto division of the Kosovo territory. See S Keukeleire and R Thiers, 'EULEX Kosovo: Walking a Thin Line, Aiming for the Rule of Law', in Blockmans, Wouters and Ruys, *The European Union and Peacebuilding* (n 30 above).

⁹² The focus in this section is on Georgia. As far as the EU's role in peaceful dispute settlement in other parts of the South Caucasus is concerned, the Commission's 2010 ENP regular reports offer a bleak picture of the Union's ability to settle disputes in the neighbourhood. See, eg, Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament and the Council, 'Taking stock of the European Neighbourhood Policy (ENP)', 'Implementation of the European Neighbourhood Policy in 2009 – Progress Report Armenia', SEC (2010) 516, which highlights the main development in Armenia in 1999, ie the signing of protocols on normalising relations with Turkey in October, mainly through Swiss mediation. However, the ratification procedure stalled after Turkey linked the opening of the border and the establishment of diplomatic relations to progress in peace talks between Azerbaijan and Armenia over Nagorno-Karabakh. Armenia suspended ratification in April 2010, blaming Turkey for the lack of progress. 'The EU was pleased to note Armenia's continued commitment to pursue the process of normalization of Armenian-Turkish relations,' the report said, 'but at the same time expressed concern about the loss of momentum in this process.' In the 'Progress Report Azerbaijan', SEC (2010) 519, the EU merely took note of the 'intensified' attempts to find a settlement over Nagorno-Karabakh.

⁹³ See J-D Giuliani, 'Editorial: Europe and Russia', *Fondation Robert Schuman Newsletter*, 24 August 2008, available at www.jd-giuliani.eu/en/article/cat-2/101_LEurope-et-la-Russie.html.

aggression.⁹⁴ To signal their willingness to act, EU Member States suspended negotiations on the new Partnership and Cooperation Agreement until Russia acted in full compliance with Sarkozy's peace plan. While it was in Russia's own interest to withdraw its forces from the self-declared buffer-zone in Georgia and start a programme of damage control in international relations, Moscow—otherwise used to a squabbling and uncritical EU—will have taken note of Europe's relatively strong reaction; relative, because compared with the tough rhetoric from Washington, the Union's reaction still looked measured. Arguably, the EU's mediating role in the conflict was all the more effective because it was backed by a growling US that openly backed Georgia's President, Mikheil Saakashvili. The Americans found it easier to be firm and critical precisely because they could rely on the EU to do the actual negotiations. The European Union has since supplemented its high-level diplomacy by attempting to mitigate the consequences of the war on the ground. In spite of an Estonian proposal to send a full-fledged ESDP peacekeeping mission to Georgia,⁹⁵ foreign ministers eventually authorised a 300-strong European Union Monitoring Mission in Georgia to replace Russian troops in the buffer-zone,⁹⁶ and pledged €500 million in aid for the period 2008–10 to help the reconstruction of the devastated Georgian economy.⁹⁷ But effectively, the issues of the inaptly named 'frozen conflicts' have been resolved, not in a peaceful manner by the EU but by force by Russia. Both South Ossetia and Abkhazia have been recognised as sovereign and independent states by Moscow, and are heavily dependent on trade with Russia.

Thus, tension and bitterness persisted, not only within the Caucasus, but also between Russia and the West. Many observers, both inside and outside the European Union, looked anxiously eastwards in the belief that Russian efforts to control its 'near abroad' would not stop at the borders of South Ossetia and Abkhazia.⁹⁸ Presumably, inaction by the EU and the US would be taken by Russia's zero-sum politicising leadership as an encouragement to move on from the 'success' in Georgia to pursue comparable objectives, tactics and methods in relation to the Russophile regions of Transnistria and the Crimea in Ukraine, and

⁹⁴ Presidency Conclusions, Extraordinary European Council, Brussels, 1 September 2008, doc. 12594/08, 11.

⁹⁵ See P Runner 'Estonia urges EU peacekeepers for Georgia', *EU Observer*, 5 August 2008.

