The Intersection Between Justice and Home Affairs and the European Neighbourhood Policy:

Taking Stock of the Logic, Objectives and Practices

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Contents

Abstract

This paper claims that the European Neighbourhood Policy (ENP) of the EU, and in particular the elements related to justice and home affairs (JHA), is a complex, multilayered initiative that incorporates different logics and instruments. To unravel the various layers of the policy, the paper proceeds in three steps: firstly, it lays out some facts pertaining to the origins of the ENP, as its 'origins' arguably account for a number of the core tensions. It then presents the underlying logic and objectives attributed to JHA cooperation, which can be derived from the viewpoints voiced during policy formulation. The paper goes on to argue that despite the existence of different logics, there is a unifying objective, which is to 'extra-territorialise' the management of 'threats' to the neighbouring countries. The core of the paper presents the various policy measures that have been put in place to achieve external 'threat management'. In this context it is argued that the 'conditionality-inspired policy instruments', namely monitoring and benchmarking of progress, transfer of legal and institutional models to non-member states and inter-governmental negotiations, contain socialisation elements that rely on the common values approach. This mix of conditionality and socialisation instruments is illustrated in two case studies, one on the fight against terrorism and one on irregular migration. Finally, the paper recommends that the EU draft an Action-Oriented Paper (AOP) on JHA cooperation with the ENP countries that indicates how the EU intends to balance the conflicting objectives and instruments that are currently present in the JHA provisions of the ENP.

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Introduction

This paper deals with the justice and home affairs (JHA) elements of the European Neighbourhood Policy (ENP). It refutes the core argument advanced by some analysts that the ENP is essentially a comprehensive cross-pillar security initiative[1] by showing that its objectives as well as its instruments are also inspired by common values. This is not to deny that the JHA and security elements play a pivotal role in the ENP as a whole, for they definitely do. The assertion that it is all about security, however, is too simplistic. This paper claims that the ENP, and in particular the JHA elements, is a complex, multilayered initiative that incorporates different logics and instruments. In dissecting the various layers, which is the main objective of the paper, we draw on the findings contained in the literature on the external aspects of JHA and on the ENP[2].

This paper proceeds in three steps. Firstly, it lays out some facts pertaining to the origins of the ENP, as its 'origins' arguably account for a number of the core tensions. It then presents the underlying logic and objectives attributed to JHA cooperation, which can be derived from the viewpoints voiced during policy formulation. Finally, the paper goes on to argue that despite the existence of different logics, there is a unifying objective, which is to 'extra-territorialise' the management of 'threats' to the neighbouring countries. Didier Bigo and other scholars have argued that the specific manner in which JHA cooperation was institutionalised within the EU led to the consideration of a broad range of internal security threats under one and the same heading . Hence, JHA actors were responsible for managing a 'broad spectrum of issues' ranging from terrorism, drugs and crime to the rights of asylum seekers and clandestine migration. The term 'security continuum' describes this broad understanding of threats. The external dimension of JHA also addresses the entire spectrum. The core of the paper presents the various policy measures that have been put in place for external 'threat management'. In this context it is argued that the 'conditionality inspired policy instruments' of monitoring and benchmarking of progress, transfer of legal and institutional models to non-member states and inter-governmental negotiations are accompanied by socialisation instruments. The mix of the two logics of action will be explicated in two case studies, one on the fight against terrorism and one on irregular migration.

Generally speaking, the paper addresses the question of the EU's actorness with respect to JHA in the neighbourhood. To assess actorness, we scrutinise the objectives

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[1] This argument can be found in Cremona & Hillion (2006) and Lynch (2006)[0].

[2] For texts on the external dimension of JHA, see Berthelet (2007), De Kerchove & Weyembergh (2003), Jeandesboz (2007), Knelangen (2007), Lavenex (2005), Occhipinti (2007), Rijpma & Cremona (2007), Trauner (2007), Wichmann (2007) and Wolff (2006b) [0].

and policy instruments contained in the JHA sections of the ENP. The reasoning underlying this choice of focus is that an actor is expected to devise appropriate means to reach certain stated objectives. It will be shown that the requirement of actorness is only partially fulfilled, as the policy measures promoted respond to both security and common values objectives, and draw on both conditionality and social learning instruments. As a consequence a creative tension arises between the various objectives and instruments inherent in JHA cooperation with the ENP countries. The main objective promoted from the security perspective is that of punctually strengthening the repressive state functions, whereas the socialisation discourse emphasises the long-term objective of enhancing the democratic structures of a state. In terms of the policy instruments this tension is mirrored in the reliance on both conditionality and socialisation-inspired instruments.

The main policy recommendation flowing from this paper is that the EU should explicitly engage with the question of actorness in the ENP by drawing up an Action-Oriented Paper (AOP) on JHA cooperation with the ENP countries which enumerates both the objectives and the policy instruments available in this area. An AOP on the ENP countries would need to take into account both the JHA external dimension 'security' objectives, while simultaneously engaging with the questions of security sector governance and the human rights compliance records of the partner countries. It should also provide an overview of all of the policy measures currently used in the relations with the ENP countries. By attempting to match the strategic objectives and the available instruments in one policy framework, the EU would take an important step towards affirming itself as an international actor. To avoid contradiction, guidelines would need to be formulated on how to deal with possible trade-offs between conflicting objectives.

The analysis focuses on the various Action Plans of the ENP in pursuit of a two-fold objective: to present the Action Plans concluded with the ENP countries in a comparative perspective and to illustrate some of the instruments in-depth to show what they cover. The illustrations are based on the Action Plans adopted with Morocco, Moldova, Tunisia and Ukraine. The four countries were selected, because they have long-standing relations with the EU, and because they are all interested in deepening their relations with the EU. Moreover, this country sample allows us to present some interesting variations as to how the policy is being implemented in practice. This paper is the result of an intensive study of ENP documents and a series of semi-structured interviews conducted by the author with policy makers in Brussels during a stay at CEPS in April/May 2007.

1. 'Policy discourses'[3] surrounding the JHA elements in the ENP: Security versus common values and socialisation?

The political science literature on the ENP has mainly focused on the question of whether the ENP applies the methods of enlargement to countries without a membership perspective or whether it constitutes a 'cross-pillar' comprehensive security initiative. Both strands of literature construct their arguments by relying on the policy formulation stage. There appears to be a broad consensus among academics that the birth of the ENP was the result of a process of inter- and intra-institutional bargaining. The main discussions centred on which countries should be covered and what should be offered to the non-member states states (Del Sarto & Schumacher, 2005). The result of this bargaining process was a broad geographical coverage, which extended the reach of the policy to all 'neighbouring countries' without a membership perspective[4], with the exception of Libya, Syria and Belarus. The incentives offered to the non-member states differ a lot from country to country.

The origins of the ENP are to be found in a number of discussions that took place in 2002. One of the most important inputs into the discussion was the letter written by Jack Straw, former British Foreign Minister, to his colleague, J. Piqué, Foreign Minister of Spain, which held the EU presidency at the time . The letter is unambiguous in asserting the security motivations that should drive the EU's policy towards its 'New Neighbours'; it qualifies the Neighbourhood as both a source and a transit zone of 'soft security' threats to Europe. The speeches delivered by Romano Prodi in 2002 and 2003 on the ENP convey a different message, which more closely resembles the conceptualisation of the ENP as a socio-economic transformation project. In line with this latter view, the policy towards the 'New Neighbours' should be based on the principle of partnership[5]. Analysts have come to agree that, as time passes, the security-related features of the ENP became more accentuated. There are a number of reasons why the 'security rationale' was strengthened during subsequent phases. Among them figured the adoption of the European Security Strategy in December 2003, the occurrence of inter-institutional differences between the

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[3] Policy discourse is used as a term that covers the major policy instruments and the statements made by policy-makers. It is not used to describe the method of 'discourse analysis'.

[4] Hence the EFTA states, the Western Balkans and Turkey are not affected by the initiative. Russia refused to be considered a neighbour and hence it negotiated the Common Spaces with the EU.

[5] Two articles on the origins of the ENP should be mentioned here (Jeandesboz, 2007; Johansson, 2007).

Commission and the Council in spring 2004, and a broadened intra-institutional consultation process within the Commission. As a consequence of this broadened intra-institutional consultation, a wider spectrum of sectoral Directorate Generals became involved in the drafting process . The *security approach* advocates that the EU should coerce partner states into acting as 'gatekeepers' to prevent the spill over of security threats into the EU. As mentioned previously, it is not the purpose of this paper to deny the enhanced security rationale embedded in the ENP; rather, it refutes the idea that the ENP is only about security. The argument is sustained by showing that even the most security-relevant provisions of the ENP, namely those related to JHA, contain remnants of the 'common values and socialisation' policy discourse (*common values and socialisation approach*).

