

**THE COMMON FOREIGN AND SECURITY  
POLICY OF THE EUROPEAN UNION AS A  
SYSTEM OF GOVERNANCE:**

**THE EURO-MEDITERRANEAN PARTNERSHIP**

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## Abstract

The Common Foreign and Security Policy (CFSP) of the European Union (EU) has often been characterised by legal scholars as an intergovernmental ‘pillar’ within the constitutional structure of the EU, distinct from the type of law and legal processes common to other dimensions of the European integration process. The perceived limitations caused by the intergovernmental nature of the CFSP have contributed to the widespread view that it is largely ineffective in meeting its goals. This thesis analyses the CFSP by characterising it as a system of governance. Building on the language and meanings of ‘governance’, an institutional constructivist framework of legal analysis is developed. Using this framework helps to show that characterising the CFSP in this way demonstrates how its (legal) effects go beyond the instruments provided for in the Treaty on European Union. The CFSP as a system of governance can be seen to influence other Union-level instruments, tools and policies in which the EU’s foreign policy goals are pursued. The case is made that the CFSP can be understood as an integral part of the constitutional order of the EU and legal analysis need not be limited to the competences and instruments found in the Treaty.

The thesis uses the Euro-Mediterranean Partnership (EuroMed) to demonstrate how the EU’s foreign policy goals are pursued. Although EuroMed was not formally created by a CFSP instrument, analysis of its institutional framework and operation shows that it bears close affinity with the CFSP goals, both globally and towards the Mediterranean. EuroMed can also be seen as a system of governance, in which the EU institutions act as strong, central actors which enable foreign policy goals to be pursued within an institutionalised framework. As a policy area within EuroMed, the broad issues of migration are examined against the background of growing EU competence in migration law and policy. The analysis demonstrates that migration issues have come to the forefront in EuroMed, which is increasingly used as a means by which foreign policy and security goals can be pursued by the EU under the guise of a ‘partnership’ with Mediterranean states. Applying the institutional constructivist framework of legal analysis to the CFSP shows that, as a system of governance, it has strong effects on other policy-making spheres within the EU, and these effects can justifiably be termed as ‘legal’. As such, the CFSP should therefore not be regarded as a policy which is limited in its usefulness but one which can be seen to fulfil its goals through a wider set of means than previously thought.



## Declaration

Pursuant to Regulation 2 of the University of Edinburgh Postgraduate (Research) Assessment Regulations: Academic Year 2008/09, I hereby declare that the research has been completed by myself alone and that the work has not been submitted for any other degree or professional qualification.

Paul James Cardwell

Legal and political developments are stated as at 30 September 2008.

At the time of writing, most EU Member States had ratified the Treaty of Lisbon. However, following the ‘no’ vote in the referendum on ratification held in Ireland on 12 June 2008, entry into force of the Treaty (originally foreseen for 1 January 2009) will be delayed. As it is possible that changes to the text of the Treaty may be made, references to the consolidated versions of the Treaties including the amendments by the Treaty of Lisbon are treated here as conditional on the current text of the Treaty eventually coming into force. Unless indicated otherwise, references to Treaty articles elsewhere in this thesis do *not* take into account amendments by the Treaty of Lisbon. References to the consolidated versions of the Treaty on European Union and Treaty on the Functioning of the European Union (the former EC Treaty) are those published in the Official Journal on 9 May 2008 [2008] OJ C 115/13.



## Contents

<b>Abstract</b> .....	<b>3</b>
<b>Declaration</b> .....	<b>5</b>
<b>Contents</b> .....	<b>7</b>
<b>Acknowledgments</b> .....	<b>11</b>
<b>Abbreviations</b> .....	<b>13</b>
<b>Introduction</b> .....	<b>15</b>
1. The CFSP: objectives and operation .....	20
2. Reforming the CFSP provisions.....	31
3. Aims, methodology, hypothesis and research questions .....	37
4. Structure of the thesis .....	40
<b>Chapter 1: Identifying EU Governance: Terminology, Trends and Challenges</b> .....	<b>45</b>
1. The uses of ‘governance’ terminology .....	46
2. Themes in the system of governance in the EU’s external sphere....	55
i. Institutionalisation.....	56
ii. Overcoming obstacles in operational practices under the CFSP ...	61
iii. From ‘Civilian power Europe’ to the European Security and Defence Policy .....	64
3. Themes in the system of governance in the EU’s internal sphere....	67
i. The Classic Community Method and ‘new modes of governance’. 68	
ii. The Open Method of Coordination .....	70
iii. Characteristics of the new modes of governance and the White Paper on Governance.....	71
4. Overcoming the external/internal division .....	75
Conclusion .....	82
<b>Chapter 2: Approaches to the Analysis of the Common Foreign and</b>	

<b>Security Policy</b> .....	<b>85</b>
1. Legal approaches to the CFSP.....	86
2. Approaches to the CFSP in political science .....	99
Conclusion.....	107
<b>Chapter 3: An Institutional Constructivist Framework of Legal Analysis for the CFSP</b> .....	<b>109</b>
1. Bringing institutions to the fore: institutionalism old and new.....	112
2. Defining an ‘institution’.....	118
3. Refining institutionalism: the construction of social reality .....	128
4. The institutional theory of law.....	136
5. Conclusion: creating an analytical framework.....	144
<b>Chapter 4: The Euro-Mediterranean Partnership as a System of Governance</b> .....	<b>151</b>
1. EuroMed and ‘the Mediterranean’ region.....	153
2. The aims of EuroMed and the relationship with the European Neighbourhood Policy .....	168
3. Institutions and instruments in EuroMed.....	177
i. The EuroMed Conference of Ministers .....	178
ii. The EuroMed Committee.....	181
iii. The EuroMed Parliamentary Assembly (EMPA) .....	183
iv. Independent EuroMed institutions.....	189
v. Instruments coopted by EuroMed: the Association Agreements	191
4. The unilateral dimension: the MEDA and ENPI programmes.....	196
5. Characterising the EuroMed system of governance in the CFSP context .....	200
Conclusion.....	210
<b>Chapter 5: Revisiting the Pillars: EU Migration Law and Policy</b> .....	<b>213</b>
1. Migration Law and Policy at the EU Level .....	218
2. The Treaty of Amsterdam, the Tampere Conclusions and the Hague	



Programme .....	219
i. Borders, the Schengen Area and third-country nationals.....	223
ii. Migrant workers and economic migration .....	224
iii. Family reunification .....	227
iv. Asylum seekers and refugees .....	230
v. Irregular migration, returns, expulsions and readmission agreements.....	238
3. Externalisation.....	243
Conclusion .....	252
<b>Chapter 6: Interaction between EuroMed and Migration Governance</b> .....	<b>255</b>
1. Migration and the Barcelona Process .....	257
2. EuroMed Ministerial Conferences .....	267
3. Euro-Mediterranean Parliamentary Assembly (EMPA) and EuroMed Non-Governmental Platform .....	273
4. Bilateral EuroMed relations .....	275
5. Unilateral mechanisms: MEDA and ENPI funding .....	280
6. Operational dimensions to migration control in the Mediterranean: Frontex, RABITs and Extra-territorial Processing .....	281
Conclusion .....	291
<b>Chapter 7: Conclusion - Governance and the Common Foreign and Security Policy</b> .....	<b>295</b>
1. Migration and the EuroMed system of governance.....	296
2. Practice and Institutional Development in EuroMed .....	303
Conclusion: the Common Foreign and Security Policy as a System of Governance .....	310
<b>References and Bibliography</b> .....	<b>315</b>



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## Abbreviations

ACP	African, Caribbean, and Pacific States
AG	Advocate General of the Court of Justice
CCM	Classic Community Method
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
COREPER	Committee of Permanent Representatives
COREU	<i>Correspondance européenne</i> telex system
EC	European Community
ECJ	European Court of Justice
EMPA	Euro-Mediterranean Parliamentary Assembly
ENP	European Neighbourhood Policy
ESDP	European Security and Defence Policy
EPC	European Political Cooperation
EU	European Union
EuroMed	Euro-Mediterranean Partnership
FSJ	Freedom, Security and Justice
GAERC	General Affairs and External Relations Council
JHA	Justice and Home Affairs
NATO	North Atlantic Treaty Organization
OMC	Open Method of Coordination
PSC	Political and Security Committee
QMV	Qualified Majority Voting
SEA	Single European Act
TEU	Treaty on European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
WTO	World Trade Organization



## Introduction

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.<sup>1</sup>

What did the acronym [CFSP], for which I had consumed so many airline cashew nuts, mean – and what impact might it have had on the lives of British or European citizens?<sup>2</sup>

The establishment of the Common Foreign and Security Policy (CFSP) in the Treaty on European Union (TEU) 1992 represented a major step for the European Union (EU) and its constitutional arrangements. The policy marked a significant leap forwards in attempts to move beyond the EU's minor political role in international *political* affairs when compared to its growing *economic* power. The time, it seemed, had come for the EU to mature beyond economic cooperation between Member States and seek to take its place in the post-Cold War international environment alongside the only remaining superpower, the United States.

The TEU represented, for the first time, the elevation of dispositions on foreign policy to the heart of the Union's constitutional arrangements. The CFSP provisions in the TEU were, however, the product of a gradual process of increasingly regular foreign policy discussions between the Member States since as far back as 1970.<sup>3</sup> The CFSP was the successor to European Political Cooperation (EPC), a discussion forum for the Member States on external affairs and foreign policy, which operated outside the formal competence of the EC Treaty. EPC was given Treaty recognition in

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<sup>1</sup> Article 11(2) TEU.

<sup>2</sup> Chris Patten, former Commissioner for External Relations, 1999-2004. C Patten, *Not Quite the Diplomat* (Penguin, London 2005).

<sup>3</sup> The Council, meeting in Luxembourg on 27 October 1970 approved the Report of the Ministers of Foreign Affairs for the Member States on the question of political integration (the Davignon report), which proposed six-monthly meetings of the Foreign Ministers of the Member States along with the Commission to discuss foreign policy issues.

the Single European Act 1986,<sup>4</sup> but no competence was granted to the Community institutions to propose or carry out foreign policy measures. This can be contrasted with the foreign *trade* policy of the EC/EU which, through the Common Commercial Policy as set out in Article 133 EC, had long since been within the competence of the Community.

The legal provisions of the CFSP were placed within a single institutional framework for the Union at the heart of its Treaty-based constitutional arrangements for the first time in 1992. However, the institutional competences, legal instruments and constitutional principles which had become the hallmarks of the European integration process were not applicable to the CFSP provisions. These include the power of initiative of the Commission in proposing legislative measures, the binding and enforceable characteristics of regulations and directives and the supremacy of EC law over national law as established by the European Court of Justice (ECJ).<sup>5</sup> By consequence, the CFSP immediately came to be viewed as a distinct ‘pillar’ in the constitutional structure of the EU.<sup>6</sup>

The signing of the TEU and the furnishing of the CFSP with specific instruments to put it into practice (Common Positions and Joint Actions)<sup>7</sup> came during a time of great change in the global international order. The focus of much of this change was the demise of the Soviet Union and fall of the ‘iron curtain’ in Europe. Within a short period of time, countries in Central and Eastern Europe, which prior to 1989 had almost no relations with the Community, were expressing their desire to become future Member States. With the EU and its achievements also becoming an increasing focus of international attention due to the moves towards

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<sup>4</sup> Articles 1, 3(2) and 30 SEA.

<sup>5</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>6</sup> B de Witte, ‘The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?’ in T Heukels, N Blokker and M Brus (eds) *The European Union after Amsterdam* (Kluwer Law International, Dordrecht 1998).

<sup>7</sup> As defined in Articles 13-15 TEU. A provision on Common Strategies was added by the Treaty of Amsterdam.



completion of the Single Market and the future plans for Economic and Monetary Union, the opportunity (and some would say the obligation) for Europe to seek a political role to match its growing economic power was certainly present.