⁹⁶ Council Joint Action 2008/736/CFSP of 15 September 2008 on the European Union Monitoring Mission in Georgia, EUMM Georgia [2008] OJ L248/26 (as amended).

⁹⁷ GAERC, Council Conclusions of 15–16 September 2008, Press Release no 13030/08 (Presse 255) 9. See also M Merlingen and R Ostrauskaitė, 'EU Peacebuilding in Georgia: Limits and Achievements', in Blockmans, Wouters and Ruys, *The European Union and Peacebuilding* (n 30 above).

⁹⁸ See T Valášek, 'What Does the War in Georgia Mean for EU Foreign Policy?' (2008) *CER Briefing Note*; M Emerson, 'Post-mortem on Europe's First War of the 21st Century' (2008) 167 *CEPS Policy Brief*; and N Popescu, M Leonard and A Wilson, 'Can the EU Win the Peace in Georgia?' (2008) *ECFR Policy Brief*.

to defend 'its' citizens—especially those, it would seem, who have recently been handed a Russian passport—anywhere with crushing force.⁹⁹

With the sense of urgency over the Georgian crisis dissipating, the divisions between EU Member States over how to deal with Russia slowly reappeared.¹⁰⁰ Regrettably, the differences in positions between EU Member States—from the 'new cold warriors' (eg Lithuania and Poland) to Russia's 'Trojan horses' in the EU (eg Bulgaria, Cyprus and Greece)—are so far apart, that building a common framework on EU-Russia relations might provide the ultimate example in defining the lowest common denominator in EU external relations policies and law.¹⁰¹ The EU will need to continue its debate about why Georgia matters,¹⁰² and what kind of tools it has at its disposal to resolve the Georgian crisis,¹⁰³ as indeed the other (potential) conflicts in the neighbourhood shared with Russia. Finally, the EU will need to engage with the big and powerful countries on its borders to resolve the frozen, simmering and boiling conflicts 'in-between',¹⁰⁴ Therefore, conflicts should always be a key focus of political dialogue with neighbouring countries. The EU should also ensure that the disputes remain on the agenda of dialogues with relevant international organisations and third countries and that it becomes an active participant in those dialogues where it is not.

⁹⁹ In the aftermath of the August 2008 Russo-Georgian war, President Medvedev laid down five principles that would guide Russian foreign policy: the primacy of international law; the quest for a multi-polar world; no isolation of Russia; the protection of its citizens; and—last but not least—spheres of influence: 'Russia, just like other countries in the world, has regions where it has its privileged interests.' When asked what these priority regions were, he replied: 'Certainly the regions bordering [on Russia], but not only them.' See P Reynolds, 'New Russian world order: the five principles', BBC News, 1 September 2008.

¹⁰⁰ See, eg, P Runner, 'Lithuania complicates French rapprochement with Russia', *EU Observer*, 7 November 2008; and R Goldirova, 'EU resumes Russia talks, isolating Lithuania', *EU Observer*, 11 November 2008.

¹⁰¹ *ibid.* For the conceptualisation and categorisation of EU Member States' positions on Russia-related topics, see M Leonard and N Popescu, 'A Power Audit of EU-Russia Relations' (2007) *ECFR Policy Paper*, 2: 'We have identified five distinct policy approaches to Russia shared by old and new members alike: "Trojan Horses" (Cyprus and Greece) who often defend Russian interests in the EU system, and are willing to veto common EU positions; "Strategic Partners" (France, Germany, Italy and Spain) who enjoy a "special relationship" with Russia which occasionally undermines common EU policies; "Friendly Pragmatists" (Austria, Belgium, Bulgaria, Finland, Hungary, Luxembourg, Malta, Portugal, Slovakia and Slovenia) who maintain a close relationship with Russia and tend to put their business interests above political goals; "Frosty Pragmatists" (Czech Republic, Denmark, Estonia, Ireland, Latvia, the Netherlands, Romania, Sweden and the United Kingdom) who also focus on business interests but are less afraid than others to speak out against Russian behaviour on human rights or other issues; and "New Cold Warriors" (Lithuania and Poland) who have an overtly hostile relationship with Moscow and are willing to use the veto to block EU negotiations with Russia.'