A further reason for rejecting the uni-dimensional security reading stems from the conviction that the EU is engaged in a strategy of 'depoliticising' the discussions on JHA issues in the relations with non-member states[6]. Evidence for the de-politicisation strategy can be found on both the institutional level, for example the decision to assign the responsibility for dealing with JHA questions to a Sub-Committee of internal security experts instead of a political body, and on the substantive level, where we find numerous attempts to discuss political problems in technical terms. The pressure exerted on Moldova to adopt a new Customs Regime imposing registration requirements on companies domiciled in Transnistria, and the launching of the EU Border Assistance Mission (EUBAM) are attempts at devising technical solutions to the Transnistria conflict (Sushko, 2006)[7]. The EU's preference for a strategy of de-politicisation results from its own 'integration' experience. We need to note from the outset that the success of this strategy heavily depends on the willingness of the partner country to engage with the EU's terms of dialogue.

The JHA sections in the ENP also have to be understood in the context of the development of an external dimension of JHA. It is interesting to note that the discourse surrounding the external aspects of JHA is characterised by the same ambiguity as the ENP, and this is the reason why it perpetuates the tensions identified previously. By and large the development of the external aspects of JHA has been characterised by, on the one hand, the insertion of JHA clauses in the broader external relations framework, and on the other hand, the adoption of JHA-specific external instruments. That these two developments are not inherently complementary has been pointed out by a number of analysts . In terms of the inclusion of JHA elements in the external dimension framework, we have witnessed the progressive inclusion of JHA cooperation clauses in all agreements with non-member countries since the

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[6] This argument draws on the discussions I have had over the last two years with Prof. S. Lavenex and Dr D. Lehmkuhl and the findings of our joint research project NEWGOV (Lavenex et al., 2007).
[7] Sushko (2006) provides interesting background information on the EUBAM.

conclusion of the Partnership and Cooperation Agreements in the early 1990s. In parallel to the progressive development of the Area of Freedom, Security and Justice internally, a broadening of the scope of the JHA clauses in agreements with non-member states has occurred. The JHA clauses in the most recent Association Agreement, concluded with Algeria, are exemplary with respect to the comprehensiveness of the issues covered[8]. We have also witnessed the adoption of 'JHA'-specific external instruments, such as the Action Plan on Organised Crime with Russia, the Action Plan on JHA concluded with Ukraine, or the Valencia Regional Action Programme (Council of the European Union, 2000; 2003; Presidency, 2002). On the whole the activities in the external dimension have been driven by the EU's security priorities, both in terms of issues and countries covered. At the end of 2005, a more strategic vision, expressed in the 2005 Commission Communication on the external dimension of JHA and the 2005 Council Strategy, came to complement the problem-driven and piecemeal case-to-case approach, which had dominated the external dimension of JHA until then (Council of the European Union, 2005; European Commission, 2005a).

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[8] For an overview of how JHA has been inserted into the relations with basically all countries on the globe, see Trauner (2006).

2. The logic and objectives underlying the JHA sections of the ENP

This section advances the argument that the ambiguities resulting from the various policy discourses are reflected in the logic and objectives underlying the JHA sections of the ENP. One of the basic assumptions underlying this argument is that among all policy areas figuring in the ENP, JHA is the one area in which the existence of the two policy discourses has a direct impact on actions. The reason for this is that no other policy area is so directly linked to the presence of 'shared values'. It has been claimed that the manner in which a state exercises its prerogatives in the area of JHA is one of the most telling indicators of the nature of a political regime. Therefore, cooperation on JHA matters with a non-member state should be made contingent on the existence of shared values . The policy discourse of the ENP as a transformation project engages directly with this imperative, as it advocates establishing security and stability democratisation and rule of law promotion in the partner countries. This approach is reflected prominently in the Country Reports, which the Commission adopted prior to the Action Plans. The latter devoted a lot of space to listing the deficiencies of the partner countries in the core areas of democracy and rule of law. In the ENP Action Plans we therefore find a number of provisions on strengthening the judiciary and eradicating corruption. Nevertheless, the detailed actions in the Action Plans and the first progress reports reveal that – particularly in relations with the Mediterranean countries – the EU is not serious about progress on these questions (Del Sarto et al., 2006). This half-hazard stance on rule of law and democracy issues is worrying, if one takes into account the mixed record of the neighbouring countries on rule of law and democracy questions and the EU's attempts to strengthen cooperation with these same countries on JHA issues[9].

The reason why the EU is keen to improve cooperation with the neighbouring countries on internal security questions is the high degree of security interdependence it is experiencing with the Neighbourhood (Lavenex, 2004; Occhipinti, 2007). When examining the organised crime reports, this threat perception becomes apparent, provided that the reports point to the pivotal role that the neighbouring countries play as source and transit countries of security threats to the EU (Council of Europe, 2004; Europol, 2004a). Hence there is a strong 'functional' argument that the EU should engage more substantively with these countries in order to prevent the spill over of insecurity to the EU (Knelangen, 2007: 266). This reasoning underlies the JHA actions

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[9] The results are at best mixed, with the possible exception of Ukraine and Georgia. This message is clear, when taking a look at the governance and rule indicators established by the Bertelsmann Transformation Index, Freedom House or the World Bank governance indicators.

that call for targeted capacity-building in the area of border management and the enhancement of non-member countries' risk analysis and information-gathering capacities. These very concrete, short-term and punctual measures aim to enhance the non-member states' capacities in managing threats to the EU's security in the short term. They do not, however, engage in questions of 'security governance' or the oversight of the security sector (Kahl, 2006: 298; Tanner, 2005). In other words, one could claim that activities launched under the JHA external dimension can either reinforce the repressive elements, which constitute the power basis of autocratic regimes, or they can contribute to fostering state structures based on the respect for the rule of law and democracy.

It is beyond doubt that a policy framework that has been influenced and motivated by various interests and imperatives, such as the JHA sections in the ENP, sends out contradictory messages to the neighbouring countries. What is worrying is not the fact that there are tensions; these are probably unavoidable. Nevertheless, it would be desirable that the European institutions formulate political guidelines on how to deal with the 'inherent' pay-offs between the long-term 'security through democracy' strategy and the short-term one of 'enhancing a partner country's capacities to manage threats to the EU's security' . In the absence of such guidelines, tensions will arise between the EU's long-term strategy of eliminating the root causes of security threats by promoting democracy and the rule of law, and the short-term requirements of cooperating with autocratic regimes in the fight against terrorism and illegal immigration . Since we cannot identify any guidelines, we are led to conclude that the implementation of the JHA provisions will constitute a credibility test for the EU as an international actor in the Neighbourhood. In other words, implementation will reveal which considerations prevail.

This leads us to formulating the policy recommendation that the EU should draw up an AOP on JHA cooperation with the ENP countries outlining the cooperation objectives in this area. The document should spell out, on the one hand, the JHA external dimension cooperation objectives and on the other hand, it should address human rights and rule of law compliance and the security sector governance situation in the respective partner country. The AOP should also contain some guidelines on which trade-offs are to be made between the security and the norms promotion objectives and the various instruments. A further reason why the EU should draw up an AOP is that it would consolidate in one document both the objectives and the instruments of JHA cooperation with the ENP countries. Such a framework is necessary, because one prerequisite of actorness is a manifested attempt to match policy objectives with instruments. In the process, the EU should also attempt to eliminate as many inconsistencies as possible to make its actions more coherent.

It is interesting to note that the AOPs are unilateral instruments, and hence they primarily reflect the EU's security interests[10]. The predominantly security-oriented approach advocated in the AOPs can be seen as an expression of the EU's ambition to extra-territorialise the management of security threats to partner countries, a strategy that we present in the next section. Nevertheless, one needs to be aware of the fact that although there exists a unified aim to 'extra-territorialise' the management of threats, the EU relies on two opposing logics of action, conditionality and social learning, to realise its ambitions. The measures through which the EU seeks to achieve these objectives will be presented in the subsequent sections of this paper.

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[10] The unilateral nature derives from the fact that they are Council adopted instruments that are not submitted to approval by the partner countries. The security motivations become apparent, when considering the issues and countries mentioned in the AOPs adopted to date (organised crime in the Balkans, drugs from Afghanistan, organised crime in Russia). The AOP seem to reflect the threat perceptions contained in the internal security reports issued by the security agencies of the EU and the member states (e.g. Europol, BKA, etc.).