Since the entry into force of the TEU, most commentators agree that the CFSP has not fulfilled the goals set out in the Treaty. The initial enthusiasm for a 'mature' EU to assert itself internationally in the post-Cold War environment was quickly lost in the 1990s. Popular perception of the EU is not that of a major foreign policy actor able to respond effectively to the major issues in world affairs whether in the former Yugoslavia, Rwanda or Iraq, nor to define its relationship with allies such as the United States, nor even to back up words with actions. The declaration of independence in February 2008 by Kosovo exposed fundamental differences between Member States in their approaches to recognition or not of its statehood: whilst it is not the EU's role to recognise new states, the terms of the Treaty (for example, Article 16 TEU)<sup>8</sup> suggest that the normal course of action would be for the Member States to act in a unified fashion, rather than an 'agreement to disagree' as was evident from the text of the Council conclusions.<sup>9</sup>

In the absence of the binding legislative measures common to other policy spheres of the EU, the achievement of a *Common* Foreign and Security Policy appears to many as a distant, impossible or irrelevant goal. Member States have resisted pooling sovereignty in the CFSP to a much greater extent than many other areas, even those which are considered 'sensitive' due to their closeness to the heart of state sovereignty, such as migration policy.<sup>10</sup> Member States have, as previously noted, pooled

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<sup>8</sup> 'Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that the Union's influence is exerted as effectively as possible by means of concerted and convergent action'.

<sup>9</sup> Council of the European Union, *Council Conclusions on Kosovo*, 2951<sup>st</sup> External Relations Council meeting, 18 February 2008.

<sup>10</sup> This is explored further in chapter five.

sovereignty in areas of external relations as the existence of the Common Commercial Policy demonstrates. This highlights the reticence to pool sovereignty in the explicit areas of foreign and security policy. The Constitutional Treaty and Treaty of Lisbon continue this trend: the 'pillar' structure is no longer an accurate description of the EU's constitutional order, but the CFSP remains outside the scope of the main supranational EU institutions (Commission, Parliament and Court of Justice) and firmly in the hands of the Council, and therefore the Member States.

Two interrelated issues have arisen in analysis of the CFSP since its inception. The first relates to the constitutional structure of the EU and the view that since the TEU clearly distinguishes the CFSP from the 'Community' or 'first' pillar, the foreign policy of the EU is sealed within its own pillar and immune (or protected, according to the language of some national government ministers) from the 'spillover' processes from the more extensive Community competences. A focus on the pillars as the constitutional structure of the EU is attractive in understanding the formal mechanics of EU decision-making and the legal effects of the provisions and institutional competences. However, it also has the result of creating intellectual barriers to understanding the CFSP as an integral part of the constitutional order of the EU that has a role to play beyond the competence-based instruments. In treating the CFSP as the intergovernmental second pillar, its 'otherness', in legal terms, means that it has often been seen as merely a supplement to the 'real' law found in the first pillar.

The second issue is how to evaluate the relative success or failure of the CFSP. Given that the structure of the international relations system continued to be based around the characteristics of the Westphalian state, it is tempting to compare the CFSP with the foreign policy of a nation state. When divisions or disagreements appear over the response to an international issue between two or more Member States, the CFSP is often immediately characterised as a 'failure' because it appears that the Treaty

provisions are ineffective in ensuring that the Member States speak with one voice. Yet, the EU is not a nation state and is not fully endowed with many of the traditional instruments used in foreign policy or diplomacy, including the lack of its own military force. It is not a member of most international organisations, including the United Nations and does not have an executive capable of making foreign policy decisions in a unified manner: instead, decisions and courses of action to follow are the product of agreements between 27 Member States. Although the Union does have some of the traditional instruments associated with the conduct of foreign policy, these are deliberately not given the commonly used terms. For example, the Union maintains representative offices in more third states around the world than most of its Member States, but these are officially called *delegations*, not *embassies*, even though many of the basic functions of the delegations (with the exception of consular and visa services) are the same as for embassies. The ‘face’ of the CFSP is not a foreign *minister*, as is the case for a nation state, but a *high representative*. Similarly, the External Action Service proposed in the Constitutional Treaty and the Treaty of Lisbon to support the Union’s work is essentially a diplomatic service, but it is not termed as such. What this demonstrates is that the CFSP shares similarities with state-based foreign policies but remains deliberately different. The CFSP is a *common* policy, which may or may be or become a *unified* policy, and it does not replace the foreign policy-making powers of the Member States.

It is not the purpose of this thesis to address these two issues head-on by analysing the respective Treaty-based competences of the EU institutions, or to suggest how or why the CFSP can be improved in terms of its success. This has already been researched in detail during the lifetime of the CFSP.<sup>11</sup> Instead, against the background of these issues, this thesis looks beyond the Treaty-based competences of the institutions to

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<sup>11</sup> Chapter two explores the literature and research undertaken on the CFSP related issues in the EU’s external relations.

the operation of the EU's foreign policy, in order to better understand how the CFSP works. The thesis makes the case that the CFSP contributes to a system of *governance* both within the EU and within its sphere of external relations. This is achieved by placing the CFSP within an institutional constructivist framework of legal analysis, which helps to see the policy less as a traditional manifestation of a state-like foreign policy and more as a means by which the EU's goals can be articulated and put into practice through other means. The argument is made that far from representing a failure in the EU's attempt to gain a greater international role, the CFSP creates an institutional environment in which the EU Member States become used to dealing collectively with the outside world through a common frame. The CFSP exists in, and contributes to, a social reality in which non-the CFSP instruments are used to fulfil foreign policy goals. The scope of the research, therefore, goes beyond the institutional practices and competences in the CFSP *stricto sensu*. The case study of the Euro-Mediterranean Partnership, and the issue of migration as a substantive law and policy making sphere, demonstrates the way in which a system of governance has been created in the external sphere and this is traceable to the existence of the CFSP in the constitutional order of the Union.

Before outlining the hypothesis, research questions, methodology and chapters of the thesis in detail, it is first necessary to use the legal framework of the CFSP, and the context in which it was created, as a point of departure. Attention is also paid to the development of the CFSP, including the changes proposed by the Constitutional Treaty and Treaty of Lisbon.

### **The CFSP: objectives and operation**

The terms of the TEU are wide-ranging in scope of their subject area. The

CFSP is designed to cover ‘all areas of foreign and security policy’<sup>12</sup> including ‘all questions relating to the security of the Union’.<sup>13</sup> The objectives of the CFSP are articulated in Article 11(1) TEU and were amended by the Treaty of Amsterdam 1998. The objectives are;

to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,<sup>14</sup>  
to strengthen the security of the Union in all ways,  
to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders,<sup>15</sup>  
to promote international cooperation,  
to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

Despite the reference to ‘all areas’ of foreign policy, the Article 11 objectives for the CFSP emphasise cooperation, respect for international law and the spreading of democracy. These objectives form the backbone of what has been termed the ‘soft power’, ‘civilian power’ and ‘normative power’ characteristics associated with the foreign policy of the EU since the development of EPC during the 1970s.<sup>16</sup> The addition of the objective on security in relation to external borders is significant for the purposes

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<sup>12</sup> Article 11(1) TEU.

<sup>13</sup> Article 17(1) TEU.

<sup>14</sup> The word ‘and integrity’ were inserted by the Treaty of Amsterdam, Article 1(10).

<sup>15</sup> The words ‘including those on external borders’ were inserted by the Treaty of Amsterdam, Article 1(10).

<sup>16</sup> ‘Civilian power Europe’ is most associated with Duchêne and, more recently, ‘normative power Europe’ with Manners: F Duchêne, ‘Europe’s Role in World Peace’ in R Mayne (ed) *Europe Tomorrow: Sixteen Europeans Look Ahead* (Fontana, London 1972); I Manners, ‘Normative Power Europe: a Contradiction in Terms?’ (2002) 40 *Journal of Common Market Studies* 235.

of this thesis, in the context of migration issues within the CFSP.<sup>17</sup>

The means by which the process of defining and implementing a CFSP for the Union according to the objectives listed above were deliberately distinct from those found in Article 249 EC (regulations, directives and decisions) and the supranational institutions at the heart of the Community, the Commission, Court of Justice and Parliament. These institutions were given little or no formal role in the CFSP. Subsequent Treaty amendments have not moved the CFSP to a position where it can formally be seen as a *supranational* policy. The TEU created the CFSP legal instruments at the disposal of the Council, with the obligation on the Member States to support the policy 'actively and unreservedly in a spirit of loyalty and mutual solidarity'.<sup>18</sup> The CFSP is discussed at the monthly Council meetings in the General Affairs configuration, which since 2002 has become the General Affairs and External Relations Council (GAERC). The participants are the Ministers of Foreign Affairs of the Member States, the Secretary-General of the Council/High Representative for the CFSP and the Commission. GAERC is chaired by the Member State holding the Council Presidency, and ministers holding portfolios including defence, trade and overseas aid attend when necessary. Opinions on the CFSP are drawn up by the Political and Security Committee (PSC), which mirrors but is separate to the Committee of Permanent Representatives (COREPER). GAERC meetings, however, deal with the CFSP as well as other external policies including the European Security and Defence Policy (ESDP), commercial policies and development aid.

No enforcement mechanisms were provided for, either in the TEU or since, to ensure Member State compliance with the Treaty provisions or legal instruments. The instruments at the disposal of the Council, Joint Actions and Common Positions, were neither fully defined by the TEU nor

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<sup>17</sup> This is discussed in chapters 5 and 6.

<sup>18</sup> Article 11(2) TEU.

inspired by established legal instruments in domestic, EC or international law.<sup>19</sup> This is also the case for Common Strategies, introduced into the TEU by the Treaty of Amsterdam.<sup>20</sup>

Common Strategies guide the implementation of Joint Actions and Common Positions, but the latter are not dependent on a Common Strategy already being in place. They do not appear regularly, and in fact only three have been adopted since the Treaty of Amsterdam: on Russia,<sup>21</sup> Ukraine<sup>22</sup> and the Mediterranean Region.<sup>23</sup> Joint Actions and Common Positions taken on the basis of a Common Strategy are adopted by qualified majority in the Council,<sup>24</sup> as an exception to the usual rule of unanimity.<sup>25</sup> Since there have only been three Common Strategies adopted, this provision has not been extensively used and has been limited in its application to technical matters.<sup>26</sup>

By contrast, Joint Actions are adopted more regularly and ‘address specific situations where operational action by the Union is deemed to be required’.<sup>27</sup> They include, for example, sending missions to third states, such as the Union police mission sent to Afghanistan in 2007<sup>28</sup> and the mission to support security sector reform in Guinea-Bissau in 2008.<sup>29</sup> Missions with the purpose of monitoring elections have also been sent on the basis of Joint Actions.<sup>30</sup> EU special representatives to troubled third

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<sup>19</sup> P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, Oxford 2004) 896.

<sup>20</sup> Article 1(10) TEU (as amended).

<sup>21</sup> Council Common Strategy (CFSP) 1999/414 on Russia [1999] OJ L157/1.

<sup>22</sup> Council Common Strategy (CFSP) 1999/877 on Ukraine [1999] OJ L331/1.

<sup>23</sup> Council Common Strategy (CFSP) 2000/458 on the Mediterranean Region [2000] OJ L183.

<sup>24</sup> Article 23(2) TEU.

<sup>25</sup> Article 23(1) TEU.

<sup>26</sup> I Pernice and D Thym, 'A New Institutional Balance for European Foreign Policy?' (2003) 8 *European Foreign Affairs Review* 369, 375.

<sup>27</sup> Article 14(1) TEU.

<sup>28</sup> Council Joint Action 2007/369/CFSP on the establishment of the European Union Police Mission in Afghanistan (EUPOL) [2007] OJ L139/33.