¹⁰² See D Lynch, 'Why Georgia Matters' (2006) 86 *EUISS Chaillot Paper*.

¹⁰³ See M Leonard and C Grant, 'Georgia and the EU: Can Europe's Neighbourhood Policy Deliver?' (2005) *CER Policy Brief*; R Asmus, S Cornell, A Herrberg and N Popescu, 'Internationalizing the Georgia-Abkhazia Conflict Resolution Process: Why a Greater European Role is Needed' (2008) *GMF Policy Brief*; and N Popescu, M Leonard and A Wilson, 'Can the EU Win the Peace in Georgia?' (2008) *ECFR Policy Brief*.

¹⁰⁴ See, eg, S Gaenzle, 'The EU-Russia Relations and the Repercussions on the "In-Betweens"', in Schmidtke and Yekelchik, *Europe's Last Frontier* (n 78 above).

IV VISION ...

A ... or the perceived lack thereof

The EU's approach in dealing with harder security issues is often perceived by others as weak.¹⁰⁵ Yet, as we have seen in this chapter, the EU's image problem is less related to the scale of its efforts than to inherent structural deficiencies. That is not to say that the efforts developed by the EU could not be strengthened. It goes without saying that, eg, unconvincing (prospects of) benefits, ineffective targeted sanctions, weak mandates for EUSRs and small CSDP missions with limited mandates should be prevented, and amended where already in existence. It is a positive sign that, in the framework of the ENP, for instance, the Commission has indicated to stand ready to develop, together with the Council, further proposals in the field of dispute settlement, using all instruments at its disposal.¹⁰⁶ History will tell whether the war in Georgia in August 2008 was the shock that the European Union needed to get its act together on the European Neighbourhood Policy, energy relations with third countries, and a coherent foreign policy strategy. The first signs, however, give us few reasons to be hopeful. Neither the new Union for the Mediterranean nor the recently launched Eastern Partnership focus much on dispute resolution.¹⁰⁷

B Union for the Mediterranean: let's agree to disagree and do business instead

Initiated under the French Presidency of the EU on 13 July 2008,¹⁰⁸ the 'Barcelona Process: Union for the Mediterranean' is a community—complete with

¹⁰⁵ See, eg, N Chaban, O Elgström and M Holland, 'The European Union as Others See It' (2006) 11 *EFA Rev* 245. For more recent figures and clues, see the ongoing survey coordinated by S Lucarelli, 'Research Report: The External Image of the European Union', GARNET Working Paper, no 17 (2007). A first set of data drawn from the survey was published by L Fioramonti and S Lucarelli, 'How Do the Others See Us? European Political Identity and the External Image of the EU' in F Cerutti and S Lucarelli (eds), *The Search for a European Identity: Values, Policies and Legitimacy of the European Union* (London/New York, Routledge, 2008).

¹⁰⁶ Commission, 'A Strong European Neighbourhood Policy', COM (2007) 774 final, 7: 'The Commission will also do all it can to ensure that the potential offered by political dialogue is fully exploited for other issues, such as terrorism, drugs, migratory flows, civil protection, and especially governance. It will continue to promote stability notably through the sustained promotion of democracy, human rights and the rule of law throughout the neighbourhood.'

¹⁰⁷ For issues related to the Black Sea Synergy, see C Weaver, *The EU and the Black Sea: Peace and Stability Beyond the Boundaries?* (2007), available at <https://ira.le.ac.uk/bitstream/2381/4093/1/enp%20%26%20black%20sea%20refs.pdf>.

