

**‘They Need Us More Than We Need Them’:**

**British Exceptionalism, Brexit, and Justice and Home Affairs**

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*This article analyses the EU-UK Future Relationship negotiations on Justice and Home Affairs (JHA) through the lenses of ‘exceptionalism’. This concept refers to a given state’s self-understanding as being not only fundamentally different from other states, but also morally superior. In its exemptionalist variant, exceptionalism also calls attention to the belief that one is entitled to exemptions from ordinary rules. This article argues that, whilst exemptionalist exceptionalism can be said to characterise the UK’s position in relation to European integration in general, it has been particularly pronounced in the JHA policy area. This is shown through an analysis of the various exemptions from ordinary rules and arrangements obtained by the UK over the years. The existence of those also demonstrates a broad acceptance by the rest of the EU of this self-perception of the UK as being an exceptional state. Furthermore, this article shows that, perhaps unsurprisingly, the UK government has retained this stance in the Future Relationship negotiations with the EU. It has set its expectations of negotiating agreements with the EU that would set it apart from all the other partners of the EU. It has attempted to justify such an exceptional treatment on the basis of the remarkable quality of the contribution that it has been able to make to EU internal security as encapsulated in the idea that ‘the EU needs us more than we need them’. However, recent developments suggest that the EU is no longer as favourably disposed to grant exceptional treatment to the UK in the field of JHA now as it was when the UK was a Member State.*

## Introduction

‘If [no deal] is causing some anxiety in Britain – think what it's causing in Brussels’.<sup>1</sup> These words were uttered by Liam Fox, a Conservative Member of Parliament (MP), prominent Brexiter and former Secretary of State for International Trade, in 2018. Like the quote in the title – ‘they need us more than we need them’<sup>2</sup> –, this claim is underpinned by a strong conviction that the European Union (EU) somehow needs the United Kingdom (UK) more than the UK needs the EU. The basis for such a belief is rather questionable. The EU is an organisation and market of nearly half a billion people, while the UK’s population is only about 66 million; the EU is an economic superpower, the UK is not; and the UK stands to lose a lot more in any reduction in cooperation than the EU, although the EU is not likely to emerge unscathed from Brexit either. With respect to internal security (that is, ‘Justice and Home Affairs’ (JHA) or the ‘Area of Freedom, Security and Justice’ (AFSJ) in EU parlance), although the UK is in a relatively stronger position than in relation to other policy matters, the EU has consistently maintained that the UK cannot expect to keep the same rights that it had when it was a Member State. By contrast, the British government envisages a privileged and unprecedented partnership in JHA that would notably continue to facilitate police and judicial cooperation with other European states.

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<sup>1</sup> Sky News, ‘Europe Really Doesn’t Need Us as Much as We Need Them’, 2018, available at: <https://news.sky.com/story/europe-really-doesnt-need-us-as-much-as-we-need-them-11462776> (accessed on 2<sup>nd</sup> July 2020).

<sup>2</sup> Statement made by the former Independent Reviewer of Terrorism Legislation, Lord Carlile. Daily Express, ‘Still Fighting Project Fear!’ Furious Backlash as Europol Chief Warns of Brexit Danger’, 2017, available at: <https://www.express.co.uk/news/uk/768123/Rob-Wainwright-criticised-Brexit-EU-security> (accessed on 14<sup>th</sup> July 2020).

What explains the attitude of the British government? Any outside observer would see an asymmetrical relationship, whereas the British negotiators emphasise the importance for the UK to be treated as a ‘sovereign equal’.<sup>3</sup> The EU and the UK may well be legally equal as sovereign political actors, but the EU evidently carries more weight in most respects.

This article examines the EU-UK Future Relationship negotiations on JHA through the lenses of ‘exceptionalism’, which can be considered a key trait of British<sup>4</sup> identity. ‘Exceptionalism’ refers to the belief that one’s state is somehow exceptional and superior to others, whether historically, politically, socially, or economically. For its purpose, this article is structured into three main sections. The first section introduces the concept of ‘exceptionalism’. This is followed by an analysis of the evolution of the UK’s role in the EU in general and with regard to JHA matters in particular, including its attempts at carving out exceptions for itself. The third section looks in depth at the respective mandates of the UK and the EU regarding the JHA dimension of the EU-UK Future Relationship negotiations, before reflecting on these negotiations through the lenses of ‘exceptionalism’. Finally, the article offers some conclusions, notably highlighting that it is far from certain whether the EU and the UK will

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<sup>3</sup> HM Government, *The Future Relationship with the EU: The UK’s Approach to Negotiations*, 2020, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/868874/The\\_Future\\_Relationship\\_with\\_the\\_EU.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf) (accessed on 22<sup>nd</sup> June 2020).

<sup>4</sup> Some might argue that talking about *English* rather than *British* nationalism would be more precise, but this complex question falls outside the scope of the present article. See Ailsa Henderson, Charlie Jeffery, Robert Lineira, Roger Scully, Daniel Wincott, and Richard Wyn Jones, ‘England, Englishness, and Brexit’, *The Political Quarterly*, 2016, Vol. 87, No. 2, pp. 187-199; Ben Wellings, ‘Losing the Peace: Euroscepticism and the Foundations of Contemporary English Nationalism’, *Nations and Nationalism*, 2010, Vol. 16, No. 3, pp. 488-505; Ben Wellings and Helen Baxendale, ‘Euroscepticism and the Anglosphere: Traditions and Dilemmas in Contemporary English Nationalism’, *Journal of Common Market Studies*, 2015, Vol. 53, No. 1, pp. 123-129.

be able to successfully negotiate any agreement to continue to facilitate their cooperation in JHA matters.