3. Extra-territorialisation

In the academic literature one finds the terms 'external governance' and 'externalisation' to describe how European norms and rules produce effects beyond the EU's borders (Lavenex & Uçarer, 2004; Rijpma & Cremona, 2007: 9). The term 'extra-territorialisation' was developed by Cremona and Rijpma to describe "the means by which the EU attempts to push back the EU's external borders or rather to police them at distance in order to control unwanted migration flows" (Rijpma & Cremona, 2007: 10). For the purpose of this paper the scope of the definition needs to be extended to the management of all security threats, provided that a similar assumption underlies all JHA external activities. There are different ways in which extra-territorialisation can occur: firstly, it refers to action taken by the EU itself, independently of non-member states, that can have effects on the legal order of non-member states and their nationals[11]. Secondly, it may take place in a context of external Community action[12]. And in the context of the EU's relations with the partners, it may describe the promotion of the EU's own *acquis* towards non-member states, and their adoption of it into their own legal order . The conceptual approach of 'extra-territorialisation' has the merit of grasping what the EU is attempting to achieve in the JHA sections of the ENP.

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[11] Examples cited in this context are the EU's visa policy or the rules on carrier sanctions (Cremona & Rijpma, 2007: 11).

[12] In this context, liaison officer networks, the determination of safe non-member states, the conduct of joint Frontex operations and the need for third countries to cooperate with the EU to return their nationals are cited (Cremona & Rijmpa, 2007: 12).

4. Policy measures contained in the ENP Action Plans

This 'core' section of the paper presents the policy measures that are contained in the JHA sections of the ENP Action Plans. The measures will be classified according to a categorisation applied by Florian Trauner – who had taken over from Heather Grabbe – to JHA cooperation with the countries of the Western Balkans (Trauner, 2007; Grabbe, 2003)[13]. In the literature on the ENP there is a wide spread consensus that the EU is attempting to emulate the use of the conditionality approach in its relations with the ENP countries (Cremona, 2005; Tulmets, 2007). Conditionality can be used in the context of the membership prospect, at the sectoral level, or at the project level. In the case of sector or project conditionality, the EU links the granting of (financial) incentives to the commitment of the partner country to carry out certain political or administrative reforms. The ENP's documents differentiate between negative conditionality and positive conditionality. Positive conditionality is based on the idea that the EU offers rewards to non-member states for fulfilling reforms, instead of threatening to withhold a promised benefit in case of non-compliance. As the membership prospect is absent in the ENP, the EU needs to increasingly rely on positive conditionality to entice states to move closer to European standards.

Since enlargement is considered by many as the most successful foreign policy of the EU, it is obvious that the EU tries to emulate elements of this policy in its dealings with countries outside the circle of the accession countries . During enlargement the EU used both logics of action, whereby that of conditionality seems to have prevailed in fostering adaptation pressures (Kelley, 2004; Schimmelfennig & Sedelmeier, 2005). We allege that in the case of the ENP, conditionality is the dominant logic of action, but that we also find socialisation elements. This argumentative step moves us away from the analysis conducted by Trauner, who presents the instruments deployed in the relations with the Western Balkans countries as based exclusively upon conditionality (Trauner, 2007). Conditionality stipulates that actors act in accordance with a 'logic of consequentiality', which means that the decision whether or not to cooperate with the EU is the consequence of a partner country conducting a cost/benefit analysis (March & Olsen, 1989). The alternative logic of action, i.e. socialisation, stipulates that non-member states can be enticed to follow the EU's model, because they identify with the values and norms promoted by the EU. The logic of socialisation is based on the belief that actors change their conduct in accordance with the 'logic of appropriateness'.

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[13] An alternative way to classify these measures is the use of the external governance approach that we have been developing in the framework of the Newgov project. See Lavenex et al. (2007).

There is a broad consensus in the literature that for the ENP to be successful in the absence of the membership prospect, the EU needs to increasingly rely on this type of instrument, at least with respect to the political elements (Jones & Emerson, 2005: 18-19). In the JHA area, social learning is used both as a vehicle for fostering norm adoption and compliance, and to enhance the level of policy implementation.

Efforts to transfer the EU's approach to internal security to the ENP countries through soft measures and learning can be detected at all levels. In the context of benchmarking and monitoring, the socialisation element manifests itself through the search for a common understanding of internal security and security threats. When promoting legislative and institutional models to partner countries, socialisation is used to discuss the needs and the approximation wishes of the partner countries. Technical assistance or capacity-building by definition intends to trigger social learning effects. Lastly, through negotiations the EU attempts to change the cost/benefit calculation of the partner country. As the EU cannot withhold or grant membership to the ENP countries, it needs to modify the incentive structure that the partner country is facing within the area of JHA. In other words, the EU needs to make cooperation on JHA issues more attractive for the partner countries. To achieve this objective, the EU devises a mixture of measures drawing on socialisation and conditionality, as we will show in the two mini case studies on irregular migration and terrorism.

4.1 'Benchmarking and monitoring'

The ENP Action Plans are meant to incorporate the principles of benchmarking. The EU first experimented with benchmarking in the area of employment policy. Raffaella Del Sarto has defined it as follows: "benchmarking is a system that aims at comparing in a systematic manner organisational processes and/or performances with the objective of improving these processes and thus creating new and (higher) standards (Del Sarto et al., 2006: 14)." The ENP has introduced benchmarking into the realm of the EU's foreign policy (Tulmets, 2007). In the context of external relations the term is firstly, associated with the idea of continuous evaluation and comparison between the participants in the process; secondly, it relies on clear pre-determined criteria, in particular goals and objectives for evaluating progress, and thirdly, it draws on soft law (Del Sarto et al., 2006: 14 ff.). The ENP Action Plans incorporate some of the features of benchmarking, because they contain precise commitments that the partner countries seek to attain over a given time frame (short, medium or long term). The Action Plans were elaborated based on the European Commission's Country Reports.

The ENP Action Plans reflect the priorities expressed by the EU and the partner country. Participants in the negotiation process confirmed that both sides had a say in defining the priority actions in the Action Plans[14]. In the area of JHA, the priority actions concern 'readmission' and migration management. Border management is also listed as a priority in the relations with Morocco, Ukraine and Moldova. In the Mediterranean countries there are numerous references to intensifying the fight against terrorism. The strengthening of rule of law, and of administrative and judiciary capacity also features as a priority action in all of the Action Plans. In terms of wording and targets we find more precise formulations in the sections on border management and enhancing security than on governance-related matters. Moreover, the first two years of implementation have revealed a focus on the security questions, provided that agreements on readmission/visa facilitation have been initialled with both Ukraine and Moldova. In addition, the border management mission (EUBAM) was launched in Ukraine/Moldova, and the dialogue on terrorism with the Mediterranean countries has intensified (European Commission, 2006a). The progress in terms of rule of law, political and administrative reforms has been slower in all of the partner countries.

The ENP Action Plans are not legally binding; they complement the provisions of the Association and Partnership and Cooperation Agreements as 'soft law'. The monitoring of progress has both bilateral and a unilateral elements. On the bilateral level the bodies established under the Association Agreements (AA) and the Partnership and Cooperation Agreements (PCA) are responsible for discussing progress. There is also a unilateral component to monitoring progress under the ENP, in that the Commission draws up regular implementation reports. From a formal point of view, the institutional provisions of the Action Plans look very much alike, with the exception that the PCA structures cannot adopt binding decisions, whilst the Association Councils have the competence to do so (Lannon & van Elsuwege, 2004: 55). The responsibility for monitoring the JHA provisions is attributed to a Sub Committee on Justice, Freedom and Security in the relations with the Eastern neighbours. In the relations with the Southern neighbours the responsibility for JHA matters is split between the Sub Committee on Justice and Security and the one on Migration and Social Affairs. In contrast to the formal provisions, practice has revealed important differences in terms of the intensity of the relations.

The JHA Action Plan adopted with Ukraine in 2001 and updated in 2006 contains a plethora of detailed measures[15] and an accompanying monitoring instrument, the so-called scoreboard. Progress on JHA issues is discussed at regular meetings on JHA

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[14] Information received in confidential interviews with third country representations (Brussels, May 2007).
[15] The revised EU-Ukraine Action Plan on Freedom, Security and Justice: Challenges and Strategic Aims contains 99 objectives and 224 joint actions. The document was made available to the author by an interview partner.

issues, which take place between officials at all levels of seniority. There is even a Ministerial Troika on JHA issues, which is convened at regular intervals with Ukraine. The discussions in the Sub-Committee meetings on JHA have evolved substantially since the first meeting in 2002. Whilst in the early days the discussions were of a more general nature, nowadays the Sub Committee meetings are focused. The Sub Committee is used as a forum for discussing technical details and implementation problems. This is by far the most intensive relation between an ENP partner country and the EU in the area of JHA. At the opposite end of the spectrum one can situate the relations with Tunisia. Both the limited number of obligations subscribed to by this country and the fact that the Sub-Committee on Justice and Security has not yet been able to convene, point towards the difficulties the EU is facing in strengthening cooperation with this country on JHA questions. The relations with Moldova and Morocco are situated between the two extremes[16]. Sub Committee meetings and other working party meetings are being held with both countries. The discussions with the two countries have bypassed the stage of 'pure monologue' and are moving towards a policy dialogue. The two countries are willing to subscribe to concrete commitments and targets, and the parties are now seeking further ways to deepen their relations.