¹⁰⁸ See the Joint Declaration of the Paris Summit for the Mediterranean, adopted under the co-presidency of the President of the French Republic and the President of the Arab Republic of Egypt, in the presence of, inter alia, the EU, the UN, the Gulf Cooperation Council, the Arab League, the African Union, the Arab Maghreb Union, the Organisation of the Islamic Conference, and the

institutional structures and headquarters in Barcelona—that unites all EU Member States and all non-EU countries bordering the Mediterranean Sea, plus Mauritania,¹⁰⁹ with the objective of transforming the Mediterranean into ‘an area of peace, democracy, cooperation and prosperity.’¹¹⁰ This strategic ambition is underlined by the agreement among participants ‘to continue with renewed dynamism the quest for peace and cooperation, to explore their joint problems and transform these good intentions into actions in a renewed partnership for progress.’¹¹¹ However, instead of focusing on dispute settlement, or developing instruments thereto, the founding document of the Union for the Mediterranean only speaks in a more concrete sense of the non-proliferation of weapons. The somewhat vague pledges of partners to ‘promote conditions likely to develop good-neighbourly relations among themselves and support processes aimed at stability, security, prosperity and regional and sub-regional cooperation’ and to ‘consider any confidence and security-building measures that could be taken between the parties with a view to the creation of an “area of peace and stability in the Mediterranean”; including the long-term possibility of establishing a Euro-Mediterranean pact to that end’, do not reflect a clear vision of the resolution of the conflicts in the Mediterranean region, nor a common will to immediately translate these goals into the necessary hard-hitting tools with which to settle disputes.¹¹² The Union for the Mediterranean is said to be complementary to both EU bilateral relations with these countries, which will continue under existing policy frameworks such as Association Agreements and the ENP Action Plans, as well as the regional dimension of the EU enlargement policy. In terms of dispute settlement, it is clear that the Union for the Mediterranean will add very little to the weak elements already foreseen in the framework of the ENP.¹¹³ In fact, in the press briefing on the EU’s relations with its eastern

World Bank, Paris, 13 July 2008. The Joint Declaration is based on the Communication from the Commission to the European Parliament and the Council, ‘Barcelona Process: Union for the Mediterranean’, COM (2008) 319 final.

¹⁰⁹ Libya has observer status. The Western Sahara (ie SADR) is not represented.

¹¹⁰ See Joint Declaration of the Paris Summit for the Mediterranean, 8.

¹¹¹ *ibid.*, 9.

¹¹² *ibid.*, 10. Only the Israeli-Palestinian Peace Process is mentioned by name, with participants to the Paris Summit welcoming the announcement that Syria and Israel initiated indirect peace talks under the auspices of Turkey. Ministers of Foreign Affairs at their Marseille Summit of 3–4 November 2008 stressed, however, ‘that the Barcelona Process: Union for the Mediterranean is not intended to replace the other initiatives undertaken in the interests of the peace, stability and development of the region, but that it will contribute to their success.’ See Final Statement, 1.

¹¹³ The Final Statement of the Marseille Summit of Ministers of Foreign Affairs of 3–4 November 2008, in its section ‘Political and security dialogue’ of ‘Fields of Cooperation to be pursued in 2009’, at 8–9, does not mention *any* concrete effort to resolve the existing conflicts in the region. With regard to the Middle East, the Commission noted in its ‘Progress Report Israel’, SEC (2010) 520, that there has been no progress in the ‘peace process’ between Israel and the Palestinians, and that the continued *de facto* blockade of the Gaza strip by Israel and Egypt has perpetuated a humanitarian crisis there. The EU’s border assistance mission has remained on stand-by. In its ‘Progress Report occupied Palestinian Territory’, SEC (2010) 515, the Commission noted that there has been no progress in talks between Israel and the Palestinians, and that the occupied territories continue to be split in two, with

and southern neighbours over the past five years, European Commissioner Füle for enlargement and ENP bluntly stated that ‘The very idea of the Union for the Mediterranean is not to create another framework for political discussions trying to solve the existing conflicts.’ As a spin-off of the ENP, the Barcelona-based organisation is instead designed to be a ‘project-oriented union, where the secretariat ... is expected to put together ideas, investors, experts and to help stamp projects which will bring real benefits to the citizens of the region.’¹¹⁴