### **Exceptionalism in international relations**

Traditionally, the concept of ‘exceptionalism’ has been associated with the United States. However, recent literature has argued that this concept can be used to analyse the foreign policies of various other states, including China, India and Turkey.<sup>5</sup> Despite this revival in recent years, ‘exceptionalism’ has rarely been precisely defined. For the purpose of this article, it is understood as ‘a foreign policy discourse that is part of a society’s debates around its identity as a nation... [and] is articulated and enacted through states’ foreign policy’.<sup>6</sup> The importance of exceptionalist beliefs has been summed up by Holsti as follows:

[...] recent studies suggest that such rhetorical devices are more complex than mere platitudinous justifications for self-interest. They express deeply held ideological convictions, mental frameworks, and social constructions that have a profound effect on perceptual processes, on how issues (particularly crises) are defined, how friends and enemies become categorized (with resulting elements of trust and distrust), how identities are formed, and how policy choices are articulated.<sup>7</sup>

In other words, beliefs about one’s own state or political community are not mere rhetorical devices, but can have significant influence on an actor’s behaviour on the international stage.

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<sup>5</sup> Kalevi Holsti, ‘Exceptionalism in American Foreign Policy: Is it Exceptional?’, *European Journal of International Relations*, 2010, Vol. 17, No. 3, pp. 381-404; Nicola Nymalm and Johannes Plagemann, ‘Comparative Exceptionalism: Universality and Particularity in Foreign Policy Discourses’, 2019, *International Studies Review*, Vol. 21, No. 1, pp. 12-37.

<sup>6</sup> Nymalm and Plagemann, ‘Comparative Exceptionalism’, p. 14.

<sup>7</sup> Holsti, ‘Exceptionalism in American Foreign Policy’, pp. 382-383.

It is also important to distinguish nationalism from exceptionalism. Whereas nationalism can be viewed as superiority in ethnic or cultural terms, 'exceptionalist discourses refer to a morality that all humankind should ideally adhere to', which means that exceptionalism paradoxically combines particularism with universalism.<sup>8</sup> Furthermore, exceptionalist discourses tend to share several characteristics, although not all of them may be discernible when examining a specific case.<sup>9</sup> One of them which is particularly relevant to the case of the UK is the belief that an 'exceptionalist state is or should be free from external constraints such as rules or norms that govern or influence the relations between "ordinary" states'.<sup>10</sup> This form of exceptionalism is known as 'exemptionalist exceptionalism'.

When it comes to the UK, one can identify important cultural traditions of Atlanticism, pro-Europeanism, and pro-Commonwealth in British foreign policy.<sup>11</sup> In 1991, Wallace wrote about how 'Anglo-Saxon exceptionalism will continue to exert deep strains on British foreign policy until the confusion between the two conceptions of Britain's role [Anglo-Saxons and Europeans] is sorted out and the present is disentangled from the past'.<sup>12</sup> One of the main manifestations of British exceptionalism has been the Euroscepticism towards the European integration project.<sup>13</sup> This can be at least partially explained by Spiering's observation that

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<sup>8</sup> Nymalm and Plagemann, 'Comparative Exceptionalism', p. 14.

<sup>9</sup> Holsti, 'Exceptionalism in American Foreign Policy', p. 384.

<sup>10</sup> *Idem*.

<sup>11</sup> Mark Bevir, Oliver Daddow, and Ian Hall, 'Introduction: Interpreting British Foreign Policy', *The British Journal of Politics and International Relations*, 2013, Vol.15, No.2, pp.168-169.

<sup>12</sup> William Wallace, 'Foreign Policy and National Identity in the United Kingdom', *International Affairs*, Vol. 67, No. 1, p. 65.

<sup>13</sup> Andrew Glencross, 2014, 'British Euroscepticism as British Exceptionalism: The Forty-Year "Neverendum" on the Relationship with Europe', *Studia Diplomatica*, Vol. 67, No. 4, pp. 7-20.

‘what Britain does not share with “any other nation in Europe” is the sense that it is not just, say, the French, Germans or Italians that serve as the Other, but the Europeans *en masse*, as if they are one distinct nation’.<sup>14</sup> Going further, there are arguably three key aspects to Britain’s perception of itself as exceptional: firstly, Britain’s unique ‘island story’ as an early liberal state and common law country, with a tradition of parliamentary sovereignty; the British empire and the special relationship with the Anglosphere states; and the UK as the state that generously came to the aid of Europe twice in the twentieth century and saw no need to reinvent itself after the Second World War in the way several European states did. What is also particularly remarkable since the EU membership referendum is the emergence of a narrative around ‘Global Britain’, suggesting Britain’s return to being a global player, as if being within the EU somehow prevented this.<sup>15</sup>

The next section shows how the British discourse surrounding the EU has often been exceptionalist, in particular in relation to the development of JHA cooperation. It was especially so at key moments in the integration process as can be seen in requests for exceptions.

### **British Exceptionalism in JHA**

It is important to start by locating British exceptionalism in JHA in the wider context of the contested nature of the UK’s participation in the EU. The UK initially rejected membership of the European project during the 1950s, but moved towards it as time progressed and as it recognised that its political weight on the global stage had been significantly diminished. The

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<sup>14</sup> Menno Spiering, *A Cultural History of British Euroscepticism* (Palgrave Macmillan: Basingstoke, 2015), p. 23.