Overall what we observe at the steering level of the ENP is an attempt by the EU to move away from the conditionality approach of the past towards a relationship based on partnership. This 'new approach' strives for intensifying the policy dialogue based on 'benchmarks'. The success of this strategy depends a lot on the issue area debated and on the country in question.

4.2 Transfer of legal and institutional models to non-member states

This type of activity is very prominent in the external dimension of JHA. It is the approach that translates the extra-territorialisation strategy most directly. The reliance on this strategy is a result of the enlargement experience, during which period the EU was engaged in an intensive exercise of norms transfer towards the new member states. The transfer of legal norms stemmed from the third Copenhagen criterion, which stated that to become an EU member, the entire *acquis* needed to be transposed into the domestic legal order of the accession states. With respect to JHA this meant that the new member states had to transpose the entirety of Titles IV TEC containing the provisions on asylum and immigration and Title VI TEU on police and judicial cooperation into their legal systems. As a consequence of the incorporation of the Schengen provisions

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[16] The dialogue with Morocco on migration issues constitutes an exception in this regards, provided that negotiations on readmission/irregular migration have been ongoing for a while now.

into the Treaty of Amsterdam, they also became part of the *acquis*. During the accession process it became apparent that it was not enough to demand that the candidate countries incorporate the legal standards; instead the EU needed to provide them with financial assistance and expertise to support the implementation of the provisions. The transfer of institutional models in the JHA area, through the pre-accession toolkit, consisting of PHARE funding, Twinning and TAIEX, became important in the process of bringing the accession countries closer to EU standards

The transfer of legal norms to non-member states occurs when the EU demands non-member states to adapt their domestic legislation to *acquis* provisions or international standards. The transfer of international standards is frequent in the JHA area, as the JHA *acquis* contains numerous international instruments. Annex I illustrates that a plethora of international conventions on JHA-related issues exist, which the EU attempts to transfer to the ENP countries through the Action Plans. When considering the table in Annex I we conclude that the overall balance sheet of the EU's norm-promotion efforts in this area is successful. Yet, the fact that a country has become party to a Convention does not necessarily mean that it complies with the obligations contained in the Conventions; for example a number of the neighbouring countries have been seriously deficient in fulfilling their obligations under the Geneva Convention on the Status of Refugees . There is also a difference in norms promotion based on the whether the country is a southern or an eastern EU neighbour, because in the eastern region the EU extensively draws on Council of Europe conventions and standards.

The main tool used for promoting institutional models to the partner countries is Twinning. The latter is a cooperation tool aimed at developing the capacity of the public administration in those countries. As the projects are carried out by equivalent institutions in EU member states, the aid is provided on a 'peer-to-peer' basis. Twinning was made available to the neighbouring countries when the ENP was launched. The basic rule is that a Twinning project must contain an element of alignment with the *acquis*. In contrast to enlargement during which alignment had to be 100%, the extent of alignment with the *acquis* sought in ENP countries depends on the issues under discussion and the country's willingness to approximate its legislation. Twinnings are demand-driven, which means that the non-member states can influence in which sectors they are realised; they do, however, need to be related to the domains of cooperation mentioned under the PCA or the AA. Twinning was frequently used in the sector of JHA during pre-accession, which is confirmed by the fact that 367 of 1,674 Twinnings were carried out on JHA issues between 1997 and 2006. This is by far the highest number of Twinnings carried out in a specific sector, the next one being agriculture and finance with 281 projects each[17].

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[17] Data retrieved from the Twinning Thesaurus, 2007 version. CD Rom was made available by Europeaid.

In the relations with the ENP countries, 12 Twinnings have been planned on JHA matters for the period of 2004-07. As to the Twinnings being carried out in ENP countries: three are being implemented in Morocco – one on border management, one on consumer protection and one setting up a Financial Intelligence Unit. Twinnings have also been planned with Jordan in the area of penitentiary reform and combating terrorism. Moldova has demanded a Twinning to support the Parliament and one related to the administration of justice (e.g. reform of the penalty system). With Ukraine a Twinning is planned on the introduction and development of quality management within the Ukrainian Police (Ministry of Interior)[18]. Twinnings on customs can be found in most neighbouring countries. For the time being the demand for Twinning on JHA issues is not that high in the ENP countries owing to the sensitivity of the issues dealt with. This contrasts strongly with the demand for TAIEX activities, which for its part has been high. TAIEX assistance covers a number of short-term activities, such as seminars, study visits and workshops. One of the objectives of the TAIEX activities is to prepare the ground for the subsequent launching of Twinning activities. In 2006 TAIEX study visits have been planned for Jordanian officials to EU member states both on penitentiary reform and on combating terrorism[19]. There were also TAIEX seminars organised on trafficking in human beings and a study visit on the fight against corruption.

With respect to the provision of legislative and institutional models we observe a prolongation of the modes of interaction developed during eastern enlargement. There is a strong reliance on the transfer of legislative provisions to non-member states, which find their origin either in the *acquis* or in international standards. Yet the way in which these institutional models are applied in the ENP countries differentiates from what we observed during enlargement, as they are more tailored to the needs of the individual countries.

4.3 Funding and technical assistance for JHA activities in the ENP

Funding for external assistance activities in the EU is provided based on the geographical financial instruments, and not on a sector basis. Simultaneous with the introduction of the ENP a new financial instrument, the European Neighbourhood and Partnership Instrument (ENPI), was introduced. This instrument was to finance the activities with the Neighbours that had previously fallen under two different budget

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[18] This information was received during an interview with Europeaid officials in May 2007. They were very helpful in providing me with a number of statistics on Twinnings in the ENP countries.

[19] This information was also contained in an information leaflet I received from Europeaid on the occasion of the interview in May 2007.

lines, TACIS in the former Soviet Union and MEDA in Mediterranean countries. The major part of ENPI funding goes to financing bilateral technical assistance activities in the neighbouring countries. The ENPI also contains a regional envelope for cooperation in both the East and the South, a cross-border cooperation instrument for financing activities in border regions including both member states and non-member states and an inter-regional cooperation initiative. Moreover, a Governance Facility has been introduced in the ENP. This instrument allocates additional financial assistance to countries that are willing to introduce reforms in the governance area.

External assistance under the ENPI is subject to a multi-annual programming cycle. Every six years the EC drafts Country Strategy Papers, which elaborate the assistance priorities for the following six years; in spring 2007 the documents for the years 2007-2013 were released. These documents are adopted following consultations with the partner countries and the other international donors. The National Indicative Programmes set out the priority areas of assistance for a three-year period, and they allocate the amount of funds to be distributed to specific projects. The Annual Work Programmes further specify the Indicative Programmes and allocate the funds to the projects that will be carried out during the following year. There are different modalities for providing technical assistance to non-member states, but for the most part private counterparts (consultants or international organisations, etc.) carry out the activities. The main criticisms of the current funding system focus on the rigidity of the system, preventing the money from being allocated flexibly in the case of an emergency. Moreover, there are a number of problems concerning the limited absorptive capacity of the partner countries and the amount of time that the whole process takes.

Although it is difficult to compare the sums attributed to JHA technical assistance across the ENP countries, some interesting conclusions can be drawn from the overview provided in Annex II. The fact that justice projects feature prominently in the democracy/governance component in all ENP countries and that JHA is a priority sector for administrative capacity-building and regulatory alignment in the Neighbourhood reveals that JHA-related funding constitutes an important part of ENPI assistance overall. This observation is confirmed, if we consider the number of projects financed under the regional and the cross-border programmes of the ENPI dealing with JHA issues. Indeed, the projects in the regional programmes lay a strong emphasis on networking law enforcement authorities in the respective regions, so that they can combat common challenges in a more efficient manner. In addition, the management of external borders is an important priority in the cross-border cooperation programmes. These programmes are meant to intensify the contacts between the ENP countries and their immediate neighbouring countries in the EU.