<sup>29</sup> Council Joint Action 2008/112/CFSP on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau [2008] OJ L40/11.

<sup>30</sup> For example, to Nigeria: Council Joint Action on the basis of Article J.3 of the Treaty on European Union in support of the democratic process in Nigeria [1998] OJ L358/2.

states or regions receive their mandate from a Joint Action.<sup>31</sup> Joint Actions have also been used to create bodies such as the EU Institute for Security Studies<sup>32</sup> and the EU Security and Defence College.<sup>33</sup> Joint Actions are not, therefore, limited to ‘technical’ issues but have been used for a variety of purposes. They commit the Member States ‘in the positions they adopt and in the conduct of their activity’<sup>34</sup> but no enforcement mechanisms are provided for at Union level.

Common Positions are also adopted regularly and often implement UN Security Council resolutions, such as restrictive measures on third states. By way of example, in February and March 2008 there were Common Positions adopted or renewed in relation to third states as diverse as Zimbabwe,<sup>35</sup> Liberia,<sup>36</sup> the Transnistrian Region of Moldova<sup>37</sup> and Iraq.<sup>38</sup> The Treaty is less detailed on the scope of Common Positions, and their differentiation from Joint Actions is not clearly defined.<sup>39</sup>

By far the most regular expression of the CFSP is through the Declarations issued by the Presidency. There is no Treaty basis for the issuing of Declarations, but they are issued on an almost daily basis.<sup>40</sup> They frequently appear when condemning violence and appealing for calm in troubled regions,<sup>41</sup> and also to express concern on issues such as the use

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<sup>31</sup> For example, Council Joint Action 2008/123/CFSP appointing a European Union Special Representative in Kosovo [2008] OJ L42/92.

<sup>32</sup> Council Joint Action 2001/554/CFSP on the establishment of a European Union Institute for Security Studies [2001] OJ L200/1.

<sup>33</sup> Council Joint Action 2005/575/CFSP establishing a European Security and Defence College [2005] OJ L194/15.

<sup>34</sup> Article 14(3) TEU.

<sup>35</sup> Council Common Position 2008/135/CFSP renewing restrictive measures against Zimbabwe [2008] OJ L43/39.

<sup>36</sup> Council Common Position 2008/109/CFSP concerning restrictive measures imposed against Liberia [2008] OJ L38/26.

<sup>37</sup> Council Common Position 2008/160/CFSP concerning restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova [2008] OJ L51/23.

<sup>38</sup> Council Common Position 2008/186/CFSP amending Common Position 2003/495/CFSP on Iraq [2008] OJ 59/31.

<sup>39</sup> Eeckhout (n 19) 403.

<sup>40</sup> During the first three months of 2008, a total of 45 Declarations were issued by the Council Presidency (Slovenia).

<sup>41</sup> For one of many examples, Council of the EU, ‘Declaration by the Presidency on behalf



of the death penalty in third countries.<sup>42</sup> These examples demonstrate that the Council and its Presidency are very active in terms of the CFSP output and the scope of the CFSP instruments covers all regions across the globe. It has also become commonplace for non-Member States including Iceland, Norway, the candidate states, and some states in the EU's neighbourhood to align themselves with the Declarations. This gives the impression of a European foreign policy which is led by, but not exclusive to, EU Member States.

The reticence on the part of Member States to pool foreign policy-making sovereignty is masked by two features of the Treaty provisions on the CFSP. First, the Union is 'served by a single institutional framework'.<sup>43</sup> Although, as already noted, the competences of the institutions vary between the CFSP and the 'first' pillar, this provision suggests that the CFSP cannot be seen as wholly separate from those articles which deal with the external sphere, such as commercial and development policy, where the Commission has a more central role.<sup>44</sup> The quote at the beginning of this Introduction by Chris Patten indicates that as a Commissioner, he spent a great deal of his time involved in the CFSP.<sup>45</sup> The same Treaty article which lays down the existence of the single institutional framework goes on to state the obligation for the Union to 'ensure the consistency of its external activities as a whole' and this task falls jointly to the Commission and Council.<sup>46</sup> The ECJ has held that where there is overlap in first and second pillar competences, the first pillar

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of the European Union on the recent upsurge in violence in Sudan', Press Release 9352/08, 14 May 2008.

<sup>42</sup> For example, Council of the EU, 'Declaration by the Presidency on behalf of the EU concerning the death penalty in the USA', Press Release 8767/08, 25 April 2008.

<sup>43</sup> Article 3(1) TEU.

<sup>44</sup> Eeckhout (n 19) 140.

<sup>45</sup> 'What did the acronym [CFSP], for which I had consumed so many airline cashew nuts, mean – and what impact might it have had on the lives of British or European citizens?' Patten (n 2) 16.

<sup>46</sup> Article 3(2) TEU.

competences must be used.<sup>47</sup> Second, the Treaty speaks in very broad and general terms of the EU asserting its identity on the international scene,<sup>48</sup> and covering ‘all areas of foreign and security policy’.<sup>49</sup> It is not therefore designed merely to supplement and support the external aspects of the competences the Community enjoys. These provisions make the CFSP appear less like a policy area which was conceived as being completely sealed from the institutional operations of other policy areas.

It is also useful to note that whilst the ‘intergovernmental’ label commonly attached to the CFSP as a pillar of the European *Union* rather than the *Community* suggests that it is fully excluded from the jurisdiction of the ECJ, case-law of the Court demonstrates that this is not entirely accurate. In *Pupino*,<sup>50</sup> the ECJ was asked by preliminary reference to consider the effect of a Framework Decision concluded under Article 34 TEU. The article is part of the ‘third’ pillar of Police and Judicial Cooperation and the subject matter of the Framework Decision was the standing and protection of victims in criminal proceedings. Whilst the terms of Article 34 EU exclude the possibility of direct effect of Framework Decisions, the ECJ stated that as the binding character of Framework Decisions (in Article 34(2)(b)) is formulated in identical terms to Article 249 EC paragraph 3, there is an obligation on national courts ‘to interpret national law in conformity’.<sup>51</sup> This obligation is unaffected by the less extensive jurisdiction of the ECJ in third pillar matters under Title VI of the TEU.<sup>52</sup> Even though the third pillar does not have an equivalent of Article 10 EC, the principle of loyal cooperation, the ECJ found that non-application of a ‘general or particular’ principle of cooperation would render the Union’s tasks difficult to carry out effectively, and therefore

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<sup>47</sup> Case C-91/05 *Commission of the European Communities v Council of the European Union (ECOWAS case)* [2008] (decision of 20 May 2008, not yet reported)

<sup>48</sup> Article 2 TEU.

<sup>49</sup> Article 11(1) TEU.

<sup>50</sup> Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

<sup>51</sup> *Pupino* (n 50) 34.

<sup>52</sup> *Pupino* (n 50) 35.

national courts must interpret national law 'as far as possible in the light of the wording and purpose of the Framework Decision'.<sup>53</sup>

Whilst *Pupino* concerned third pillar measures, this judgment could potentially have strong implications for the legal order in the CFSP too, since the ECJ may try to read the obligation on Member States to 'actively and unreservedly in a spirit of loyalty and mutual solidarity'<sup>54</sup> with the logic of its decision in *Pupino*. The point to make at this juncture is that measures which are taken within intergovernmental frames should not be seen as immune from the legal techniques developed by the court, such as indirect effect, which apply in the first pillar.<sup>55</sup>

Other recent cases in the ECJ have demonstrated that foreign policy is, contrary to traditional assumptions, not contained within diplomatic frames but can affect individuals and their rights too. These cases further demonstrate the futility of considering foreign policy in isolation from the other pillars, and the inherent links between fulfilling the CFSP goals through instruments available across the three pillars in addition to the mechanism provided for in Article 301 EC.<sup>56</sup> In *Kadi*<sup>57</sup> and *Yusuf*,<sup>58</sup> the applicants challenged two Regulations made in furtherance of the CFSP Common Positions which had been created in order to implement a UN Security Council Resolution.<sup>59</sup> The measures aimed to freeze the assets of

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<sup>53</sup> *Pupino* (n 50) 43.

<sup>54</sup> Article 11(2) TEU.

<sup>55</sup> M Fletcher, 'Extending "Indirect Effect" to the Third Pillar: the Significance of *Pupino*?' (2005) 30 *European Law Review* 862, 866.

<sup>56</sup> 'Where it is provided, in a common position or in a Joint Action adopted according to the provisions of the Treaty on European Union relating to the Common Foreign and Security Policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures'.

<sup>57</sup> Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649.

<sup>58</sup> Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3649.

<sup>59</sup> Council Regulation (EC) 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000 [2001] OJ L277/25 and Council Regulation (EC) 467/2001 of 6 March 2001 [2001] OJ L67/1 following Council Common Position 1999/727/CFSP [1999] OJ L294/1 and

individuals suspected of supporting Osama Bin Laden, the Taliban and Al-Qaeda. Kadi and Yusuf were named as such supporters by the UN Sanction Committee in 2001 and subsequently added to the Regulation annex.<sup>60</sup> They unsuccessfully challenged the freezing of their assets in the CFI. The Court found that the Regulations could be based on Articles 60, 301 and 308 EC and it was not possible to review the Regulation with regard to compliance with fundamental human rights, since this would indirectly constitute a review of the Security Council Resolution.<sup>61</sup> The legal basis for competence is significant, since the Court refused to endorse the Commission's argument that the fight against international terrorism fell within its residual competence of Article 308 in order to achieve a Community objective. This, in the view of the Court, would 'deprive many provisions of the Treaty on European Union of their ambit and would be inconsistent with the introduction of instruments specific to the CFSP'.<sup>62</sup> Both lodged appeals with the ECJ.<sup>63</sup> Advocate General Maduro's opinion on the *Kadi* case, delivered in January 2008, proposed that the Court should set aside the CFI's decision and annul the Regulations insofar as they concern the applicant. The opinion places great emphasis on the right of the Community courts to review whether the Regulation complies with the respect for the individual's fundamental rights, and as such the Community institutions 'cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order'.<sup>64</sup> The decision of the ECJ in

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2001/154/CFSP [2001] OJ L57/1 and United Nations Security Council Resolution 1267 (15 October 1999) UN Doc S/RES/1267.

<sup>60</sup> Regulation 467/2001, annex I, as amended by Regulation 2026/2001 (for *Kadi*) and Regulation 2199/2001 (for *Yusuf*).

<sup>61</sup> *Kadi* (n 57) 221.

<sup>62</sup> *Yusuf and Al Barakaat* (n 58) 156.

<sup>63</sup> Case C-402/05 *Yassin Abdullah Kadi v Council and Commission*; Case C-415/05 *Al Barakaat International Foundation v Council and Commission*. At time of writing, the Advocate General has given his opinion on both cases and the final decisions of the Court are pending.

<sup>64</sup> Opinion of Poireres Maduro AG, *Kadi* (n 63) delivered on 16 January 2008, 54. Identical words are found in the Opinion delivered on the *Al Barakaat International Foundation*

September 2008 found that the Council was competent to adopt the Regulation on the legal basis it did, but that the CFI erred in holding that the Community courts had no jurisdiction to review the measure in light of the fundamental rights of the applicant. The ECJ set aside the ruling of the CFI and set aside the Regulations freezing *Kadi* and *Al Barakaat International's* funds on the basis that they constituted unjustified restrictions and unacceptable limits on the right to be heard and effective judicial review of those rights.<sup>65</sup>

The *Organisation des Modjahedines du peuple d'Iran*<sup>66</sup> judgment differed from the CFI *Kadi* and *Yusuf* decisions in that the CFSP measures challenged by the applicants were 'autonomous' and not the product of UN Security Council Resolutions. The CFI therefore held that the right to a fair hearing and the right to reasons should apply.<sup>67</sup>

Furthermore, the ECJ has ruled on challenges to the CFSP Common Positions using the power granted to it under Article 35(6) TEU.<sup>68</sup> In *Segi*<sup>69</sup> and *Gestoras Pro Amnistia*<sup>70</sup> the ECJ dismissed appeals from the CFI relating to claims for damages for inclusion on a list of suspected terrorist groups. The ECJ did not find any jurisdiction to award damages under Title VI of the TEU nor the right to directly or indirectly challenge a Common Position. Yet, given the potential effects on third party individuals of a CFSP measure, the Court found that:

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case on 23 January 2008.