<sup>15</sup> Oliver Daddow, ‘GlobalBritain™: The Discursive Construction of Britain’s Post-Brexit World Role’, *Global Affairs*, Vol. 5, No. 1, pp. 5-22.

decision to join what was then known as the ‘European Economic Community’ in 1973 and the decisive victory for the pro-Europeans in the 1975 referendum dealt with the UK’s European question for a time, although it did not put an end to Euroscepticism, which was to wax and wane over the years. Indeed, the UK negotiated exception after exception for itself as further European integration took place.

The British government, which was led by Margaret Thatcher at the time, played a vital role in the adoption of the Single European Act (SEA) of 1986. Nevertheless, Thatcher was concerned about some of the reforms that were affecting decision-making in the European institutions. Her Bruges speech of 1988 has been viewed as comparing liberal Britain to illiberal Europe and setting off Euroscepticism in the Conservative Party.<sup>16</sup> The SEA paved the way for the Treaty of Maastricht in 1992. This treaty notably introduced EU citizenship, which underpins the right of persons to move and reside freely within the territory of the Member States, as well as the new ‘pillars’ of the Common Foreign and Security Policy (CFSP) and JHA. In the run-up to the signing of the Treaty of Maastricht, the British government voiced its opposition to the inclusion of a new social policy chapter in the Treaty on European Union. As a result, an Agreement on Social Policy and a Social Policy Protocol were annexed to the Treaty of Maastricht with the purpose of ensuring that the UK would not be involved in these social measures. In addition, at the time, the UK was opposed to proceeding to the third stage of the Economic and Monetary Union (EMU), which consisted of adopting the Euro as a new currency. Again, this position was accommodated in the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland. Thus, the UK managed to negotiate for itself a series of exceptions to the ordinary

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<sup>16</sup> Cary Fontana and Craig Parsons, “‘One Woman’s Prejudice’: Did Margaret Thatcher Cause Britain’s Anti-Europeanism?”, *Journal of Common Market Studies*, 2015, Vol. 53, No. 1, p. 95.

rules, which took the form of these so-called ‘opt-out’ and ‘opt-in’ Protocols.<sup>17</sup> Despite having been granted these exceptions for the UK, the British government had to deal with the so-called ‘Maastricht rebels’<sup>18</sup> who opposed the granting of more competences to the EU across a range of policy areas, notably security.

At the following Intergovernmental Conference, which was negotiating the future Treaty of Amsterdam, the British government managed once again to secure several exceptions for itself.<sup>19</sup> Three Protocols, in addition to the EMU Protocol, were attached to the Treaty of Amsterdam, which had the combined effects of granting the UK (and the Republic of Ireland) significant exemptions and opt-in rights in relation to JHA matters.<sup>20</sup> The UK had notably successfully negotiated an opt-out from the Schengen *acquis* that was being integrated into the EU’s legislation and that had been presented as ‘an assault on state sovereignty and the UK’s identity as an “island nation”’.<sup>21</sup> In contrast to Schengen cooperation, the UK decided to sign the Dublin Convention (1990), which mainly aimed to establish which EU Member

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<sup>17</sup> Maria Fletcher, ‘Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom’s “Ins” and “Outs”’, *European Constitutional Law Review*, 2009, p. 78.

<sup>18</sup> See David Baker, Andrew Gamble, and Steve Ludlam, ‘Whips or Scorpions? The Maastricht Vote and the Conservative Party’, *Parliamentary Affairs*, 1993, Vol. 46, No. 2, pp. 151-166.

<sup>19</sup> For the sake of completeness, one should mention that, in contrast, the Protocol and associated Agreement on social policy disappeared, as the new Labour government agreed to the inclusion of a new chapter on social provisions into the treaties (Fletcher, ‘Schengen, the European Court of Justice and Flexibility’, p. 79).

<sup>20</sup> *Idem*.

<sup>21</sup> Berthold Rittberger, Dirk Leuffen, and Frank Schimmelfennig, ‘Differentiated Integration of Core State Powers’, in Phillip Genschel and Markus Jachtenfuchs (eds) in *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford University Press: Oxford, 2014), p. 204.

State is responsible for processing a given asylum application, and decided to exercise its opt-in rights several times in the field of asylum and migration.<sup>22</sup>

The UK shifted towards greater involvement under the leadership of Labour Prime Minister Tony Blair, who was elected in 1997 and wanted the UK at the centre of Europe.<sup>23</sup> The events of 11 September 2001, which were followed by other terrorist attacks in Europe, led to a strengthening of European cooperation in counter-terrorism, with even the UK falling into line.<sup>24</sup> Terrorism has catapulted EU cooperation on security matters forward, while simultaneously overloading its policy process.<sup>25</sup> In this period, the EU began to focus on a number of threats, as laid out in the European Security Strategy (2003) and subsequent programmatic documents, some of which established linkages between terrorism, crime, and migration.<sup>26</sup> The UK made a significant shift from being semi-detached to occupying a leadership position in the field of JHA, with regard to counter-terrorism in particular. The EU's Counter-Terrorism Strategy was adopted under the British presidency in the second half

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<sup>22</sup> Geddes, *Britain and the European Union*, p. 190.

<sup>23</sup> Scott James and Kai Oppermann, 'Blair and the European Union', in Terrence Casey (ed.) *The Blair Legacy: Politics, Policy, Governance, and Foreign Affairs* (Basingstoke: Palgrave Macmillan, 2009), p. 297.