Apart from the funding granted under the geographic budget lines, technical assistance can also be financed through the thematic budget lines. Amongst the

thematic budget lines the one on migration and asylum is most directly linked to activities in the JHA field. The thematic budget line on migration and asylum supports activities in the neighbouring countries that are aimed at enhancing their protection capacities, fighting irregular migration and accompanying readmission agreements, promoting well-managed labour migration, fostering the links between migration and development and protecting migrants against exploitation and exclusion exclusion (European Commission, 2006e). The thematic budget line on human rights, which is going to replace the EIDHR, will make funds available for projects in the area of criminal justice. The granting of these 'human rights' funds is different from the traditional technical assistance under the ENPI, as the disbursal of funds is not made dependent upon the consent of the partner countries' authorities (Council of the European Union, 1999). Hence the money can be used to finance access to justice projects supporting NGOs or bar associations. Lastly, under Article 4 of the Stability Instrument, the EC can make available technical and financial assistance in the context of stable conditions for cooperation in the pursuit of specific aims, such as "threats to law and order, to the security and safety of individuals, to critical infrastructure and to public health" (Council of the European Union, 2006: 4). Article 4 makes explicit reference to the possibility of funding activities in the area of counter-terrorism, narcotics, customs and immigration law and law enforcement issues more generally.

The lack of a specific funding instrument attributed to funding the external dimension of JHA is one of the major obstacles to its realisation. One way in which JHA specific money can be made available to non-member states is through the internal programmes, on law enforcement cooperation. Under these programmes organisations (governmental and non-governmental) in the EU member states can apply for implementing a project in which they cooperate with partner organisations from ENP countries. The difficulty for non-member states is that under these calls for tender they cannot submit project proposals themselves; they are dependent on EU member states asking them to join. When a topic is of interest to both an ENP and an EU country, this type of cooperation does occur, such as the AGIS projects on anti-trafficking in which EU member states cooperated with Moldova and Ukraine. A further example for an internal instrument that includes a reference to non-member state participation is the call launched under the 'Commission programme for the prevention of and response to violent radicalisation'. This programme description specifies:

> *Trans-national projects of the type described above aimed at tackling violent radicalisation, which involve partners in at least two member states or at least one member state and an applicant country or a country within the Euro-Med region, will be given preference*[20].

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[20] http://ec.europa.eu/justice_home/funding/2004_2007/radicalisation/doc/call_2007_en.pdf, page 4. Consulted on 15 June 2007.

A number of interviewees in the European institutions confirmed that a lack of financing was one of the major problems in realising the external dimension. The current system makes the funding of JHA-related projects entirely dependent upon the money managed by RELEX. There is apparently an ongoing debate on whether more JHA 'internal' money could be made available for cooperation with non-member states.

In the area of technical assistance, we once again find evidence for the existence of an interesting mix of measures based on the logics of conditionality and social learning. A further interesting finding in the context of funding is the difficulty that the EU is facing in establishing financial instruments to pay for JHA specific measures in the external dimension. In the next section, we will flag some of these JHA-specific tools.

4.4 Inter-governmental negotiations

In the context of enlargement, 'gate-keeping' refers to the process of granting or refusing a candidate country to reach the next stage in the accession process. It is the most powerful instrument that the EU can use to foster compliance on the side of the partner states. In the interactions with the ENP countries, the EU cannot use this tool, as there is no accession prospect for the countries concerned. In fact the ENP was explicitly conceived as an alternative to, and not a preparation for enlargement, although recently the ENP official language has changed. In the case of European (i.e. Eastern) neighbours, future membership is not completely ruled out in future. So when it comes to negotiating on JHA issues with ENP countries, the EU has to find ways of devising package deals that contain sufficiently attractive incentives for the partner country to adopt their behaviour to the EU's demands. Within the ENP a certain amount of issue linkage takes place, as progress in one area can be rewarded with a concession in another area. For example cooperation on the environment can be rewarded by facilitating access to the internal market. Although inter-linkage between issues is always an option for the EU, at times the partner countries explicitly ask for concessions on the issue area under discussion. For example in the case of negotiations on JHA the partner countries frequently ask for rewards in this area. The incentives the EU can offer in the JHA area are money, mobility partnerships and capacity-building. It is important to note that negotiations only occur in issue areas in which both sides, the EU and the partner country, have a strong interest and when both have something to offer to the other party. In the next section we will take a closer look at two case studies, irregular immigration and terrorism, which will show us how the EU devises package deals that are supposed to respect the wishes of both parties.

4.5 Two mini-case studies

4.5.1 Irregular Immigration

In the area of irregular migration, the EU has declared the negotiation of readmission agreements as a priority matter in the relations with the ENP countries. The objective of concluding a readmission agreement with Morocco has led to the convening of at least nine rounds of negotiations[21], but for the time being no agreement has been finalized (Bouteillet, 2003). Morocco has demanded a number of concessions, amongst them visa facilitation and a substantial increase of funds devoted to socio-economic development. Furthermore, it has demanded an increase of funds to deal with the transit migrants from Sub Saharan Africa. A number of participants in the negotiations with Morocco have confirmed that these talks have contributed to the elaboration of the so-called 'global approach' on migration, which the EU has been advocating since the Hampton Court Summit in November 2005. The global approach constitutes an explicit attempt to devise package deals in the area of mobility. It tries to satisfy the demands of the EU and those of the partner countries. In other words, it strives to balance the EU's desire to get the partner countries to do more in the fight against irregular migration with the partner countries' demands for opening channels of legal migration, visa facilitation and socio-economic development.

The policy discourse surrounding the need for a more comprehensive, balanced or global approach to migration is by no means a novelty in the EU, but it has only led to the elaboration of concrete policy measures in recent times. In terms of the production of policy papers, the global approach has been developing at an astounding speed over the last two years. The first document to be published was the Commission Communication following up the Hampton Court European Council Conclusions (European Commission, 2005b). This document focuses specifically on cooperation with the Mediterranean neighbours and the African states. It was complemented by a Communication on 'one year on in the implementation of the global approach' (European Commission, 2006f), which draws up a balance sheet of the first year of implementation of the global approach. The process of elaborating the global approach culminated in the adoption of two Communications, one on circular migration migration (European Commission, 2007b) and one on applying the global approach to the neighbours in the East and the South-East (European Commission, 2007a) in May 2007. These documents cross-reference to the other texts, and hence we are led to conclude that the four Communications together express the global approach.

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[21] At the end of November 2005, eight rounds had taken place and in May 2006, a ninth one was convened (see http://www.libertysecurity.org/article614.html for details at the end of 2005). Consulted on 16 June 2007.

The Communication on circular migration and migration partnerships lists a number of concessions in the area of irregular migration that the EU demands from the partner countries (readmission, border management, exchange of information), and it enumerates the commitments that the EC and the member states could possibly make. In this context the Communication recommends improving channels of legal migration to the EU (mainly for seasonal workers and the highly skilled), establishing mechanisms for matching labour supply and labour demand, providing migration capacity-building and on the issuance of multiple entry visas for certain categories of people. Since the relations on migration questions are more advanced with the Eastern neighbours, we will take a look at how the global approach has materialised in the relations with these countries. Overall we find a strengthened commitment on the side of the partner countries to intensify the fight against irregular migration, expressed through their willingness to sign readmission agreements with the EU, and to conclude working arrangements with Frontex. In return the EU commits itself to providing technical assistance, capacity building, visa facilitation, visa policy and mobility partnerships.

In terms of concrete realisations one needs to mention firstly, the signing of a readmission and visa facilitation agreement with Ukraine. In the margins of the EU-Ukraine Cooperation Council, a readmission agreement was signed with Ukraine on 18 June 2007. The readmission agreement sets out obligations and procedures for the authorities of both Ukraine and the respective EU member state as to when and how to take back people who are illegally residing on their territories. The readmission obligations cover nationals from Ukraine, the EU member states and those from partner countries and stateless people. With respect to the latter two categories, a transitional period of two years was agreed upon, before Ukraine has to readmit these categories of people. The agreement also contains safeguards with regard to data protection and the protection of fundamental human rights[22]. To ease the strain on the readmission obligations for the Eastern neighbours, the EU is increasing the financial assistance provided to these countries in the area of migration and asylum. One area in which the lack of resources is particularly pronounced is that of reception facilities for asylum seekers and irregular migrants. Provided the identified gaps in the asylum systems that result both from a lack of resources and other protection related difficulties, the EU has developed the concept of Regional Protection Programmes (RPP) to tackle asylum issues in a comprehensive manner. RPP combine elements of capacity-building, support for infrastructures and training on human rights. A pilot RPP is being set up in Ukraine Ukraine (European Commission, 2005c; Human Rights Watch, 2006).