C Eastern Partnership: new wine, old skins

Proposed by Poland and Sweden on 23 May 2008 as a parallel initiative to the French-inspired Union for the Mediterranean, the Eastern Partnership received broad Member State support in the wake of the Russo-Georgian war at the Extraordinary European Council on 1 September 2008 and was officially launched by the Commission on 3 December of that year.¹¹⁵ The Eastern Partnership has been heralded by the EU as ‘a real step change in relations with our Eastern neighbours, with a significant upgrading of political, economic and trade relations.’¹¹⁶ While the professed goal is to strengthen the prosperity and stability of Ukraine, Moldova, Belarus, Georgia, Armenia, and Azerbaijan, and thus the security of the EU, with proposals which cover a wide range of bilateral and multilateral areas of cooperation, including energy security and mobility of people, the Eastern Partnership fails to offer concrete innovations in the sphere of dispute settlement.¹¹⁷ The Partnership talks only in general terms of promoting stability and multilateral confidence-building with the goal of consolidating the sovereignty and territorial integrity of partners, in the sense that it ‘should

the West Bank under the control of secular Fatah and the Gaza strip run by Islamist Hamas, with Israel encroaching on both territories. The Palestinian authority, Fatah, has viewed the ENP primarily as a state-building tool and will continue on that path for the foreseeable future. Israel’s war on Gaza in December 2008–January 2009 had ‘devastating effects’ on civilians and ‘destroyed’ Gaza’s economic and institutional structures, the report says. More than 1400 Palestinians, including around 1000 civilians, were killed.

¹¹⁴ As reported by V Pop, ‘Mediterranean union not for conflict resolution, Füle says’, *EU Observer*, 12 May 2010. See also K Pieters, *The Integration of the Mediterranean Neighbours into the EU Internal Market* (The Hague, TMC Asser Press, 2010).

¹¹⁵ Commission, ‘Eastern Partnership’, COM (2008) 823/4; and see the accompanying Commission Staff Working Document, SEC (2008) 2974/3.

¹¹⁶ See the High Representative’s ‘Report on the Implementation of the European Security Strategy—Providing Security in a Changing World’, doc 17104/08 (S407/08) 10.

¹¹⁷ The Eastern Partnership also failed to satisfy the ambition of future EU membership cherished by some of the six neighbouring countries, most notable Moldova and Ukraine. While the Partnership does not provide them with a promise of EU membership, and is being perceived as a ‘triumph of constructive ambiguity’, it does put the countries of Eastern Europe on track towards that goal. See M Sadowska and P Swieboda, ‘Eastern Partnership—good start, hard labour to come’, *demosEUROPA Commentaries and Reports*, 8 December 2008. For a short elaboration of the desire of most Eastern European governments to have ENP à la carte, see N Popescu, ‘The EU’s Sovereign Neighbours’, *ECFR Commentary*, 1 December 2008.

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advance political dialogue in fields of common interest and cover specific CFSP and ESDP issues' and that 'Early-warning arrangements should be enhanced, with particular focus on conflict areas.'¹¹⁸ Here too, therefore, one has to observe that the ENP has not been reinforced with concrete objectives and instruments to engage in conflict resolution on the eastern fringes of the European Union. It would seem that, in spite of the Commission's vow to reinforce the ENP by developing, together with the Council, further proposals in the field of peaceful dispute settlement, the European Neighbourhood Policy has in fact been weakened in this respect.

V CONCLUDING REMARKS

To a great extent, the flagrant lack of common vision on how to tackle and resolve disputes on the borders of the European Union is due to the lack of unity among Member States on how such a strategy should be defined.¹¹⁹ Indeed, the real test of the EU's effectiveness comes at the level of cohesion among Member States. A Union that is divided, and where the biggest countries pursue their own selfish interests in bilateral deals with powerful neighbouring states, while the smaller Member States stubbornly block decisions defining EU positions and actions to draw attention to their own concerns, will achieve little but derision, both at home and abroad. A European Union that unites around clearly defined objectives will stand a much better chance of playing a stabilising role in the neighbourhood and being taken seriously as an 'honest broker' to settle disputes on its borders.