<sup>24</sup> Christian Kaunert, "'Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission', *Journal of European Integration*, 2007, Vol. 29, No. 4, pp. 387-404; Christian Kaunert, *European Internal Security* (Manchester University Press: Manchester, 2010).

<sup>25</sup> Javier Argomaniz, 'Post-9/11 Institutionalisation of European Union Counter-Terrorism: Emergence, Acceleration and Inertia', *European Security*, 2009, Vol. 18, No. 2, pp. 151-172; Raphael Bossong, 'The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance', *Journal of Common Market Studies*, 2008, Vol. 46, No. 1, pp. 27-48.

<sup>26</sup> Christian Kaunert and Sarah Léonard, 'The Collective Securitisation of Terrorism in the European Union', *West European Politics*, 2019, Vol. 42, no. 2, pp. 261-277.

of 2005. The British government also consistently pushed to upload domestic measures, whilst being an unwavering supporter of cooperation between the EU and third states.<sup>27</sup>

The UK continued to play a significant role and to regularly support strengthening the EU's security role under David Cameron's Conservative-Liberal Democrat coalition government, but it also began to withdraw to some extent. In particular, the so-called '2014 Decision', which was permitted by Protocol 36 of the Treaty of Lisbon (2009), allowed the UK to exercise a block opt-out from all 130+ JHA measures adopted before 31<sup>st</sup> May 2014. The British government chose to do so, although it also requested reinvolvement in thirty-five measures. The justification for going through this process was that the Court of Justice of the European Union (CJEU) would have acquired jurisdiction over pre-Lisbon measures after this date. British Eurosceptics have had an almost obsessive aversion to the CJEU, which might notably be explained by the mismatch between, on the one hand, the UK's status as a common law country with a tradition of parliamentary sovereignty and the CJEU's activism on the other hand.<sup>28</sup> Prime Minister Cameron appeared to have believed that this was necessary for appeasing Eurosceptics in his party.<sup>29</sup> Still, in 2015, the UK successfully negotiated another exceptional treatment for itself and was given partial access to the

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<sup>27</sup> Alex MacKenzie, 'The UK, EU, and Counter-Terrorism', in Helena Carrapico, Antonia Neihuss, and Chloé Berthélémy (eds), *Brexit and Internal Security: Political and Legal Concerns* (Basingstoke: Palgrave Macmillan, 2019), p. 100.

<sup>28</sup> Susanne Schmidt, 'No Match Made in Heaven: Parliamentary Sovereignty, EU Over-Constitutionalisation, and Brexit', *Journal of European Public Policy*, 2020, Vol. 27, No. 5, pp.779-794.

<sup>29</sup> Hugo Brady, 'Britain's 2014 Justice Opt-Out: Why it Bodes Ill for Cameron's EU Strategy', *Centre for European Reform*, available at: [https://www.cer.eu/sites/default/files/publications/attachments/pdf/2013/final\\_brady\\_jha\\_20march13-7124.pdf](https://www.cer.eu/sites/default/files/publications/attachments/pdf/2013/final_brady_jha_20march13-7124.pdf) (accessed on 7th July 2020).

Schengen Information System, despite not being a member of the Schengen area. It was described as an ‘absolute game-changer’ by the UK’s National Crime Agency.<sup>30</sup> Moreover, the UK played a key role in the establishment of an EU-PNR<sup>31</sup> system in 2016 – a measure that it had promoted for the best part of a decade. Even after the vote to leave the EU, the UK remained important for its security expertise, as demonstrated by the EU’s decision to name Sir Julian King as the Commissioner for the Security Union. Other British individuals had also played an important role in the development of the EU’s security role, such as Rob Wainwright, who, as the Director of the EU Agency for Law Enforcement Cooperation (Europol) from 2009 until 2018, is generally considered to have vastly improved the capabilities and reputation of the agency, with many of its systems ‘a complete lift and shift from the UK intelligence model’.<sup>32</sup>

In sum, the UK has had a complicated relationship with JHA cooperation, which has also been through several phases. Being semi-detached to begin with before taking on a stronger leadership role, before returning to a more peripheral position after 2010. Even so, in the final assessment, it is evident that the UK ‘has deeply shaped’ the development of JHA

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<sup>30</sup> Parliament.uk, ‘Data Sharing for Law Enforcement Purposes’, 2016, available at: <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/77/7706.htm> (accessed on 23rd June 2020).

<sup>31</sup> ‘PNR’ stands for ‘Passenger Name Record’. PNR data refers to data information provided by passengers and collected by airlines for enabling reservations and the check-in process.

<sup>32</sup> Parliament.uk, ‘Europol’, 2018, available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/635/63506.htm> (accessed on 23rd June 2020).

cooperation'<sup>33</sup>, arguably more so than most other EU Member States. Although it is rarely acknowledged, the UK has been a major engine in the development of JHA cooperation. Moreover, in line with its 'exemptionalist exceptionalist' self-understanding, it managed to successfully negotiate a growing set of exceptions to ordinary rules and arrangements when it wanted to do so. The UK's success also demonstrates that the rest of the EU acceded to its demands for an exceptional treatment most notably with regard to JHA matters when it was an EU Member State.

### **The EU-UK Future Relationship Negotiations in the Field of JHA**

Having examined the evolution of the UK's position in JHA prior to the 2016 EU referendum, this article can now turn to considering the EU-UK Future Relationship negotiations in this policy field. The first section presents the UK's mandate regarding JHA matters, before contrasting it with that of the EU. The second section reflects on the mandates and the negotiations through the lenses of exemptionalist exceptionalism.