In return for the readmission agreement, an agreement on visa facilitation was signed. The latter agreement limits the fee for a visa application to €35, which is definitely cheaper than the €60 foreseen in the Common Consular Instructions Instructions

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[22] http://soderkoping.org.ua/page14834.html. Consulted on 16 June 2007.

(Boratynski et al., 2006; Szymborska, 2007: 278-279). Moreover, the agreement indicates that some Ukrainian citizens, in particular minors, disabled and others, can be exempt from paying the application fees. The Agreement also stipulates that all applications must be handled in a time frame of 10 days, whereby in individual cases this can be extended to 30 days. The difficulty with this rule is that it does not start counting on the day on which the person had the first contacts with the embassy of a Schengen state. It is indeed this pre-submission process that is cumbersome for the applicants, provided that all of the documents then need to be collected. Lastly, the agreement allows for granting certain categories of Ukrainian citizens, close relatives, lorry drivers, people on business, students, journalists and members of official delegations, multi-entry visas to the EU. For these categories the agreement also reduces the number of documents that are required to complete the visa application process. On the downside the analysts note that in the eyes of the Ukrainian population the agreement discriminates between the few who can benefit from the simplified visa procedure, and the ordinary citizen, who cannot. In Ukraine this seems to be interpreted as a sign that the EU prefers cooperating with the Ukrainian elites instead of the population .

Secondly, with respect to operational cooperation, the EU provides direct assistance to Moldova and Ukraine. Operational assistance is provided through the EU Border Assistance Mission, EUBAM, which the involved parties consider a success so far[23]. Operational cooperation is also being strengthened through the conclusion of Frontex working arrangements with the Eastern partner countries. Indeed, Frontex has the capacity to enter into agreements with non-member countries (Carrera, 2007; Jorry, 2007). According to Article 14 of the Frontex regulation, the Agency "shall facilitate the operational cooperation between member states and non-member states, in the framework of the European Union external relations policy" (Council of the European Union, 2004c: 5). The neighbouring countries are second in line after agreements have been concluded with the accession and candidate countries. The first step in establishing relations with Frontex is the conclusion of a working arrangement (protocols and/or memoranda of understanding). The first-ever working arrangement was concluded with Russia in November 2006. In the margin of the JHA Council in June 2007, a working arrangement was also concluded with Ukraine. According to S. Carrera (2007: 18), informal contacts have also been established between Morocco, Algeria, Egypt and Lebanon. Before Frontex operations can take place, bilateral agreements need to exist between the country in charge of the operation and the neighbouring countries, but unfortunately the content of these agreements is not publicly known (Carrera, 2007: 20).

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[23] See Joint Press Release by the Border Control and Law Enforcement Services of Moldova and Ukraine and the European Union Border Assistance Mission at http://www.delukr.ec.europa.eu/press_releases.html (retrieved 4 July 2007). Confirmed during interviews in Brussels in May 2007.

Thirdly, the EU is attempting to make concessions with respect to facilitating the arduous visa procedures. The agreement on visa facilitation initialled with Moldova on 25 April 2007, introduces a number of aspects aimed at easing the visa issuing procedure[24]. For example the agreement foresees the creation of a Common Visa Application Centre. The Common Visa Application Centre, which is located in the Hungarian embassy in Chisinau, has been joined by Austria, Slovenia, and Latvia, and in the future Denmark and Estonia. This Centre will deliver Schengen visas to Moldavians on behalf of the aforementioned EU member states. Provided that many of the participating countries do not have diplomatic or consular representations in Chisinau, this Centre will provide an opportunity for Moldovan citizens to lodge an application in their country. They no longer have to travel to Ukraine or Romania to apply for a Schengen visa.

On the whole the EU is trying to make concessions on visa policy, because it knows that the issue of mobility is crucial for the neighbouring countries (Grabbe, 2000; Jileva, 2003). The Commission acknowledges this in the Communication on enhancing the relations with the ENP countries . The analysis of the realisation of the global approach in the relations with the Eastern neighbours reveals that the EU is using a number of instruments in the field of migration to make cooperation more attractive for the partner countries. The EU is providing the partner countries with know-how and support on how to manage migration and asylum in the framework of the Regional Protection Programme, it is attempting to facilitate movement between the EU and the partner countries, and it offers operational support for border management, as in the case of EUBAM. On the whole the negotiations on irregular migration are characterised by an interesting mix of material incentives and the promotion of soft skills. It remains to be seen how successful this strategy will be in fostering change in the behaviour of the partner countries.

4.5.2 Terrorism

European Commissioner Franco Frattini has proclaimed that "we must build a network of security against the network of terror" . One component of this 'network of security' is the establishment of closer contacts with the partner countries in the Neighbourhood. One of the main techniques in this regard is the intensification of political dialogue. For the time being the EU has chosen a two-pronged approach to the fight against terrorism in the Mediterranean, a multilateral and a bilateral one. In the framework of the 'Barcelona plus Ten' meeting in November 2005, the EU

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[24] On the Agreement with Moldova see: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/153&format=HTML&aged=0&language=EN&guiLanguage=en. Consulted on 2 July 2007.

adopted a 'Code of Conduct' in the fight against terrorism[25]. Whilst the Code has been criticised for containing neither a definition nor any concrete obligations to enhance effective international cooperation, it is nonetheless important, because it contains a commitment by the Barcelona process participants to condemn all forms of terrorist acts and it reiterates their intention to tackle the causes of terrorism and radicalisation (Bicchi & Martin, 2006; Reinares, 2006). Moreover, it lists a number of international instruments and standards, mainly concluded in the framework of the UN that the partners need to respect in the fight against terrorism. That this fight is not always carried out in accordance with international human rights standards has been pointed out on numerous occasions by human rights organisations, such as Amnesty International and Human Rights Watch[26].

On the bilateral level we have witnessed the insertion of clauses on counter-terrorism cooperation in agreements with non-member states. These clauses are modelled on the Standard Counter-Terrorism clause agreed by Coreper (Council of the European Union, 2004a)[27]. The clause reiterates the commitment of the parties to intensify their fight against terrorism. Moreover, the clauses acknowledge that the UN documents should serve as a reference point in the fight against terrorism. In addition the clauses contain a commitment by the states to enhance the exchange of information on terrorist groups and the exchange of views on the means and methods used to fight terrorism[28]. The list of countries with which the EU has sought to include a counter-terrorism clause, has not been made public to date. A counter-terrorism clause has been inserted in the Association Agreement concluded with Algeria, and in an exchange of letters on the fight of terrorism with Lebanon[29]. Moreover, all ENP Action Plans contain an action on enhancing the fight against terrorism.

In exchange for enhanced political dialogue on terrorism, the EU offers to increase the exchange of information and the transfer of best practices with and to the Mediterranean countries. In this regard the EU can offer the conclusion of cooperation agreements with the agencies and coordinating bodies, Europol and Eurojust. The ENP countries have explicitly voiced their interest in expanding these contacts with the EU . Europol can conclude strategic and operational agreements with non-member states based on the Council Decision of 27 March 2000 and the subsequent updates extending the range of countries to Moldova, Ukraine and Morocco (Council of the

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[25] http://ec.europa.eu/external_relations/euromed/summit1105/terrorism.pdf. Consulted on 17 June 2007.

[26] See for example Amnesty on the Algerian authorities
http://web.amnesty.org/library/Index/ENGIOR610062002?open&of=ENG-2D3. See also Wolff, 2006a.

[27] 'Coreper' is The Permanent Representatives Committee (Article 207 of the Treaty establishing the European Community). Coreper is responsible for preparing the work of the Council of the European Union. It consists of the member states' ambassadors to the European Union ('Permanent Representatives') and is chaired by the member state that holds the Council Presidency.

[28] http://www.statewatch.org/news/2005/may/eu-terr-clauses.pdf. Consulted on 17 June 2007.

[29] http://ec.europa.eu/external_relations/news/patten/sp02_288.htm. Consulted on 17 June 2007.

European Union, 2004b; Europol, 2004c). The main difference between an operational and a strategic agreement relates to the exchange of personal data. Under a strategic agreement the exchange of personal data is not possible, whilst it can be done under the terms of the operational agreement (Rijken, 2001). The only ENP country with which the negotiations on a strategic agreement have been concluded is Moldova. Most ENP partner countries have expressed their interest in negotiating operational agreements with Europol, but for this to happen a number of obstacles in the area of data protection need to be eliminated (Europol, 2004b).