In the face of strong neighbouring states competing for the Union's 'spheres of influence', internal decision-making procedures in CFSP/CSDP which require unanimity allow one or two EU Member States to block any proposal for conflict resolution carried by the other Member States and have the potential of putting the EU's efforts of dispute settlement out of sync with such conflicts' own dynamics.¹²⁰ The CFSP risks of faltering more frequently as splinter groups of Member States that diverge in their opinions about how to resolve conflicts proliferate. In section II(D), we have argued that the post-Lisbon EU Treaties will only be able to counter these difficulties when full use is made of the new institutional arrangements. However, the bottom line remains that the willingness of the Member States to act together through 'their' Union is often missing.

¹¹⁸ See COM(2008) 823/4 (n 115 above) 10 and SEC (2008) 2974/3 (n 115 above) 3. Both documents also mention integrated border management, including at Eastern Partnership countries' non-EU borders.

¹¹⁹ Another reason is of course the unwillingness of countries like Morocco to accept outside involvement and define a common strategy for the resolution of what they perceive and present as purely domestic disputes.

¹²⁰ See, eg, B Coppieters, 'The EU and Georgia: Time Perspectives in Conflict Resolution', EUISS Occasional Paper, no 70 (2007).

While pragmatism about the fact that only a united EU can tackle most of the security challenges posed by a globalising world should make the Member States mend their ways, it will depend on vision and political leadership whether they will.

But these deficiencies do not absolve the EU and its Member States from attaining the mission statements mentioned at the outset of this contribution. Mismanagement of the ethnic-territorial and constitutional conflicts on its borders could have severe and destabilising consequences for the neighbourhood and the EU alike, including a greater likelihood of political extremism, an increase in organised crime and other illegal economic activities, terrorism, armed conflict and further human displacement. New headline-grabbing violence will bring home to the EU what has been common knowledge in its neighbourhood for some time: the status quo is unsustainable. Another episode of war, however limited, would be devastating for all involved and would amount to a policy failure with damaging implications for the international organisations active in the region, in particular the European Union.

Proponents of a more extensive role for the Union in regional dispute settlement may find reason for some optimism in the ambitions laid down in the new Treaties. Indeed, the extensive number of references to the United Nations seems to reflect a new role of the EU as a regional agency in the sense of Chapter VIII of the UN Charter. Applied to the specific functions of the EU, this new role would turn the EU into (perhaps one of) the regional organisations in charge of peaceful dispute settlement in the region. As we have seen, the logic of Chapter VIII UNC implies that these regional organisations carry a primary responsibility to settle regional disputes. This would change the nature of this organisation, as attention is partly shifted from internal to external action. In fact, one could argue that by accepting the role of a 'regional agency', the current neighbourhood becomes part of the 'internal' scope of the EU and disputes in the region are to be considered 'local disputes'.¹²¹

Despite the difficulties we listed on the basis of past performance of the EU in this area, its new ambitions as well as institutional capabilities reveal the existing potential. The EU includes the assertion of its own identity on the international scene and the promotion of peace, security, progress and international law in Europe, its neighbourhood, as indeed the world, among its principle mission statements.¹²² It sports a unique combination of capabilities in the fields of policy, law, economics and security, and it has the money, interest, and even some power to stabilise the roughest of its neighbourhoods. What needs to be found is

¹²¹ *cf* Art 52, para 2 UNC: 'The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.'

¹²² See, eg, the Preamble and Art 3 of the Treaty on European Union (TEU); the 2003 ESS (n 1 above) and the 2004 Strategy Paper on the ENP (n 2 above).

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the common political will (how) to deal with the parties to the conflicts. Member States should not lose sight of the fact that because 'their' Union is well placed to stabilise the neighbourhood, they carry a heavy responsibility to see the processes of sustainable dispute settlement through.