### ***The Mandates of the UK and of the EU in JHA***

Internal security was not a widely discussed issue prior to the UK's EU referendum in June 2016. Nevertheless, some high-profile figures occasionally expressed their views on the subject. For example, Sir Richard Dearlove, former Chief of the Secret Intelligence Service (MI6), claimed in March 2016 that 'the truth about Brexit from a national security

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<sup>33</sup> Helena Carrapico, Antonia Neihuss, and Chloé Berthélémy, *Brexit and Internal Security: Political and Legal Concerns* (Basingstoke: Palgrave Macmillan, 2019), p. 7.

perspective is that the cost to Britain would be low'.<sup>34</sup> He went on to highlight what he described as 'two potentially important security gains', namely 'the ability to dump the European Convention on Human Rights [...] and, more importantly, greater control over immigration from the European Union'.<sup>35</sup> The then British Work and Pensions Secretary Iain Duncan Smith appeared to be in broad agreement as he argued that EU membership actually made the UK more vulnerable to terrorist attacks.<sup>36</sup> In contrast, Rob Wainwright, the then Director of Europol and originally from the UK, warned that withdrawing from EU security cooperation would be a 'serious miscalculation'.<sup>37</sup> This opinion was shared by Sir David Omand, the former Director of the Government Communications Headquarters (GCHQ), who commented that '[the] UK would be the loser in security terms from Brexit, not the gainer'.<sup>38</sup> Since then, the importance of security matters in the debates on the future relationship between the UK and the EU has grown. The positions of both sides have changed over time, quite significantly in some respects. It is beyond the scope of this article to systematically analyse their evolution. Instead, the present article focuses on the negotiation mandates of both actors, which were laid down in 2020, as the most concrete indication of their respective objectives. To begin with, it considers the broad contours of the future

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<sup>34</sup> Dearlove, R. (2016) 'Brexit Would Not Damage UK Security', *Prospect*, 23 March 2016, available at: <http://www.prospectmagazine.co.uk/opinions/brexit-would-not-damage-uk-security> (accessed on 18th September 2020).

<sup>35</sup> *Idem*.

<sup>36</sup> BBC, 'Staying in the EU 'Exposes UK to Terror Risk' Says Iain Duncan Smith, 2016, available at: <https://www.bbc.co.uk/news/uk-politics-eu-referendum-35624409> (accessed on 10th July 2020).

<sup>37</sup> The Guardian, 'Europol Chief: Brexit Would be a Mistake for UK Security', 2016, available at: <https://www.theguardian.com/uk-news/2016/mar/24/europol-chief-rob-wainwright-brexit-mistake-uk-security-richard-dearlove> (accessed on 10th July 2020).

<sup>38</sup> *Idem*.

relationship envisaged by both sides before moving on to the specificities of internal security cooperation.

In brief, the British government's official position, which has been detailed in a document entitled 'The Future Relationship with the EU: The UK's Approach to Negotiations', is that there should be a Comprehensive Free Trade Agreement (CFTA) at the core of the EU-UK future relationship, along the lines of the EU-Canada agreement. This CFTA would also be supplemented by separate agreements on other policy areas, namely fisheries, aviation, energy, mobility and social security coordination, participation in Union programmes, nuclear cooperation, law enforcement and judicial cooperation in criminal matters, asylum and illegal migration, as well as security of information. Such an arrangement would have the advantage of enabling cooperation to continue in some areas, even if it were to fail in others.<sup>39</sup> By contrast, the EU is seeking to achieve a single, broad agreement, which would have three components, namely an institutional framework for managing the relationship and resolving any disputes, an economic partnership that would include trade, as well as a security partnership, including cooperation on internal security matters. This approach can be seen as an attempt by the EU at increasing its leverage over the UK and is in line with its traditional approach of linking various issues to facilitate negotiations.<sup>40</sup>

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<sup>39</sup> Institute for Government, 'UK-EU Future Relationship Negotiations: Key Flashpoints', available at: <https://www.instituteforgovernment.org.uk/explainers/future-relationship-negotiations-key-flashpoints> (accessed on 30th June 2020).

<sup>40</sup> See Raya Kardasheva, 'Package Deals in EU Legislative Politics', *American Journal of Political Science*, 2013, Vol. 57, No. 4, pp. 858-874.

Moving on to the specific aspect of JHA, there are rather significant differences between the British mandate and the EU mandate. Each of those is examined in turn. With regard to the British government, its 'Future Relationship with the EU' document emphasises that '[at] the end of the transition period, we will fully recover our sovereign control over our borders and immigration system'.<sup>41</sup> It is then observed that '[against] this background, the UK stands ready to discuss an agreement on law enforcement and judicial cooperation in criminal matters'.<sup>42</sup> This specific phrasing suggests a willingness not to appear overly keen to conclude an agreement with the EU on law enforcement and judicial cooperation in criminal matters. The 'Future Relationship with the EU' document then identifies three aspects that such an agreement should cover: 'arrangements that support data exchange for law enforcement purposes; operational cooperation between law enforcement authorities; and judicial cooperation in criminal matters'.<sup>43</sup>

More precisely, concerning data exchange for law enforcement, the British government calls for 'capabilities similar to those' provided by the European Criminal Records Information System (ECRIS). It is indeed an important tool for judicial cooperation in criminal matters, as the response time to a request about a foreign national's criminal history has been cut from sixty-six to ten days by ECRIS.<sup>44</sup> However, the House of Lords pointed out in 2016 that access to ECRIS and to the second generation of the Schengen Information System (SIS II) would be 'particularly ambitious' due to the lack of a precedent with regard to a non-EU,

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<sup>41</sup> HM Government, 'The Future Relationship with the EU', p. 24.