In the area of judicial cooperation the EU offers the Mediterranean countries opportunities to enhance the contacts between magistrates and judges on both sides of the Mediterranean. The main incentives the EU can offer in this area are Eurojust cooperation agreements and the setting up of European Judicial Network contact points (EJN). Eurojust can negotiate cooperation agreements with non-member states. For the time being Eurojust has not concluded any agreements with Mediterranean countries, as data protection continues to constitute a problem in all ENP countries (Council of the European Union, 2007b). In the absence of a cooperation agreement Eurojust can convene – subject to a unanimous vote of the Eurojust College of Prosecutors – a meeting with prosecutors from a partner country, if there is evidence that cooperation with that country is necessary for prosecuting a case of cross-border crime. Apparently such working meetings have been convened with Morocco on terrorism. The legal basis for convening such meetings is the existence of bilateral agreements on mutual legal assistance between EU member states and the respective non-member countries. This is possible, because Eurojust prosecutors are endowed with the same powers as national prosecutors. They can hence rely on the mutual legal assistance agreements concluded between the non-member country and their member state of origin. Lastly, there exists the option of establishing EJN contact points in ENP countries through which judicial contacts between the EU states and the ENP countries can be facilitated.

Apart from promising more exchange of information on terrorism, the EU is also an active provider of capacity-building in the fight against terrorism at the bilateral and at the multilateral level. At the bilateral level the ENP countries are among the main beneficiary countries of counter-terrorism technical assistance projects. In fact, Algeria and Morocco were the two countries in which pilot projects on counter-terrorism were conducted conducted (Council of the European Union, 2007a). These projects focus on administrative capacity-building; they normally concentrate on police cooperation, justice cooperation, customs cooperation and border management. The projects normally also include efforts to upgrade anti-money laundering legislation and activities on combating the financing of terrorism. It is at times difficult to clearly separate technical assistance on terrorism from that provided to combat other forms of organised and economic crime[30].

At the regional level we find the Euromed Police and Justice projects. The Euromed Police project is being implemented by the European Police College (European Police College, 2006). Little information is available about this programme. What is known is that the CEPOL project focuses on transmitting best practices in the area of policing to the Mediterranean partner countries.31 A short glimpse at the Euromed Synopses confirms that the fight against terrorism is one of the issues on which training sessions have been carried out[32]. In the framework of the Euromed Justice regional project the EU cooperates with the European Institute for Public Administration, EIPA, in carrying out seminars on a number of questions related to terrorism. A strong focus in the Euromed Justice programme has been laid on prosecuting the financing of terrorism. The seminars are geared towards high-level magistrates in the ENP countries. They should then disseminate the knowledge they gained in these seminars to the lower-level judges in their home countries[33].

One the whole in the fight against terrorism we observe a tendency on the side of the EU to intensify contacts with the Mediterranean countries on the bilateral and the regional level. In exchange for political dialogue on terrorism the EU offers an intensification of information exchange, technical assistance and capacity-building for the law enforcement authorities in the partner countries. For the most part the EU has to rely on transmitting 'software' to the partner countries in the form of dialogue and capacity-building. The reason for this is that the 'hardware', such as infrastructure support, intelligence, military, policemen and gendarmes, are not part of the EU competences. Good contacts with the member states are indispensable in the international fight against terrorism, because many partner countries are interested in the 'hardware', which only the member states can provide.

These sections on negotiations have showed that in the areas of both irregular migration and terrorism we witness an increased reliance on instruments of social learning to make the partner countries more willing to cooperate with the EU. It remains an open question whether these incentives will really entice the partner countries to change their behaviour. It also became apparent in this section, that when coming up with 'incentives packages' the Commission is constantly confronted with its limits in terms of competence. All of the documents issued on the global approach and on the fight against terrorism manifest the enormous caution with which the Commission goes about cooperation in this area.

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[30] Information received from Commission official in May 2007.

[31] CEPOL is the European Police College. CEPOL brings together senior police officers across Europe with the aim to encourage cross-border co-operation in the fight against crime, public security and law and order.

[32] See for example the Euromed synopsis of 4 March 2004: http://ec.europa.eu/external_relations/euromed/synopsis/synopsis262_en.pdf. Consulted on 4 July 2007.

[33] Information on Euromed Justice can be retrieved from the following website http://www.eipa.eu/en/topics/show/&tid=159. Consulted on 4 July 2007.

5. Conclusions

This paper has attempted to convey the message that the ENP is a multi-layered policy. In fact one could allege that the ENP is an umbrella that has come to encompass a number of different policy objectives and instruments under one and the same heading. The ENP is an amalgamation of different policy objectives and instruments that need to be analysed and considered in their own right. The argument on the multi-layered nature was made by taking a look at the origins and the major policy documents making up the policy. The argument was advanced that since the outset two discourses have surrounded the ENP, one that considers it a security initiative and another that sees it as a broader socio-economic transformation project. These two discourses translate into conflicting strategies: firstly, a long-term strategy of enhancing security by promoting democracy and the rule of law in neighbouring countries and secondly, a short-term one that advocates punctual short term measures to strengthen the capacities of law enforcement authorities to tackle a broad range of threats spanning the entire security continuum. It is at the level of the policy objectives that political guidelines need to be formulated that take into account the potential trade-offs between the two objectives.

Despite these opposing logics the paper goes on to allege that there is a unifying objective that is common to all JHA measures. Indeed, the objective of 'extraterritorialising' the management of internal security threats to the neighbouring countries permeates the entire policy initiative. There are, however, two different logics of action that underlie the extraterritorialisation objective, one draws on conditionality and the other one on social learning. The paper goes on to show that the four categories of conditionality instruments are also inspired by social learning.

The most interesting finding of this paper pertains to the enormous diversity that we find in the relations with the various partner countries. In fact the practice with respect to benchmarking and monitoring of progress differs from country to country. At the one extreme we find focused discussions, such as with Ukraine, whereas at the other end, exemplified by Tunisia in this study, there is no dialogue for the time being. The way in which progress is monitored combines elements of conditionality and social learning. At the level of the transfer of legislative and institutional models, we find an attempt to entice the ENP countries into incorporating EU or international standards in their domestic legislation. The 'flanking measures' accompanying legislative approximation are Twinning and TAIEX. With respect to the implementation of these instruments the EU strives to achieve a high level of co-ownership and dialogue. Respecting the partnership principle is important, because

it is only in this way that the EU can adapt the instruments to the circumstances in the partner countries. A third finding was that the amount of technical assistance and funding dedicated to JHA measures in ENP partner countries has substantially increased over the last years, as the section on funding the external dimension of JHA illustrated. Lastly, in the context of technical assistance we find an interesting mixture of norms transfer and capacity-building, which is by definition inspired by conditionality and social learning.

The paper spends some space elaborating on the fourth conditionality-inspired instrument, namely that of negotiations. It has been argued that negotiations with ENP countries need to focus on the costs and benefits within specific sectors, as there is no membership prospect that outweighs the costs of making concessions in any one given sector. The EU draws up package deals to get partner countries to cooperate on the questions of irregular immigration and terrorism. As a matter of fact, the EU mixes a number of material incentives and soft measures, such as capacity-building, to influence the partner country's cost/benefit calculation. In the area of irregular migration the EU has proved some creativity in providing incentives that might be of interest to the partner countries. On terrorism-related questions, however, the range of incentives is more limited; this is probably a consequence of the absence of EU competence in this field. Overall this overview of negotiations concludes that it remains to be seen if the incentives are strong enough to entice the partner countries to adapt to the EU's demands.

What comes to the fore in the whole paper is the enormous diversity that the common policy framework, ENP, has to accommodate. This diversity constitutes an obstacle to the EU's capacity to project itself as an actor in the international arena. The analysis reveals that there are major differences across policy issues and countries. It is an open question whether, as time passes, the differences will narrow or whether they will become more accentuated. A number of interesting research tasks result from this alleged diversity. There is indeed a need for analysts to carry out rigorous comparative work identifying which factors account for the variation between the countries and the issue areas, and specifying the conditions under which successful JHA cooperation can emerge.

6. Policy Recommendations

This analysis of the JHA elements in the ENP has led us to formulate a number of policy recommendations:

- The EU should draft an Action-Oriented Paper (AOP) on Cooperation with the ENP countries that provide us with a better insight into what the EU is doing in this area. The AOP should also include references to the state of security-sector governance in these countries (judicial oversight, questions of accountability). It would be desirable that, in parallel to the AOPs, human rights compliance reports would be released on the countries with which the EU is seeking to expand cooperation on JHA issues[34].

- The idea of drawing up an AOP on counter-terrorism cooperation with the Mediterranean countries should be pursued. The fight against terrorism is the area in which the tensions between the various objectives are most likely to occur.

- In terms of the monitoring and benchmarking provisions, the EU should consider moving towards the Ukraine JHA Action Plan model with all countries, as this seems to provide a fruitful framework for dialogue.