<sup>65</sup> Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] (decision of 3 September 2008, not yet published)

<sup>66</sup> Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665.

<sup>67</sup> *Organisation des Modjahedines du peuple d'Iran* (n 66) 91.

<sup>68</sup> 'The Court of Justice shall have jurisdiction to review the legality of Framework Decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure'.

<sup>69</sup> Case C-355/04 *Segi, Izaga and Galarraga v Council* [2007] ECT I-1657.

<sup>70</sup> Case C-354/04 *Gestoras Pro Amnistia, Olano and Errasti v Council* [2007] ECR I-1579.

... it has to be possible to make subject to review by the Court a Common Position which, because of its content, has a scope going beyond that assigned by the EU Treaty ... Therefore, a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a Common Position adopted on the basis of Article 34 EU, as is the case in this instance for part of Common Position 2001/931 ... and which has serious doubts whether that Common Position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the Common Position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.<sup>71</sup>

Taken together, the pillar structure does not separate the EU's legal order into hermetically sealed parts and despite the 'intergovernmental' characteristics of the CFSP, important consequences on the legal order of the Member States may arise, and have effects on individual EU and non-EU citizens and their rights.<sup>72</sup> Constraints, derived from Article 10 EC, do exist on the Member States in the exercise of their foreign policies.<sup>73</sup> The ECJ demonstrated in *Pupino* that the principle of loyal cooperation extends beyond the Community pillar. There seems to be little room for doubt, therefore, that if the ECJ is prepared to extend the effect of Article 10 EC to the third pillar, the CFSP should be immune from a reinforcement of the obligation of cooperation, especially since Article 11(2) TEU expressly includes the obligation for Member States to

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<sup>71</sup> *Gestoras Pro Amnistia* (n 70) 54.

<sup>72</sup> K Lenaerts and T Courthaut, 'Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law' (2006) 31 *European Law Review* 287, 288.

<sup>73</sup> M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M Cremona and B De Witte (eds) *EU Foreign Relations Law: Constitutional Fundamentals* (2008) 167.

‘unreservedly’ support the CFSP.<sup>74</sup> Gosalbo Bono concludes from this that, ‘even the sacrosanct Community principles of direct effect and primacy over the law of the Member States cannot be said to be completely alien to the CFSP legal order’.<sup>75</sup> The legal system and relationship between the ‘pillars’ is more complex than the structure suggests: this forms a significant backdrop to themes and hypothesis in this thesis.

## **Reforming the CFSP provisions**

With such wide-reaching language of foreign goals framed in general terms, the expectations that in the post-Cold War world the EU would be equipped to build on the cooperative nature of EPC with concrete actions through the use of the CFSP instruments were high. Yet, whilst the Council was able to progressively increase declarations on issues across the globe, turning words into actions has proved much more difficult. The ambitious wording of the CFSP provisions in the TEU was agreed at the same time as the disintegration of the Federal Republic of Yugoslavia. The provisions seemed incapable of forming a common European response to the ensuing bloodshed. Whilst it may have been too early to expect, for example, humanitarian intervention under an EU banner, the examples of the rapid and uncoordinated recognition of the independence of Slovenia and Croatia by some Member States in late 1991,<sup>76</sup> at the same time as the agreement on the wording of the CFSP Treaty dispositions, demonstrated that there was a lack of a political will to seriously begin the path towards forging a *common* foreign and security policy according to the spirit of Article 11 TEU.

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<sup>74</sup> P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (4th edn, OUP, Oxford 2008) 191-192.

<sup>75</sup> R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 *Common Market Law Review* 337, 378.

<sup>76</sup> DH Bearce, 'Institutional Breakdown and International Cooperation: the European Agreement to Recognize Croatia and Slovenia' (2002) 8 *European Journal of International Relations* 471, 473.

Since the failure to capitalise on the Treaty instruments agreed at Maastricht, renewed efforts have been made to address the perceived weakness of the lack of visibility of the CFSP. The appointment of the Secretary of the Council as the High Representative for Foreign and Security Policy in the Treaty of Amsterdam 1998 gave a 'face' to the CFSP to the wider world and the power to negotiate with third states when requested to do so by the Council.<sup>77</sup> The High Representative's role is to 'assist' the Council, distinguishing his role from that of a foreign minister of a nation-state. This was an important step in securing visibility for the CFSP, and the EU more generally in third states, yet the more obvious step to ensuring that the CFSP becomes more effective (creating binding obligations with enforcement mechanisms, similar to those in Article 249 EC) has been resisted. Many Member States, whilst reaffirming in public the need for a strong and effective EU on the world stage, have been unwilling to pool sovereignty in the same way as in other areas of law and policy-making. This was again evident in the Treaty establishing a Constitution for Europe, where unanimous voting was retained on most the CFSP issues and remains the general characteristic of the decision-making process.

Debate on the CFSP figured strongly during the negotiations for the Constitutional Treaty and, following its abandonment, the Treaty of Lisbon. The text of the Treaty of Lisbon signed in December 2007 continues to reflect the reticence of some Member States to wholeheartedly endorse the CFSP as a fully-fledged part of the EU's supranational legal order, insofar as its intergovernmental characteristics are still much in evidence. There were, however, three notable developments in relation to proposed amendments to the CFSP which merit attention.<sup>78</sup>

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<sup>77</sup> Article 26 TEU.

<sup>78</sup> References to the consolidated versions of the Treaty on European Union and Treaty on the Functioning of the European Union (the former EC Treaty) are those versions



The Treaty of Lisbon would reform Article 11 TEU and remove the foreign policy objectives, inserting them instead into a new provision which applies to *all* the Union's external relations, not only the CFSP.<sup>79</sup> The objectives would remain broadly the same, though there is reference to the Union's action on the international scene which shall 'be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world'.<sup>80</sup> These principles are democracy, the rule of law, the respect for human rights and the principles of equality and solidarity. The article would also insert commitments to sustainable economic, social and environmental development,<sup>81</sup> and 'the integration of all countries into the world economy'<sup>82</sup> as objectives, along with the obligation 'to promote an international system based on stronger multilateral cooperation and good global governance'.<sup>83</sup>

A new Article 47 TEU would state that 'The Union shall have legal personality' and replace the current Article 281 EC, 'The Community shall have legal personality'. Whilst this might appear as a rather cosmetic change of name alone, it has particular significance for the CFSP which was not part of the 'Community' pillar upon its creation in the TEU. By referring only to the EU and its legal order in the Treaty, the 'pillars' readily identified since 1992 as forming the structure of the EU would disappear from view. The most noticeable change is that agreements with third states or international organisations will be concluded by the Union, rather than the Community. This also explains why the objectives of the Union's external relations cut across the different policy spheres and combine political, economic and environmental goals.

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published in the Official Journal on 9 May 2008 [2008] OJ C 115/13.

<sup>79</sup> Article 21 TEU, as inserted by the Treaty of Lisbon, Article 1(24).

<sup>80</sup> Article 21(1) TEU, as inserted by the Treaty of Lisbon, Article 1(24).

<sup>81</sup> Article 21(d) and (f) TEU, as inserted by the Treaty of Lisbon, Article 1(24).

<sup>82</sup> Article 21(e) TEU, as inserted by the Treaty of Lisbon, Article 1(24).

<sup>83</sup> Article 21(h) TEU, as inserted by the Treaty of Lisbon, Article 1(24). The meaning and nature of 'good global governance' here is returned to in chapter one.

This change suggests that the Member States have taken the step at Lisbon of agreeing to place the CFSP under the same legal regime as the ‘internal’ policy-making sphere; that is where binding regulations and directives apply, majority voting occurs, and where the Court of Justice has extensive jurisdiction. The pooling of sovereignty in foreign policy-making by the Member States would appear to have taken place. However, on closer inspection, the amended Article 24 TEU (ex Article 11) would state that:

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded.<sup>84</sup>

The ‘specific rules’ of the CFSP as mentioned in the above provision do not have the same binding characteristics as the regulations, directives and decisions of the current Article 249 EC.<sup>85</sup> The amended Article 24 TEU would make clear that the ‘specific rules’ are not considered to be ‘legislative acts’ and they appear to lack legally enforceable characteristics. The CFSP instruments created at Maastricht and since, namely Common Strategies, Joint Actions and Common Positions have been renamed as ‘decisions defining actions to be undertaken’, ‘positions to be taken’ and ‘arrangements for the implementation of the decisions’.<sup>86</sup> Little further clarification is provided by the amendments to the Treaty on their future application.

The principle of the CFSP decision-making remains that of unanimity. Qualified majority voting continues to be possible when

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<sup>84</sup> Article 24(1) TEU, as amended by the Treaty of Lisbon, Article 1(27).

<sup>85</sup> The Treaty of Lisbon renames the EC Treaty the ‘Treaty on the Functioning of the European Union’ (TFEU). Article 249 EC, as amended by the Treaty of Lisbon, Article 2(235) would become Article 249 TFEU.

<sup>86</sup> Article 12 TEU, as amended by the Treaty of Lisbon, Article 1(28).

adopting decisions pursuant to a previous European Council decision on strategic interests and objectives.<sup>87</sup> This provision has been rarely used. The same article also allows for qualified majority voting:

when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative.<sup>88</sup>

This would appear to open the door a little wider to qualified majority voting in the CFSP, since the High Representative would have the ability to put forward an issue in the Council, which could then specifically request him to present a proposal. Whether this is a useful tool at the disposal of the High Representative depends on whether the hitherto largely unused the CFSP qualified majority dispositions become more habitually used and relied upon.

The proposed collapse of the pillar structure similarly does not entail roles for the Commission, Parliament and ECJ equivalent to those currently found in the first (Community) pillar. The current residual powers clause, Article 308 EC,<sup>89</sup> would contain a new provision specifically excluding the use of this Article for the CFSP objectives.<sup>90</sup> Putting the CFSP into practice would, according to the amended provision, largely remain in the hands of the Council, following the decisions on the

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<sup>87</sup> Article 31(2) TEU, as amended by the Treaty of Lisbon, Article 1(34).

<sup>88</sup> Article 31(2) TEU, as amended by the Treaty of Lisbon, Article 1(28).

<sup>89</sup> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

<sup>90</sup> Article 352(4) TFEU, as inserted by the Treaty of Lisbon, Article 2(289): 'this Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union'.

‘strategic interests and objectives of the Union’ as taken by the European Council.<sup>91</sup> The potentially increased role for the High Representative in the CFSP is discussed below. The European Parliament would gain a slight boost in its ability to scrutinize the CFSP, with the ability to question the High Representative as well as the Council on the CFSP matters.<sup>92</sup> Its views should be ‘duly taken into consideration’ by the High Representative and a Parliamentary debate specifically devoted to the CFSP would take place twice, rather than just once, a year.<sup>93</sup> The ECJ’s jurisdiction over the CFSP provisions of the Treaty would continue to be excluded,<sup>94</sup> although the amended Treaty would allow for the ECJ to be the arbiter of disputes over the respective competences of the Union institutions and the Member States,<sup>95</sup> which is potentially a powerful future tool if opportunities for the Court to use the provision arise. In general, however, the Treaty does not change the institutional competences of the Parliament or Court to a great extent.