<sup>42</sup> *Idem*.

<sup>43</sup> HM Government, 'The Future Relationship with the EU', p. 25.

<sup>44</sup> Romyana van Ark, 'Post-Brexit (In)Security', *International Centre for Counter-Terrorism*, 2019, available at: <https://icct.nl/publication/post-brexit-eu-insecurity/> (accessed on 14<sup>th</sup> July 2020).

non-Schengen state being granted access to these. Following on from this, the British government also calls for similar capabilities as those delivered by the Prüm framework, which enables EU Member States to grant each other access to their automated DNA analysis files, automated fingerprint identification systems and vehicle registration data. With regard to PNR, the recent agreement between the EU and Japan is mentioned, but with the ambition of going beyond it. A significant issue here may well be the possibility that intra-EU data may not be sent to the UK, whilst there has been concern that the CJEU's 2016 decision to not permit the conclusion of the EU-Canada agreement might be an obstacle to an unprecedented EU-UK deal.<sup>45</sup> Real time alerts on persons and objects mean that the UK wants similar capabilities as those currently delivered by SIS II, using non-EU Schengen states as precedent. The problem is that no non-Schengen, non-EU state has access to SIS II. The UK has been the third highest user of SIS II, making 571 million searches in 2019.<sup>46</sup> The UK also wants to continue working with Europol and to go beyond precedent due to what it sees as its exceptional contributions to the work of the agency. However, a recent report published by the German government commented on the 'impossible demands' made by the UK to access Europol databases.<sup>47</sup>

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<sup>45</sup> Parliament.uk, 'Summary of Conclusions and Recommendations', available at: <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/77/7708.htm> (accessed on 14th July 2020).

<sup>46</sup> The Guardian, 'UK and EU Clash Over Crime-Fighting Database in Brexit Talks', 2020, available at: <https://www.theguardian.com/politics/2020/may/22/uk-and-eu-brex-it-talks-clash-over-crime-fighting-database> (accessed on 14th July 2020).

<sup>47</sup> The Guardian, 'UK Making Impossible Demands Over Europol Database in EU Talks', available at: <https://www.theguardian.com/world/2020/apr/23/uk-making-impossible-demands-over-europol-database-in-eu-talks> (accessed on 9th July 2020).

Furthermore, on judicial cooperation, the UK wants judicial cooperation with Eurojust along the lines of precedent, and there are agreements between the agency and third states, such as with the US. It is no longer seeking to remain involved in the European Arrest Warrant (EAW), despite such initial ideas, but wants an arrangement that would be more along the lines of the Surrender Agreement that the EU has with Norway and Iceland. Nearly 250 EAW requests were made in 2015-2016, leading to 150 arrests, and EU Member States made over 14,000 requests of the UK in the same year.<sup>48</sup> However, there are significant problems with the surrender agreements mentioned in the British document. They have taken about thirteen years to go from conception to introduction, Germany also has a constitutional block on extraditing its own citizens to non-EU Member States.<sup>49</sup> With Mutual Legal Assistance, the UK would aim to build on the 1959 Council of Europe Convention on Mutual Legal Assistance and its Protocols. Unfortunately, this agreement does not offer a high level of operational cooperation. Nor does it cover an extensive list of crimes.<sup>50</sup> The British government would also like transfer of prisoners to be part of the agreement and to build on the 1983 Council of Europe Convention on the Transfer of Sentenced Persons and its Protocols.

Thirdly, concerning the field of asylum and illegal migration, the British government reiterates its ‘specific commitment to seek to negotiate a reciprocal agreement for family reunion of unaccompanied children seeking asylum in either the EU or the UK’ in the

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<sup>48</sup> BBC, ‘UK Can’t Keep European Arrest Warrant after Brexit’, 2018, available at: <https://www.bbc.co.uk/news/uk-politics-44532500> (accessed on 14th July 2020).

<sup>49</sup> House of Commons Library, ‘Brexit Next Steps: The European Arrest Warrant’, 2020, available at: <https://www.bbc.co.uk/news/uk-politics-44532500> (accessed on 14th July 2020).

<sup>50</sup> Carrapico, Neihuss, and Berthélémy, *Brexit and Internal Security*, pp. 55-56.

document setting out its approach to the negotiations.<sup>51</sup> It also indicates its openness to ‘an agreement regulating asylum and migrant returns between the UK and the EU, or alternatively with individual Member States’.<sup>52</sup> Finally, the UK notes its openness to a Security of Information Agreement.

As for the EU, it has made it very clear from the start that it wants ‘close law enforcement and judicial co-operation in relation to prevention, investigation, detection, prosecution of criminal offences’, but that as a third country, the UK ‘cannot enjoy the same rights and benefits as a Member State’.<sup>53</sup> In the EU document, there is a desire to maintain PNR data transfer. Given that both sides want this and that the EU already has international agreements with others, this might be a relatively straightforward issue. Failure to come to an agreement on PNR might harm the EU because London is an important hub for flights.<sup>54</sup> The EU also wants to maintain reciprocal access at the national level to DNA and fingerprints of convicted criminals, in addition to vehicle registration, which is linked to the Prüm framework. Once again, both sides basically agree on this, which means that some kind of settlement should be feasible. Following this is a reference to efficient and effective exchange of information and

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<sup>51</sup> HM Government, ‘The Future Relationship with the EU’, p. 28.