- If the EU is serious about building an external dimension to JHA it will have to think about the financing of these activities. It cannot continue to be entirely dependent on the external relations financial instruments.

- As regards negotiations one is led to conclude that the EU will need to make more substantial concessions on JHA issues to change the cost/benefit calculations of the partner countries. The Commission Communication on mobility partnerships and circular migration undeniably constitutes a step in the right direction, but for it to produce tangible effects it probably has to offer more. For obvious reasons the question of the incentives is intrinsically linked to that of competence distribution between the EU and the member states. It is a well known fact that such questions can only be addressed in a more comprehensive framework, that of Treaty Reform.

- There is a need to increase the dialogue between the various actors involved in the ENP and the external dimension of JHA. The flow of information between the strategic level at which the policy objectives are formulated and the level of policy implementation needs to be enhanced. This would allow for a more coordinated use of the entire spectrum of policy instruments. It is imperative that the EU do this, if it wants to be taken seriously as an international actor.

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[34] This recommendation is voiced in the draft report of the EP LIBE Committee (European Parliament - Committee on Civil Liberties and Justice and Home Affairs, 2007).

Annex I. Legislative approximation efforts[35]

Relevant international conventions in the areas of asylum & trafficking in human beings

Country	Refugee Status Convention 1951		Protocol on Refugee Status 1967		European Convention on Human Rights 1951		Organisation of African Unity Refugee Convention	
	Signed	Rat. Acc(a) Succ(d)	Signed	Rat. Acc(a) Succ(d)	Signed	Rat.	Signed	Rat.
Algeria		1963d		1967a				1974
Armenia		1993a		1993a		2002		
Azerbaijan		1993a		1993a		2002		
Belarus		2001a		2001a				
Egypt		1981a		1981a				1980
Georgia		1999a		1999a		1999		
Israel		1954		1968a				
Jordan								
Lebanon								1981
Libya								
Moldova		2002a		2002a		1997		
Morocco		1956d		1971a				1974
Syria								
Tunisia		1957d		1968d				1989
Ukraine		2002a		2002a				

International conventions on fighting trafficking in human beings

	International Convention on Transnational Organised Crime (Palermo Convention)	Optional Protocol on Trafficking in Persons, particularly Women and Children
Algeria	2002	2004
Armenia	2003	2003
Azerbaijan	2003	2003
Belarus	2003	2003
Georgia	2006	2006
Egypt	2004	2004
Israel	2006	signed in 2001, not ratified
Jordan	signed in 2002, not ratified	not signed
Lebanon	2005	2005
Libya	2004	2004
Moldova	2005	2005
Morocco	2002	not signed
PA	N/A	N/A
Syria	signed in 2000, not ratified	signed in 2000, not ratified
Tunisia	2003	2003
Ukraine	2004	2004

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[35] These tables have been adapted from (Lavenex & Wichmann, 2006).

International conventions and monitoring mechanisms on corruption

	United Nations Convention Against Corruption 2003	Council of Europe Criminal Law Convention	Council of Europe Civil Law Convention	GRECO[36]	OECD Anti-Corruption Network for Transition Economies (ACN)
Algeria	Ratification				
Armenia	Ratification	Ratification	Ratification	x	x
Azerbaijan	Ratification	Ratification	Ratification	x	x
Belarus	Ratification				
Egypt	Ratification				
Georgia		Signature	Ratification	x	x
Israel	Signature				
Jordan	Ratification				
Lebanon					
Libya	Signature				
Moldova	Signature	Ratification	Ratification	x	
Morocco	Ratification	-	-		
Palestine		-	-	-	-
Syria	Signature	-	-		
Tunisia	Signature	-	-		
Ukraine	Signature	Signature	Ratification	x	x

International instruments on money laundering*

	Compliance with FATF Recommendations	1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime	1999 UN Conv. on Financing of Terrorism	Membership in a Peer Review Mechanism
Algeria			Ratification	MENA-FATF
Armenia	Partially	Yes	Ratification	Moneyval
Azerbaijan	Partially	Yes	Ratification	Moneyval
Belarus			Ratification	Eurasian Group
Egypt	Yes		Ratification	MENA-FATF
Georgia		Yes	Yes	Moneyval
Israel	Yes		Ratification	
Jordan			Ratification	MENA-FATF
Lebanon	Yes		No	MENA-FATF
Libya			Ratification	
Moldova	No	Yes	Ratification	Moneyval
Morocco			Ratification	MENA-FATF
Syria			Ratification	MENA-FATF
Tunisia			Ratification	MENA-FATF
Ukraine	*Yes*	Yes	Ratification	Moneyval

* Information retrieved from 2007 Report of US State Department can be found on
http://www.state.gov/p/inl/rls/nrcrpt/2007/vol2/html/80886.htm

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[36] The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards.

Annex II. Funding the JHA elements in ENP countries

Country	Total allocation (mio euro)[1]	JHA allocation (mio euro)	Specification of activities
Algeria	220	17 24	Justice project Supporting activities to the Association Agreement (migration, organized crime related measures mentioned)
Armenia	98.4	29.52 Democracy/ Good Governance 29.52 Regulatory Reform and Administrative Capacity Building	Justice listed as one sub priority JHA (border management and migration) mentioned as areas in which administrative capacity building is necessary
Azerbaijan	92	30 Democratic Development/ Good Governance	Rule of Law and Justice Reform listed as one priority. Also mentioning of public sector reform to enhance fight against corruption and fight against organized crime
Belarus	20	14 Social and Economic Development	Administrative capacity building on JHA issues mentioned as a possible target for support
Egypt	558	10 13	Modernisation of Administration of Justice and enhancement of security Good Governance and Decentralisation (fight against corruption one element)
Georgia	120.4	31 Democracy, Rule of Law and Governance	Sub priority 2 on Rule of Law and Criminal Justice Reform. Sub priority 3 on Good Governance and Administrative Capacity Building (incl. fight against corruption).
Israel	8	2 *acquis* related activities in key ministries	JHA mentioned as one sector in which Israelis are interested in cooperating.
Jordan	265	17 Political reform, democracy, human rights, good governance, justice and co-operation in the fight against extremism 30 Good Governance, Transparency, Regulatory alignment	JUST – strengthening capacity of the judiciary Support to Amman message (against terrorism and extremism) Support to implementing Action Plan Programme (fight against corruption, organized crime, terrorism and financing of terrorism).
Lebanon	187	10 sub-priority 2 on Justice, Liberty and Security. Support efficiency and independence of the judiciary	Activities in area of justice reform and penitentiary reform.
Libya[2]	8		
Moldova	209.7	52-73 Supportfor Democratic Development and Good Governance 31-41 Administrative capacity-building and regulatory reform	Activities in the area of justice reform and fight against corruption are mentioned. The areas of asylum/migration and border management are mentioned in this context.
Morocco	654	20 Governance and human rights 50 Vocational Training	Support for Ministry of Justice One of the measures to combat sources of emigration in the long run
Palestinian Authority[2]	632		

Country	Total allocation (mio euro)[1]	JHA allocation (mio euro)	Specification of activities
Syria	130	10	Modernising the judiciary
Tunisia	300	30 for Policy Action Plan	Covers the sections of the ENP AP not included in the following NIP (e.g. JHA)
Ukraine	494	148.2 Support for Democratic Development and Good Governance 148.2 Support for administrative capacity building and regulatory reform 197.6 Support for infrastructure development	Rule of law and judicial reform programme Mentioning of migration/asylum and border management as priority sectors Border management figures as one of the sub priorities in this regard.
Regional Programmes Mediterranean Eastern Europe	343 223.5	13 Justice, Security and Migration 20-30% allocated to Border and Migration Management, the Fight against Transnational Organised Crime, and Customs (20-30%)	
ENPI Cross Border Cooperation Initiative	583		Border management and addressing common challenges
Thematic budget line for enhancing cooperation with countries on migration matters[4]			Commitment that up to 3% of ENPI will be made available for migration related issues[3]
Stability Instrument[4]			Contains provisions on financing activities in the areas of terrorism and organized crime
Thematic budget line on human rights[4]			Some activities on access to justice can be financed under this budget line.

[1] Information retrieved from: http://ec.europa.eu/world/enp/pdf/country/0703_enpi_figures_en.pdf (consulted on 13 June 2007).

[2] Planning figures only. Since medium-term programming is not possible for the Palestinian Authority and Libya, no Strategy Papers and Indicative Programmes have been adopted. Co-operation with Libya will only be fully activated when necessary preconditions are in place.

[3] Reference to this number can be found in the one year update to the global approach on migration (European Commission, 2006d).

[4] The thematic programming documents are not yet available at time of writing (19 June 2007).

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