The Commission’s role in the CFSP would become somewhat fuzzier. Under the current Treaty arrangements, it is ‘fully associated’ with the representation and implementation of the CFSP according to Articles 18(4) and 27 TEU. This created only a limited formal role in the CFSP for the Commission. The ‘fully associated’ provision would disappear following the Lisbon amendments. The Commission’s ability to refer the CFSP questions to the Council would remain, but through the High Representative of his/her own accord or ‘with the Commission’s support’.<sup>96</sup> This reflects a modified role of the High Representative, who would sit *within* the Commission, merging the present role with that of the current Commissioner for External Relations. It should also help to rectify the problem of incoherence between the EU’s external policies and

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<sup>91</sup> Article 22(1) TEU, as inserted by the Treaty of Lisbon, Article 1(24).

<sup>92</sup> Article 36 TEU, as amended by the Treaty of Lisbon, Article 1(40)(b).

<sup>93</sup> Article 36 TEU, as amended by the Treaty of Lisbon, Article 1(40)(b).

<sup>94</sup> Article 24(1) TEU, as amended by the Treaty of Lisbon, Article 1(27)(a).

<sup>95</sup> Article 24(1) TEU, as amended by the Treaty of Lisbon, Article 1(27)(a).

<sup>96</sup> Article 30(1) TEU, as inserted by the Treaty of Lisbon, Article 1(33)(b).

internal policies which have an external dimension. The Commission would be charged, under the new Article 10A TEU in the general provisions on external action, with ensuring consistency between these different policy areas. It would share this responsibility with the Council but it would still lack the comprehensive powers to drive the CFSP forward as it has done in so many other areas of EU policy-making. The creation of a link between the Council and Commission via the High Representative follows the logic of recognising the growing synergy between external policies and internal policies with external dimension. The agreement at Lisbon (and previously in the Constitutional Treaty) on the need for this provision reinforces the thrust of this thesis in demonstrating the artificial barriers between a strictly intergovernmental basis for foreign policy at the EU level and the other law and policy-making areas which are more readily identifiable as being of a 'supranational' character.

### **Aims, methodology, hypothesis and research questions**

Against the background of the Treaty basis of the CFSP, I begin with four research assumptions which help to frame the context for the central hypothesis. First, the CFSP is a *sui generis* policy which belongs to a *sui generis* entity. The CFSP exists alongside the national foreign policies of the Member States. It shares some similarities with national foreign policies, but its decision-making structure and policy instruments are substantially and procedurally different from those of a nation state. Second, the operational record of the instruments used pursuant to the Treaty articles on the CFSP demonstrates that it has not achieved its goals, including those set out in Article 11 of the Treaty on European Union. Third, the aims and processes associated with the CFSP should be seen in the context of gradual European integration, rather than concentrating on short term foreign policy objectives. As such, attention

should not only be paid to major ‘events’ in international affairs (for example, the 2003 US-led invasion of Iraq or the responses to the declaration of independence by Kosovo) or ‘high politics’ but to longer-term processes. Fourth, due to the *sui generis* nature of the CFSP, the traditional paradigms of legal and political analysis of foreign policy and external competences are limited in their suitability for the study of it. This means that it is important to avoid seeing the EU, its legal system and foreign policy-making sphere, solely through the prism of the nation state. The framework for researching the effects of the CFSP must take into account its uniqueness.

With these research assumptions in mind, the central research hypothesis posed in this thesis is:

- Assuming that it is possible to characterise it as a system of governance, the CFSP can be seen to have consequences beyond the Treaty-based instruments and, as such, it is an integral part of the constitutional order of the European Union.

Constructing a theoretical and empirical framework within which this hypothesis can be tested requires five research questions to be asked.

- First, what are the characteristics of ‘governance’ and how and why is this term appropriate for characterising the CFSP?
- Second, how does this approach to understanding the CFSP differ from a traditional, diplomacy-based foreign policy? What are the goals and instruments associated with foreign policy that could be expected to be seen within the CFSP?
- Third, does the use of the terminology of ‘governance’ help to explain the institutional development of the CFSP and if so, how?
- Fourth, what are the legal outcomes in the EU’s external relations, which can be traced to the institutional development of the CFSP?

- Fifth, how can the relationship between the CFSP and other EU policies with an external dimension be characterised, and is this relationship evolving or static?

Since the hypothesis and research questions are less concerned with measures which carry the formal designation of 'law' within the CFSP and more with the processes and institutions which have emerged over the course of the development of the CFSP, the theoretical framework within which these questions are addressed goes beyond the scope of traditional frameworks of legal analysis. An interdisciplinary approach is explicitly adopted, incorporating scholastic approaches from the disciplines of political science and international relations. The central question of identifying and understanding 'governance' and 'systems of governance' in the EU and its foreign policy necessitates a fuller definition of these terms. Given their contested nature, however, they are not sufficient in their own right to place the operational practices of the EU in its foreign policy within the scope of theoretical analysis. As such, an institutional constructivist framework of legal analysis is developed and used to explore and explain how the CFSP works. This draws on a number of different theoretical strands, and places the study of institutions and institutional behaviour at the heart of the scope of analysis, with emphasis on the emergence and place of practices, ideas and identities. The institutional theory of law is used in order to characterise how legal norms and legal institutions arise from the practices in the EU's external sphere.

The research for this thesis is based on primary sources, including documentation from the EU institutions, Member States and the institutions established in the Euro-Mediterranean Partnership. Given the importance of institutions and institutional behaviour, the primary materials drawn upon include legislative measures (the CFSP and non-the CFSP) and also policy-papers, working documents, informal agreements

and proposals. Use is also made of material from non-governmental organisations. In order to link the development of the CFSP with other areas of internal and external governance, the primary materials used in the empirical chapters originate from a wide variety of sources and policy-areas. Furthermore, interviews were conducted with personnel in the Council, Commission, European Parliament, Frontex (the EU's Border Management Agency) and Euro-Mediterranean Parliament Assembly between 2006 and 2008. Secondary literature was extensively used in the development of the theoretical framework (chapter three) and throughout the thesis where appropriate. The academic work used is drawn from a variety of disciplines, primarily law and political science/international relations and also European/EU studies, Mediterranean studies and refugee/migration studies.

### **Structure of the thesis**

The research questions are explored in seven thematic chapters. Chapter one introduces the different uses of the terminology of 'governance' and its connotations as a description, concept and approach to studying the EU. The chapter develops a key subject in the thesis in bridging the divide between 'external' and 'internal' policy-making by identifying common themes and challenges in these spheres. The changing nature of governance and increasing prevalence of 'new governance' and 'new modes of governance' in policy-making fields are highlighted, and the reasons why these are only discussed in relation to 'internal' spheres of governance are identified. The argument is made that the characteristics of 'governance' do not prevent the consideration of the CFSP as a form of governance, nor as a policy which can only be understood in isolation from other areas in which the EU operates.

Chapter two contrasts the discussion on 'governance' in chapter one with a review of the literature on the CFSP by legal scholars and



political scientists, including international relations scholars. The review demonstrates that legal scholars have tended to focus on the ‘pillar’ structure of the Union’s constitutional order and competences of the institutions. Since the formal role of institutions such as the Commission, Parliament and ECJ is limited, legal scholars have often neglected to go beyond the formalism of the Treaty and not treat the CFSP and its outputs as ‘law’. The task of examining the CFSP within existing paradigms in the international discipline relations has provoked a great deal of literature within the field of political science, although not in most cases using the language of governance. Leading contemporary works on the CFSP are drawn upon so as to set the scene for the elaboration of a theoretical framework in chapter three. Particular attention is paid to the works of scholars who have begun to develop an ‘external governance’ approach.

Chapter three develops the theoretical framework of analysis. In addressing the need to bridge the legal/political science and external/internal divides identified in chapter one, an institutional constructivist approach of legal analysis is adopted, drawing on theories of (old and new) institutionalism, the institutional theory of law and (social) constructivism. The significance of institutions and institutional practices in the theoretical framework is brought to the fore. This approach is used in order to identify the practices within the CFSP, the social reality it operates in and identifies how, in the case study, the theoretical framework offers answers to the research questions in order to test the hypothesis.

Chapter four introduces the case study of the thesis, the Euro-Mediterranean Partnership, by examining the institutions which have developed during its lifetime. This justifies why, on the one hand, EuroMed serves as an example of the CFSP in practice even though it was not initially the subject of a CFSP instrument and, on the other hand, how EuroMed can also be understood as a system of governance. This system of governance becomes apparent when the institutional framework and

practices arising through it are examined from their multilateral, bilateral and unilateral dimensions. The chapter argues that EuroMed can be seen as a system of governance, though one which is dominated by strong central actors (the EU institutions and Member States) and surrounded by a periphery (the Mediterranean Partner States) which has more limited input into the Partnership as a system of governance. As such, EuroMed can also be seen as a frame for the EU's foreign policy in the Mediterranean region. The more recent proposal for a 'Mediterranean Union' as a key aim of the French Council Presidency in the latter part of 2008 is placed within the context of the development of EuroMed.

The internal/external distinction between spheres of governance, which was explored in chapter one, is returned to in chapters 5 and 6, which take migration law and policy as a substantive law and policy-making field with clear internal and external dimensions. Chapter five explores the legal and policy measures the EU has taken in relation to migration and notes the growing importance and dynamism of the external dimension of the EU's area of Freedom, Security and Justice, making links with measures taken under the CFSP. Chapter six moves a step further and places migration within the context of the EuroMed Partnership. The chapter explores the relationship between migration governance and the system of governance in EuroMed identified in chapter four. Institutional practices and outputs, such as readmission agreements, discussion of extra-territorial processing centres for migrants and the documentation surrounding them are analysed to see to what extent the language reveals how EuroMed is used to fulfil the CFSP goals.

Chapter seven concludes the thesis by bringing together the various strands of the findings and offering answers to the research questions in order to test the hypothesis. The theoretical framework is applied to the empirical research in order to offer a wider understanding and fuller picture of the CFSP as a dynamic and evolving policy. Through the use of the case study on migration within the context of EuroMed, generalised

conclusions on how the CFSP works in practice are offered. Testing the hypothesis reveals that the CFSP, as a system of governance, enjoys relationships with other aspects of the EU's system of governance and constitutional order which are closer and deeper than previously thought.



## **Chapter 1: Identifying EU Governance: Terminology, Trends and Challenges**

The language of 'governance' frequently arises in discussions about law and politics in society today. These discussions take place in relation to nation-states, at the level of regional organisations and at global levels. Yet, despite this widespread use, 'governance' does not have a settled meaning and in many cases is used by scholars and policy-makers as a convenient alternative to 'government'. 'Governance' is attractive in this way because the term 'government' is no longer sufficient as a characterisation of the interactions between citizens and those exercising power and coordinating public resources. 'Government' is indicative of an organised, executive power at the national or sub-national ('local government') level, which cannot fully be applied to situations where other bodies or institutions have roles to play.

The use of 'governance', including variations such as 'good' and 'new' governance, by scholars and policy-makers in a variety of settings and contexts and for different purposes does not as such assist conceptual clarification, even when the context is limited to that of the EU. As the central theme of this thesis is the characterisation of the CFSP as a system of governance, greater explanation of how the term is used here and distinguished from other uses is required. This chapter fulfils two tasks necessary for setting the context for the development of a theoretical framework and the empirical research undertaken in relation to the Euro-Mediterranean Partnership. It first identifies three uses of the term of 'governance' and explains how these are used in this thesis. It subsequently explores current themes in the external and internal spheres of the EU's system of governance before identifying bridges between the spheres via the common challenges each faces, and the relevance of the language of governance in doing so.