<sup>52</sup> *Idem*.

<sup>53</sup> Council of the European Union, ‘ANNEX to COUNCIL DECISION authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement’ 5870/20, 2020, available at: <https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf> (accessed on 30th June 2020), p. 33.

<sup>54</sup> Tim Durrant, Lewis Lloyd, and Maddy Thimont Jack, *Negotiating Brexit: Policing and Criminal Justice*, Institute for Government, 2018, available at: [https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG\\_Brexit\\_policing\\_criminal\\_justice\\_web.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_policing_criminal_justice_web.pdf) (accessed on 14th July 2020).

intelligence between the EU and the UK security authorities, but there is little clarity on this. More specifically, there is the offer that the UK could cooperate with Europol and Eurojust, but only as a third state. As a result, the UK may not be successful in its attempts at going beyond precedent here. On the issue of extradition or surrender, the EU is keen to have streamlined arrangements, but also circumstances under which EU nationals will not be surrendered. Both sides agree here, but there is quite a lot to work out. There should also be arrangements for law enforcement and judicial authorities along the lines of those set in Council of Europe conventions and including joint investigation teams. Arrangements on exchange of criminal records, drawing on the Council of Europe as a precedent, are present, but once again, somewhat old precedents are drawn upon. The EU also emphasises that it would like the EU and the UK to work together through the International Financial Action Task Force (FATF). The EU also foresees cooperation on intelligence and irregular migration. Considering the political salience of the latter issue, finding an agreement will likely be challenging.

Finally, it is important to mention some broader issues that have a significant impact on possible JHA cooperation between the UK and the EU in future. The EU wants to make future relations dependent on the UK's continuing membership of the European Convention on Human Rights (ECHR), but the British government has refused to commit to doing so.<sup>55</sup> Furthermore, another issue that will inevitably impinge upon security cooperation is that of data protection. So important is data transfer for security purposes today, as well as the EU having a historical commitment to the issue, that the UK will likely have to, in some way,

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<sup>55</sup> Institute for Government, 'UK-EU Future Relationship: UK and EU Mandates', available at: <https://www.instituteforgovernment.org.uk/explainers/future-relationship-uk-eu-mandates> (accessed on 30th June 2020).

commit to aligning itself with EU standards. It has already agreed to keep the General Data Protection Regulation (GDPR) and Law Enforcement Directive, but even then, it will require a data adequacy decision from the European Commission – which is separate from the negotiations - for the flow of data to continue. The British government hopes to receive this decision before the end of the transition period.<sup>56</sup> However, in doing this, it will be difficult for the UK not to remain aligned with EU standards in the future. This might represent a challenge for the UK, which has often placed security and data retention ahead of data protection.<sup>57</sup> Other potential problems in the UK-EU relationship might be UK's own domestic security legislation and whether London will pass data on to its partners in the 'Five Eyes' alliance.<sup>58</sup>

To sum up this section, the UK and the EU are quite far apart when it comes to their respective negotiating objectives. The UK is, as usual when it comes to JHA matters, seeking to negotiate for itself an exceptional agreement with the EU that would go beyond any precedent. In contrast, the EU is less receptive than before to the idea of accommodating British exceptionalism and is holding firm to its position that the UK cannot have identical or similar benefits to what it had as a Member State. Furthermore, some recent scandals have somewhat damaged trust in the UK. A report concluded that the UK had been making illegal copies of Schengen data. This was compounded by the fact that the UK had hired private

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<sup>56</sup> HM Government, 'The Future Relationship with the EU'.

<sup>57</sup> Aysem Diker Vanburg and Maelya Maunick, 'Data Protection in the UK Post-Brexit: The Only Certainty is Uncertainty', *International Review of Law, Computers, and Technology*, Vol. 32, No. 1, pp. 190-206.

<sup>58</sup> Andrew Murray, 'Data Transfers Between the EU and UK Post Brexit?', *International Data Privacy Law*, Vol. 7, No. 3, p. 149; Oliver Patel and Nathan Lea, 'EU-UK Data Flows, Brexit and No Deal: Adequacy or Disarray?', available at: [https://www.ucl.ac.uk/european-institute/sites/european-institute/files/eu-uk\\_data\\_flows\\_brexit\\_and\\_no-deal.pdf](https://www.ucl.ac.uk/european-institute/sites/european-institute/files/eu-uk_data_flows_brexit_and_no-deal.pdf) (accessed on 30th June 2020), p. 2.

contractors, such as IBM, for that task and that these companies could have passed data on to the US authorities as required by the Patriot Act.<sup>59</sup> Moreover, the British authorities have recently admitted to not passing on information about 75,000 criminal convictions to EU Member States and having tried to cover this up afterwards.<sup>60</sup>

### ***The EU-UK Future Relationship Negotiations in the Field of JHA through the lenses of exceptionalism***

The previous section has shown that, when laying down its mandate for the UK-EU Future Relationship negotiations, the British government has been influenced by exceptionalist ideas. It has developed a vision for future UK-EU relations in the field of JHA where it would be granted advantages that the EU has never given to any of its partners. It has attempted to justify such an exceptional treatment on the basis of what it perceives to be the exceptionally high quality of its contribution to internal security cooperation. Since the British EU referendum, there have been various attempts by the British government at presenting itself as a highly valuable partner for the EU in the field of JHA. A presentation entitled ‘Framework for the UK-EU Security Partnership’ and produced by the negotiating team for discussion with the EU negotiators in May 2018 highlighted numerous examples of the seemingly extraordinary contribution made by the UK to EU security, including the following:

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<sup>59</sup> Euobserver, ‘UK Taking ‘Steps’ After Illegal Copying of EU Schengen Data’, available at: <https://euobserver.com/justice/145530>, 2019, (accessed on 9th July 2020).