## The uses of 'governance' terminology

The vagueness of the term 'governance' is one of its most attractive qualities and helps to explain why its use is so frequent and widespread. Common to the different interpretations of the meaning of 'governance' is the idea that the nation state and its law-making powers are not the only actors and processes in the citizen's relationship with public powers. To what extent the role of the state has diminished, and what role supranational and global actors play in its place is a matter of debate.<sup>1</sup> The European Union, a non-state actor which has strong law and policy-making powers, can impact in a significant way on the lives of citizens in the EU.<sup>2</sup> It has been a major catalyst for the increasingly widespread use of 'governance' in its different forms. The categorisation of the EU as a federation, 'superstate', international organisation or regional organisation is problematic since none of these fully capture the nature of the EU: 'governance' appears therefore as a label which is sufficiently malleable and capable of application to the EU.

Characterising the CFSP as a 'system of governance' requires further attention to be paid to the identification of what this term means and how it is used in this thesis. There are three uses of 'governance' commonly found in academic literature and documentation emerging from policy-makers, and identifying these uses here is essential in providing some clarity to the way in which later chapters use the term. These uses are, first, as a characterisation of a more complex relationship between citizens and public powers than allowed for by the use of 'government'. The second use is of 'governance' as an academic *approach*

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<sup>1</sup> On the context of UK and EU sovereignty: N MacCormick, *Questioning Sovereignty: Law, State, and Practical Reason* (OUP, Oxford 1999) and on the international law context; B Fassbender, 'Sovereignty and Constitutionalism in International Law' in N Walker (ed) *Sovereignty in Transition* (Hart, Oxford 2003).

<sup>2</sup> The use of 'citizens in the EU' rather than 'EU citizens' here is deliberate, since the law and policy-making powers of the EU may also be felt by non-EU citizens in the Member States within the context of migration law and policy. This is addressed in more detail in chapter five.

to the study of law and policy-making, and in particular in relation to understanding the EU in the way it works and evolves. The third use of 'governance' is in a more ideological or normative way, often exemplified by the association of governance with discussion of 'good' and 'new' governance and used in a way to promote certain desirable, democratic qualities.

'Governance' is often employed as an alternative term to 'government' in instances where the latter term is thought to be insufficient or inaccurate. This is the use alluded to above when it was noted that in the context of the EU, existing characterisations of law and policy-making power are unsuitable. Governance is often employed in this way to denote a particular policy sphere, such as migration governance, or a territorial space. This category of the use of governance also includes the use of 'global governance', implying that governance is not merely restricted to within nation states<sup>3</sup> and exists within an emerging system across the globe. The latter is an increasingly recognised phenomenon.<sup>4</sup>

The use of 'governance' as a description denotes a more complex relationship than that of government and citizen, and may include the presence of entities such as agencies, private bodies (especially those fulfilling public roles) and supranational or international polities, such as the EU. Where the emphasis is on the organisational dimension, a 'system of governance' is employed as a term to denote an institutional arrangement capable of producing legal effects and potentially influencing different policy-areas.

A distinct 'system of governance' is an attractive description of the EU for two main reasons. First, unlike the discussion of a specific nation-

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<sup>3</sup> R Wilkinson, 'Global Governance: A Preliminary Interrogation' in R Wilkinson and S Hughes (eds) *Global Governance: Critical Perspectives* (Routledge, London 2002) 2.

<sup>4</sup> R Higgott and M Ougaard, 'Beyond System and Society - Towards a Global Polity?' in R Higgott and M Ougaard (eds) *Towards a Global Polity* (Routledge, London 2002). The Commission's White Paper on Governance also recognised the role of the EU in contributing to global governance; Commission (EC), 'European Governance: A White Paper' COM (2001) 428 final, 25 July 2001, 26.

state and its government, it is not possible to speak of an EU government, yet the EU clearly has law and policy-making powers which are impossible to ignore. No analysis of, for example, environmental law in the UK can fail to take into account the law and policy stemming from membership of the EU<sup>5</sup> and this is also true in areas traditionally seen as outside the formal Treaty-based competence of the EU, such as healthcare.<sup>6</sup> The EU cannot be regarded as merely a collection of states who are the only significant actors in law and policy-making.<sup>7</sup> Governance of the EU, then, cannot be equated with a system of governance developed within a single state since there are added 'layers' in the form of the EU's institutional arrangements.<sup>8</sup> Second, the institutional set-up of the EU is unique and includes institutions such as the Commission and Court of Justice which do not act in the interest of a nation-state, but in the interests of the supranational polity as a whole. The system of governance that can be perceived at the EU level, including the multitude of actors involved in law and policy-making, can also be seen as a system of 'multi-level governance'.<sup>9</sup> This also includes the 'sub-national' actors, such as regions,<sup>10</sup> interest groups and private persons. The language of governance used in this way indicates a move away from 'the monopoly of traditional politico-legal institutions'.<sup>11</sup>

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<sup>5</sup> For example, J Scott, *EC Environmental Law* (Longman, London 1998).

<sup>6</sup> T Hervey and L Trubek, 'Freedom to Provide Healthcare Services in the EU: an Opportunity for "Hybrid Governance"' (2007) 13 *Colombia Journal of European Law* 513; T Hervey, 'The European Union's Governance of Healthcare and the Welfare Modernization Agenda' (2008) 2 *Regulation & Governance* 103.

<sup>7</sup> W Wallace, 'Post-Sovereign Governance' in H Wallace, W Wallace and M Pollack (eds) *Policy-Making in the European Union* (5th edn, OUP, Oxford 2005).

<sup>8</sup> A Gatto, 'Governance in the European Union: A Legal Perspective' (2006) 12 *Colombia Journal of European Law* 487, 490.

<sup>9</sup> L Hooghe and G Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield, Lanham 2001); G Marks and L Hooghe, 'Contrasting Visions of Multi-Level Governance' in I Bache and M Flinders (eds) *Multi-Level Governance* (OUP, Oxford 2004).

<sup>10</sup> C Jeffery, 'A Regional Rescue of the Nation-State: Changing Regional Perspectives on Europe' (2007) University of Edinburgh Europa Institute, Mitchell Working Paper Series No. 5/2007

<[http://www.law.ed.ac.uk/file\\_download/series/32\\_aregionalrescueofthenationstatechangingregionalperspectivesoneurope.pdf](http://www.law.ed.ac.uk/file_download/series/32_aregionalrescueofthenationstatechangingregionalperspectivesoneurope.pdf)> (accessed 25 July 2008).

<sup>11</sup> G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart



The second use of 'governance' is that of an academic approach to the study of governance as a phenomenon. Using 'governance' in this way has become increasingly widespread, although there is no single or coherent theoretical underpinning to a 'governance' approach or perspective. According to Jachtenfuchs, employing a 'governance' perspective to the study of the EU as an alternative to classical integration theory has the advantage of enlarging the analytical horizon beyond the nation-state. This is because studying the coexistence of a supranational system of governance at the EU level and national systems of governance in the Member States shifts the focus away from the state of anarchy in international relations and towards the 'peaceful, non-violent relationships in a horizontally organized environment'.<sup>12</sup> The use of 'governance' as an approach can only be successfully undertaken, however, if coupled with theoretical approaches (or a combination of different approaches) capable of application to the study of the EU. In doing so, a broad-based 'governance approach' to studying the EU has evolved into a strong alternative to classical integration theory, but one which complements rather than challenges the more established methods.<sup>13</sup> It can also be said therefore that 'governance is a version, a modification or a complement of a classic State government rather than its successor'.<sup>14</sup> The 'governance approach' is less concerned with the individual EU institutions, but 'the existing multi-level institutional system as a given starting point for analysing the modes and process patterns of European policy-making and the interaction of public and

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Oxford 2006) 2.

<sup>12</sup> M Jachtenfuchs, 'The Governance Approach to European Integration' (2001) 39 *Journal of Common Market Studies* 245, 257. This point is also demonstrated by the contributors to B Kohler-Koch (ed), *Linking EU and National Governance* (OUP Oxford 2003).

<sup>13</sup> Jachtenfuchs (n 12) 256 and P Craig, 'The Nature of the Community: Integration, Democracy and Legitimacy' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (OUP, Oxford 1999) 17.

<sup>14</sup> C Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 *Common Market Law Review* 313, 314.

private actors from the subnational to the supranational level'.<sup>15</sup> Seeking the elements and processes with the systems of governance and identifying their influence and importance is a central aim.

Using the term 'governance' as an approach draws on the descriptive, first use of the term as identified earlier in this chapter. But it is used in a way which analyses *how* a system of governance works and what effects it may have. This can be seen as a two-way process: a governance approach is required in order to recognise the existence of a system of governance and, conversely, the existence of the constituent parts of a system of governance gives rise to the possibilities for further research on the effects. Conducting legal study through the use of 'governance' recognises the importance of phenomena which are not traditionally defined as law but which nevertheless may have legal effects or influence. Legal scholars have often used the label 'soft law' to denote phenomena which affect or constrain behaviour but without the formal mechanisms of enforceability. Using governance as an approach is often therefore to recognise and explain the existence of both 'hard' and 'soft' law. Yet, 'hard' and 'soft' as legal terms themselves are not settled and there is considerable debate about where the lines are drawn between 'hard' and 'soft' and what should not be considered as 'legal' at all.

In the EU context, a distinction can be made between the legally-binding and enforceable nature of regulations and directives ('hard' law), and the non-binding nature of recommendations and opinions ('soft' law), since both of these are defined in the Treaty.<sup>16</sup> However, there are also a multitude of notices, resolutions, conclusions, guidelines, declarations, programmes, codes of practice and so on, which may come under an umbrella term of 'soft' law because of their (potential) influence in the

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<sup>15</sup> F Schimmelfennig and W Wagner, 'External Governance in the European Union' (2004) 11 *Journal of European Public Policy* 655, 657.

<sup>16</sup> Article 249 EC.

legal sphere.<sup>17</sup> There are instances where both binding and non-binding provisions have been used within a single policy instrument, making agreed definitions and classifications problematic.<sup>18</sup> Snyder defines soft law as ‘rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects’.<sup>19</sup> These effects could be felt by the Member States, private/legal persons or external actors, including third states. This definition opens up the category of rules beyond those created through formal, Treaty-based competences. The EU, whose institutions rely on and are limited by these competences, can be said to employ a ‘softly softly’ approach, whereby outcomes can be achieved without the setting of formal legal obligations.<sup>20</sup> This elevates the importance of the use of what Snyder includes in his definition and consideration of provisions capable of producing effects and outcomes in such a variety of documentation widens the scope of what can be conceived as ‘law’.

In terms of using the language of governance as an academic approach, it would seem logical that in referring to the ‘governance of the EU’, both hard and soft legal instruments are included. By bringing into this approach less formal instruments and both intended and unintended effects, the emphasis on binding rules as the only means by which ‘law’ is understood can be avoided. Understanding governance includes these routines and practical elements to law and policy-making underlines the presence of private actors, the public/private distinction being of limited importance in the concept of governance,<sup>21</sup> and the moving beyond

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<sup>17</sup> L Senden, *Soft Law in European Community Law* (OUP, Oxford 2004) 23.

<sup>18</sup> One example are the Directives on Parental Leave and Part-time Work, where binding standards are combined with recommendations which may or may not be followed: G Falkner, O Treib, M Hartlapp and S Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (CUP, Cambridge 2005) 142.

<sup>19</sup> F Snyder, ‘The Effectiveness of EC Law’ in T Daintith (ed) *Implementing EC Law in the United Kingdom* (Chancery, Chichester 1995) 64.

<sup>20</sup> J Kenner, ‘EC Labour Law: The Softly, Softly Approach’ (1995) 11 *International Journal of Comparative Labour Law and Industrial Relations* 307, 309.

<sup>21</sup> Möllers (n 14) 316.

looking merely at governmental institutions<sup>22</sup> to include informal practices such as networking<sup>23</sup> and ‘the unintended effects of day-to-day routines linking closely the different levels of governance in the EU system’.<sup>24</sup> This thesis places importance on the place of practices, norms and institutions in the CFSP, elements which are often seen as outside the scope of traditional legal analysis, but which are claimed in this thesis to nevertheless be important in understanding how the CFSP works in practice.<sup>25</sup> As ‘governance’ does not supply an adequate theoretical framework for analysis of the CFSP, in chapter three governance is used as a starting point for building an institutional constructivist approach of legal analysis.

The third use of ‘governance’ identified here is when it is used in a more ideological or normative way. This suggests that the term incorporates, in particular, democratic means of accountability and standard-setting for nation-states and polities such as the EU. As such, it is an extremely value-based use of the term. Such uses of governance are often readily identifiable by the addition of the prefixes of ‘good’ and ‘new’ governance’. ‘Good governance’ frequently appears in national and international contexts, especially regarding developing countries. The promotion of ‘good global governance’ appears as one of the objectives of the EU’s external relations in the Treaty of Lisbon,<sup>26</sup> and reflects the status of good governance as one of the United Nation’s Millennium Development Goals adopted in 2000.<sup>27</sup> However, it is not the case that *good* is used as a prefix on every occasion that the term governance is used in a way which promotes these characteristics. Even where ‘governance’

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<sup>22</sup> Möllers (n 14) 316.

<sup>23</sup> JA Caporaso and J Wittenbrinck, ‘The New Modes of Governance and Political Authority in Europe’ (2006) 13 *Journal of European Public Policy* 471, 471.

<sup>24</sup> B Kohler-Koch, ‘Interdependent European Governance’ in B Kohler-Koch (ed) *Linking EU and National Governance* (OUP, Oxford 2003) 11.

<sup>25</sup> This is analysed in depth in the first part of the following chapter.

<sup>26</sup> Article 21(2) (h) TEU, as inserted by the Treaty of Lisbon, Article 1(24).

<sup>27</sup> Adopted by the UN General Assembly Resolution 55/2 (18 September 2000) UNGA Doc A/RES/55/2.

appears to be used in a more neutral, descriptive way (as according to the first use of governance identified above), its use can come closer to this more normative, value-laded sense.<sup>28</sup> An example is provided by the Commission's White Paper on Governance, where 'governance' (with no prefix) is defined as, 'rules, processes and behaviour that affect the way in which powers are exercised at European level, *particularly as regards openness, participation, accountability, effectiveness and coherence*' (emphasis added).<sup>29</sup> The characteristics associated with governance given by the Commission give the term strong associations with democratic processes and, therefore, positive overtones even without its prefix of 'good'. This is also reflected in the definition of governance provided by the United National Commission for Global Governance, whereby 'governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken'.<sup>30</sup> For this reason, caution must be exercised in using the term where there is no prefix in order to ensure that the appropriate descriptive or normative meaning is applied.

In addition to these three uses, further exploration is required of 'new' governance, since its widespread use suggest differences from, or at least, variations on the uses of governance above. New governance is identified as a current theme in the EU's internal sphere of governance, and so it is helpful at this juncture to explain how it is understood here. In a similar way to 'governance' as a term without an adjective, 'new' governance has also been used in all of the three fashions outlined above. In a descriptive way, new governance implies the use, within a system of

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<sup>28</sup> D M Curtin and I F Dekker, 'Good Governance: the Concept and its Application by the European Union' in DM Curtin and RA Wessel (eds) *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (2005) 10-12.

<sup>29</sup> White Paper on Governance (n 4) 8.

<sup>30</sup> Commission for Global Governance, *Our Global Neighbourhood* (OUP, Oxford 1995) 2.

governance, of methods and processes which move away from command-and-control regulation and law-making ('old' governance) towards more participatory forms of law and policy-making. The common denominator is that these methods and processes are not based on binding and enforceable pieces of legislation. In the context of the EU, 'new' governance is used to point to specific new *modes* of governance (including the Open Method of Coordination) and also a means to point to the changing nature of law and policy-making. In this descriptive sense, therefore, new governance can be used as shorthand to point to rather specific methods and processes. Scott and Trubek do not attempt to provide a definition of 'new governance', but instead use it as a convenient label for methods and processes characterised by departures from, and alternatives to, the community method.<sup>31</sup> 'Old' and 'new' terms have also been used interchangeably with 'hard' and 'soft' law by some legal scholars.<sup>32</sup> They suggest a list of dimensions which may be present in the new modes of governance: participation and power-sharing, multi-level integration, diversity and decentralisation, deliberation, flexibility and revisability, and experimentation and knowledge creation.<sup>33</sup> They also note, however, that the challenge presented by the modes of new governance is not confined to the EU. It has also arisen in nation states against the backdrop of the growth of the administrative or regulatory state.<sup>34</sup> Caporaso and Wittenbrink note the differences between the new modes of governance: policy processes, such as the OMC, policy process adjustments, such as gender mainstreaming and policy instruments, such as benchmarking, but they also contend that these can be grouped

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<sup>31</sup> J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *European Law Journal* 1.

<sup>32</sup> DM Trubek, P Cottrell and M Nance, "'Soft Law', 'Hard Law' and EU Integration" in G de Búrca and J Scott (eds) *Law and New Governance in the EU and the US* (Hart, Oxford 2006) 65.

<sup>33</sup> Scott and Trubek (n 31) 5-6.

<sup>34</sup> Scott and Trubek (n 31) 8.

together as new modes of governance.<sup>35</sup>

In this sense, the difference between the use of ‘new’ governance in this third, ideological/normative sense and the first, descriptive sense does not appear to be too marked. It is possible to use ‘new’ governance as a means to identify and describe methods and processes which depart from traditional ones. Yet, the distinction is worth making because ‘new’ governance is often used in a way which suggests that how it works is more democratic and legitimate. This has been a key concern for the EU in terms of the ‘democratic deficit’ it is often accused of suffering from. As with ‘good’ governance, ‘new’ governance often carries positive connotations, and caution is therefore required when simply using the term ‘governance’ without a prefix to indicate if it carries normative connotations or not. In order to avoid overly confusing the two, the use of ‘new modes of governance’ is preferred in this chapter to describe the methods and processes within the EU’s system of governance.

The use of governance in these three ways is useful in navigating through the different uses of the term in the following parts of the chapter. In the following sections, the discussion moves to explore some of the more substantive issues, trends and themes in the EU’s system of governance. In order to transcend the external/internal division in later chapters, it is first necessary to maintain a distinction between the external and internal dimensions of EU governance.

### **Themes in the system of governance in the EU’s external sphere**

The introduction to this thesis gave an overview of the history of the CFSP and its place within the Treaty arrangements of the Union. It was noted that the CFSP is by no means the only policy at the Community or Union levels which concerns the world beyond the territory of the Union. The existence of multiple policy frameworks is suggestive of a complex system

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<sup>35</sup> Caporaso and Wittenbrinck (n 23) 473.

of governance at the EU level when dealing with the outside world. The Common Commercial Policy and the enlargement processes are two prominent examples of externally-focussed aspects of the Union's system of governance which fall outside the realm of the CFSP. An 'external' dimension to policies in the 'internal' sphere relating to the area of Freedom, Security and Justice is also emerging.<sup>36</sup>

With the increases in EU competence in the external sphere, a number of key issues arise in relation to the EU's system of governance. By navigating through these issues, certain trends in the forms of governance can be detected. The first is the institutionalisation of governance in the external sphere as a means by which external policies are put into practice. The second is the operational dimension to the system of governance in the external sphere, which is the most visible practical expression of the CFSP. The third theme is the evolving nature of the role of the EU and the move from 'civilian power Europe' towards policies with a military, defence and security dimension. These dynamics are significant in recognising the changing characteristics of the EU's system of governance.

### **Institutionalisation**

The importance of institutions as a basis for a theoretical framework for analysis of the CFSP is a key part of the approach in addressing the hypothesis and research questions. The creation of institutions is a visible feature of the CFSP and the EU's external policies, bringing into focus a key theme in the EU's sphere of governance. How institutions are developed through practices and what this means for understanding the CFSP is the focus of chapter three. In this section, the institutionalisation is of a 'narrow' type, referring only to the explicit creation of institutions and structures, rather than the more 'gradual' forms, for example, through

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<sup>36</sup> This is explored in more detail in chapter five.



practices or elite socialisation.<sup>37</sup>

The system of governance in the external sphere has gradually become institutionalised since the informal practices of EPC were given a legal basis in the Single European Act.<sup>38</sup> The institutions created include the legal instruments and the frameworks for the development of relationships outside the EU's borders. Taken together, these examples of institutionalisation contribute to the emergence of a system of governance which was not visible when foreign policy cooperation was on a strictly-intergovernmental basis only.<sup>39</sup>

The TEU created specific instruments for use in the CFSP, Joint Actions and Common Positions, which are unique to the CFSP and not found in any other national or supranational context. These, along with the provision on Common Strategies introduced in the Treaty of Amsterdam, were examined in the introduction. The most significant measure in terms of institutional arrangement was the creation of the post of High Representative for the CFSP, responsible to the Council.<sup>40</sup> The post of High Representative for the CFSP is an institution and, in providing a 'face' for the Union's foreign policy, demonstrates that the Union's system of governance has incorporated a feature of foreign policy-making associated with nation states, even though the High Representative cannot be accurately called a foreign minister.<sup>41</sup> As the Treaty of Amsterdam also transferred responsibility for the Petersberg

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<sup>37</sup> M E Smith, *Europe's Foreign and Security Policy: the Institutionalization of Cooperation* (CUP, Cambridge 2004) 57. Institutionalism is dealt with in more detail in chapter three.

<sup>38</sup> Articles 1, 3(2), 30 SEA.

<sup>39</sup> Smith (n 37) 176.

<sup>40</sup> Article 26 TEU reads: 'The Secretary-General of the Council, High Representative for the common foreign and security policy, shall assist the Council in matters coming within the scope of the common foreign and security policy, in particular through contributing to the formulation, preparation and implementation of policy decisions, and, when appropriate and acting on behalf of the Council at the request of the Presidency, through conducting political dialogue with third parties'.

<sup>41</sup> It can also be noted here that the High Representative's title is more informally changed to 'foreign policy chief' in English-language media reports. For example, BBC News 'EU's Solana Begins Mid-East Tour' *BBC News Online* (London, 17 March 2008) <[http://news.bbc.co.uk/1/hi/world/middle\\_east/6440733.stm](http://news.bbc.co.uk/1/hi/world/middle_east/6440733.stm)> (accessed 25 July 2008).

tasks from the Western European Union to the EU, this new post took on much greater significance.<sup>42</sup> The Petersberg tasks, defined at the Ministerial Council of the Western European Union in June 1992, include humanitarian and rescue, peace-keeping and combat forces in crisis management tasks and Member States agree to make their military units available when necessary in carrying out these tasks. There have also been *ad hoc* 'special representatives' with specific temporary mandates, including for the African Great Lakes region, the South Caucasus and the Middle East peace process<sup>43</sup> and the establishment of a Policy Planning and Early Warning Unit located within the CFSP secretariat.<sup>44</sup> This demonstrates that the institutional map of the CFSP is more dynamic and complex than its 'intergovernmental' label suggest.

Institutionalisation in the external sphere can also be seen in the creation of frameworks and structures which include non-Member States. It is important to note here that this has not been done under the Treaty provisions of the CFSP, though these frameworks do demonstrate an external dimension to the EU's system of governance. As one of these examples is the Euro-Mediterranean Partnership, which is the case study of the thesis and examined in depth in chapter four, it is useful here to provide as an example another prominent institutionalised structure, namely the Northern Dimension Initiative (NDI).

The NDI was launched in 1997 as Finland's first political initiative

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<sup>42</sup> Article 17 TEU. The nature of the Petersberg tasks in the transformation of the EU from a purely civilian power to one with a military edge is explored in more detail from page 54 below.