<sup>60</sup> The Guardian, ‘Revealed: UK Concealed Failure to Alert EU Over 75,000 Criminal Convictions’, 2020, available at: <https://www.theguardian.com/uk-news/2020/jan/14/revealed-uk-concealed-failure-to-alert-eu-over-75000-criminal-convictions> (accessed on 14th July 2020).

- ‘[for] every person arrested on a UK issued EAW, UK arrests 8 individuals on EU EAWs’;
- ‘[in] 2017, UK contributed over 6000 pieces of information to the Europol Serious and Organised Crime Analysis Projects. More than any other Member State’;
- ‘[the] UK has the largest Europol Liaison Bureau of any Member State’;
- ‘approximately 20% of the total number of national security alerts on the SIS II system are circulated by the UK alone’;
- - ‘[in] 2016, UK responded to over 13,000 requests for conviction information from EU Member States via ECRIS’.<sup>61</sup>

More recently, this exceptionalist narrative could be detected again in a letter sent by the British EU Adviser, David Frost, to Michel Barnier, where he made the following claim: ‘on law enforcement, where you describe EU proposals as providing for an unprecedentedly close relationship, but in fact they do not go beyond agreements you have made with other third countries, many of whom have far less data to offer the EU and are less closely involved in the mutual fight against crime’.<sup>62</sup> This clearly signals the expectation of the British government that, should there be an agreement with the EU on law enforcement and judicial cooperation in criminal matters, it should be more extensive than the agreements already

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<sup>61</sup> HM Government, ‘Framework for the UK-EU Security Partnership’, May 2018, available at: <https://www.gov.uk/government/publications/framework-for-the-uk-eu-security-partnership> (accessed on 20th August 2020), pp. 18-22.

<sup>62</sup> David Frost, ‘UK Draft Legal Texts’, 19th May 2020, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/886168/Letter\\_to\\_Michel\\_Barnier\\_19.05.20.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886168/Letter_to_Michel_Barnier_19.05.20.pdf) (accessed on 9th July 2020).

signed by the EU with third countries. This expectation is notably justified on the basis of the data that the UK is able to transmit to the EU.

However, whereas the UK appears to have retained the same exceptionalist position in relation to JHA cooperation, the EU's stance towards the British demands for an exceptional treatment has significantly evolved. It is clear that the EU is keen on making a distinction between its treatment of the UK as a Member State and that of the UK as an outsider. This is fully in line with the sharp distinction that it generally draws between Member States and third states respectively. In June 2020, the EU's Brexit negotiator, Michel Barnier, warned that the UK was making too high demands of the EU, by stating the following:

‘[t]he truth is that in many areas [Britain] is demanding a lot more than Canada, Japan or many of our other [trade partners] [...] In many areas it is looking to maintain the benefits of being a member state without the constraints [...] It is looking to pick and choose the most attractive elements of the [EU] single market without the obligations’.<sup>63</sup>

In sum, since the British EU Membership referendum, one can observe that the UK has largely stuck to its exceptionalist discourse, whereas the EU's stance over the British demands for exceptional arrangements has undergone a significant change, which mirrors the major distinction that it traditionally makes between Member States and third states.

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<sup>63</sup> Reuters, ‘Britain Asks Too Much of EU in Brexit Talks’, 2020, available at: <https://www.reuters.com/article/us-britain-eu/britain-asks-too-much-of-eu-in-brex-it-talks-barnier-says-idUSKBN23H28U> (accessed on 9th July 2020).

## Conclusion

This article set out to examine the EU-UK Future Relationship negotiations on Justice and Home Affairs (JHA) through the lenses of ‘exceptionalism’. This concept refers to the self-understanding of a state as being different from and morally superior to other states. The exemptionalist type of exceptionalism also calls attention to the belief that one is entitled to exemptions from ordinary arrangements and rules. After having introduced the concept of ‘exceptionalism’, this article has shown how exemptionalist exceptionalism has characterised the UK’s positioning *vis-à-vis* European integration in general and in relation to the development of JHA cooperation in particular. Over the years, British governments have successfully secured several exceptions to the ordinary JHA legislative arrangements in the form of various ‘opt-ins’ and ‘opt-outs’. Thus, not only did the UK make a case for its exceptional status within the EU generally and in the JHA field in particular, but this discourse was also accepted by the rest of the EU, which allowed the UK to be granted all these exceptions. It is therefore perhaps not surprising that the British government has clearly stated expectations of receiving, again, an exceptional treatment from the EU when negotiating their future relations. In the field of JHA, this would mainly take the form of an agreement on law enforcement and judicial cooperation in criminal matters that would grant the UK a position, notably in terms of access to data, that no other third state has ever been given by the EU.

However, it appears that, in a remarkable departure from its previous stance, the EU is no longer as favourably disposed to grant exceptional treatment to the UK in the field of JHA now as it was when the UK was a Member State. This has been seen in its mandate for the Future Relationship negotiations, as well as in the way in which the negotiations have unfolded over the last few months. As a result, it is far from certain at the time of writing that

the EU and the UK will manage to successfully negotiate any agreement in order to continue to facilitate their cooperation on JHA matters.