<sup>43</sup> These were created by decisions by the Council and subsequently covered by Joint Actions extending and amending their respective mandates: Council Joint Action 2000/792/CFSP appointing Mr Aldo Ajello as the Special Representative of the European Union for the African Great Lakes Region [2000] OJ L 318/1; Council Joint Action 2003/872/CFSP extending the mandate of the Special Representative of the European Union for the South Caucasus [2004] OJ L 31/74; Council Joint Action 2003/873/CFSP extending the mandate of the Special Representative of the European Union for the Middle East Peace Process [2003] OJ L 326/46.

<sup>44</sup> S Vanhoonaeker, 'The Institutional Framework' in C Hill and M Smith (eds) *International Relations and the European Union* (OUP, Oxford 2005) 82; M Dassù and A Missiroli, 'More Europe in Foreign and Security Policy' (2002) 38 *International Spectator* 79, 81.

following its accession to the EU in 1994. The enlargement of the EU to the North, which also brought in Sweden,<sup>45</sup> occurred during a period where the EU's attention was focussed on the future enlargement to the newly democratic states in Central and Eastern Europe. With the EU's renewed interest in the Mediterranean symbolised by the Barcelona Process 1995, a policy framework dealing with issues in Europe's North was the missing link. This was especially true given the long border the EU now shared with Russia and the independence of the Baltic States, situated between the EU's new Northern Member States and Russia. The NDI was adopted by the Council in 1999, and included the EU Member States, with Iceland, Norway and Russia and the candidate states (at that time) of Estonia, Latvia, Lithuania and Poland. Two Action Plans for cooperation have been approved by the European Council and these ran between 2000-2003<sup>46</sup> and 2004-2006.<sup>47</sup> Since 2007, the NDI operates on the basis of a permanent policy framework.<sup>48</sup>

The purpose of the NDI is to 'address the specific challenges and opportunities arising in those regions and ... to strengthen dialogue and cooperation between the EU and its Member States, the Northern countries associated with the EU under the EEA (Norway and Iceland) and the Russian Federation'.<sup>49</sup> The EU's relationship with Russia is the most strategically important and most complex. The EU has been supportive of the drive for regionalism in the Baltic area<sup>50</sup> on the basis of promoting

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<sup>45</sup> Norway too signed the Accession Treaty, but EU membership was rejected in a national referendum on 28 November 1994.

<sup>46</sup> Action Plan for the Northern Dimension with external and cross-border policies of the European Union 2000-2003 (2000) 9401/00. Available at: [http://ec.europa.eu/comm/external\\_relations/north\\_dim/ndap/06\\_00\\_en.pdf](http://ec.europa.eu/comm/external_relations/north_dim/ndap/06_00_en.pdf)

<sup>47</sup> Commission (EC), Commission Working Document: The Second Northern Dimension Action Plan, 2004-2006 COM (2003) 343 final.

<sup>48</sup> Council of the EU, Joint Press Release on the IV Northern Dimension Ministerial Meeting, Press Release 14701/05, 21 November 2005.

<sup>49</sup> European Commission, 'The Northern Dimension' <[http://ec.europa.eu/comm/external\\_relations/north\\_dim/index.htm#History](http://ec.europa.eu/comm/external_relations/north_dim/index.htm#History)> (accessed 25 July 2008).

<sup>50</sup> A Bergman, 'Adjacent Internationalism: the Concept of Solidarity and Post-Cold War Nordic-Baltic Relations' (2006) 41 *Cooperation and Conflict* 73, 80.

'soft security'.<sup>51</sup> As such, the NDI is incorporated into the Partnership and Cooperation Agreement with Russia. A consequence of the 2004 enlargement has been the surrounding of the Russian enclave of Kaliningrad between EU Member States.

Unlike the Euro-Mediterranean Partnership, the EU has not created institutions within the NDI such as a Parliamentary Assembly, but points to the use of existing (non-EU) frameworks set up to deal with Northern and Baltic issues in the 1990s. These are the Council of the Baltic Sea States (CBSS), the Barents Euro Arctic Council (BEAC) and the Arctic Council. Cooperation and collaboration between the partners, which includes civil society as well as the EU Member States, Russia, Iceland and Norway, is stressed but the NDI has not been the subject of a specific budget line. In the absence of a strong institutional framework, overlapping interests of the regional frameworks noted above, and the apparent sidelining of these frameworks in the second Action Plan in particular have been criticised.<sup>52</sup>

Nevertheless, the example of the NDI demonstrates the general moves towards a broad institutionalisation in the EU's external sphere of governance. As a *process* of institutionalisation, it represents a long-term ambition to extend the EU's influence in its neighbourhood and ensure security around its borders beyond straightforward bilateral cooperation with third states. The Euro-Mediterranean Partnership has been the subject of a greater degree of institutionalisation, to the extent that it too can be characterised as a system of governance, with the EU institutions as strong central actors. This is the subject of chapter four, but the point to make at this juncture is that institutionalisation within the external sphere of governance has become more marked and dynamic since the

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<sup>51</sup> D Arter, 'Small State Influence within the EU: the Case of Finland's "Northern Dimension Initiative"' (2000) 38 *Journal of Common Market Studies* 677 686.

<sup>52</sup> H Haukkala, 'The Northern Dimension: a Presence and Four Liabilities?' in R Dannreuther (ed) *European Foreign and Security Policy: Towards a Neighbourhood Strategy* (Routledge, Abingdon 2004) 105.

creation of the CFSP within the EU's constitutional arrangements.

### **Overcoming obstacles in operational practices under the CFSP**

Turning to the uses of the instruments provided for in the TEU, it has been said that the track-record of the CFSP demonstrates a 'paradox and contradiction at its core'.<sup>53</sup> The text of the TEU promised much, and by providing specific instruments at the disposal of the Member States in the Council, it clearly represented a move away from the previous arrangements under EPC of simply producing communiqués on issues, without the possibility for any concrete action at the European level.

The effectiveness of the CFSP was put to the test almost immediately by events on the EU's doorstep, in particular the break-up of Yugoslavia, and events further afield, such as the genocide in Rwanda in 1994. Despite the rhetoric at the time from some Member States at the conclusion of the TEU,<sup>54</sup> it was clear that a *common* foreign and security policy was far from evident. The EU was unable to coordinate an effective response to events on its doorstep in the Balkans, and more recently, serious divisions emerged amongst the Member States over military intervention in Iraq in 2003, where the variations in their conception of foreign intervention were very clear. Questions as to whether a common foreign policy would indeed ever be possible seemed highly pertinent.<sup>55</sup> The meaning of 'common' is paramount: if it is taken to mean that all the Member States adhere to a specific course of action and policy towards a third state, then it is unlikely to happen in an enlarging EU for a very long time, if ever. This can be explained by the lack of enforcement mechanisms in the system of governance of the EU, of Treaty provisions relating to the CFSP

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<sup>53</sup> M E Smith, 'The Framing of a European Foreign and Security Policy: Towards a Post-Modern Policy Framework?' (2003) 10 *Journal of European Public Policy* 556, 556.

<sup>54</sup> The most unfortunate was Jacques Poos, Foreign Minister of Luxembourg, who declared that 1991 was the 'hour of Europe': F Cameron, *The Foreign and Security Policy of the European Union* (Sheffield Academic Press, Sheffield 1999) 28.

<sup>55</sup> B Crowe, 'A Common European Foreign Policy after Iraq?' (2003) 79 *International Affairs* 533.

and the retaining of national foreign policies alongside the CFSP.

The blame for failures in EU foreign policy during the 1990s is, therefore, usually placed with the Member State governments, since they are largely in control of the CFSP through the Council as the dominant institution. However, there has also been criticism over the complications in understanding how the CFSP instruments and institutional framework should be used.<sup>56</sup> Hill highlights the problems caused by the ‘whole language and architecture of Common Positions, Joint Actions and Common Strategies’<sup>57</sup> and lack of inclusion of the new Member States into an ‘integrating foreign policy vision of enlargement’.<sup>58</sup> Nevertheless, even without these criticisms and difficulties, institutionalisation cannot resolve the most important issues confronting the EU in the absence of collective political will on the part of the Member States.<sup>59</sup> Even with well-defined and familiar legal instruments at the disposal of institutions, this does not guarantee a meaningful the CFSP. A coherent and effective foreign policy is not merely dependent on appropriate structures and procedures, but on the political will of the Member States to become more aware of the interests they share and participate in the formation of a genuine policy.<sup>60</sup> This involves overcoming what the first Commission President Hallstein termed the ‘traditions and emotions’ of foreign policy, an idea which is very much grounded in the Westphalian order of states.<sup>61</sup>

Although it is tempting to focus on the well-documented failures of the CFSP, the consequences of its unique nature must also be recalled. The provisions in the TEU on instruments available under the CFSP were not defined clearly. As such, the way in which they have been utilised in

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<sup>56</sup> C Hill, 'CFSP: Conventions, Constitutions and Consequentiality' (2002) 38 *International Spectator* 75, 81.

<sup>57</sup> Hill (n 56) 87.

<sup>58</sup> C Hill, 'What is to be done? Foreign Policy as a Site for Political Action' (2003) 79 *International Affairs* 233, 253.

<sup>59</sup> Hill (n 56) 85.

<sup>60</sup> Cameron (n 54) 68.

<sup>61</sup> Cameron (n 54) 68.

putting the CFSP in operation is telling. Wallace terms this 'learning by doing'.<sup>62</sup> The examination of the practice and operation of the CFSP is extremely important. Whilst the work achieved 'on the ground' in the name of the EU is not as extensive as the declaratory texts adopted in the Council, a number of operational aspects of the CFSP can be hailed a success and deserve attention.

One early example of a successful Joint Action following the entry into force of the TEU, and in spite of the general failure on the part of the EU to deal with the break-up of Yugoslavia, was the EU Administration of Mostar (EUAM). This began in July 1994 and was a complex operation in running an ethnically-divided city ravaged by war.<sup>63</sup> This Joint Action was deemed a success because of the eventual return of administration of the city to local communities.<sup>64</sup> Two other successful examples, also in the Balkans, were the mediation between the authorities in the Former Yugoslav Republic of Macedonia and Albanian rebels in the country, resulting in the Ohrid Agreement of 2001 and the Belgrade Agreement between Serbia and Montenegro in 2002. Both contributed to the avoidance of conflicts and the intervention of the High Representative for the CFSP was possible because of the CFSP instruments already in force towards these third states.

The operational elements to the CFSP 'in practice' greatly contribute to a clearer picture of the issues relating to the EU's identity in the external sphere. Far from taking the language of the TEU as establishing a fully-fledged foreign policy for the EU, it is perhaps better to view the CFSP as an ongoing process of overcoming major obstacles. The legal instruments created under the CFSP have taken some time before their utility can be fully realised, and for this reason, the use of these in

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<sup>62</sup> Wallace (n 7) 439-44.

<sup>63</sup> Council Decision 94/308/CFSP of 16 May 1994 adapting and extending the application of Decision 93/603/CFSP concerning the Joint Action decided on by the Council on the basis of Article J.3 of the Treaty on European Union on support for the conveying of humanitarian aid in Bosnia and Herzegovina, Article 1.

<sup>64</sup> Cameron (n 54) 55.

response to different situations is of the highest importance. Learning from the mistakes and missed opportunities in the Balkans and elsewhere is also an essential part of this process. In terms of a form of governance, the successes and failures of the CFSP in operation demonstrate where the CFSP's strengths and weaknesses lie. The examples above of successful instruments point to the 'civilian power' aspects of the CFSP. This has long since been seen as a key hallmark of the foreign policy of the EU, to which discussion now turns.

### **From 'Civilian power Europe' to the European Security and Defence Policy**

Prior to the establishment of the CFSP, questions about security and defence at the European level were dealt with in the North Atlantic Treaty Organisation (NATO) and the Western European Union (WEU). These organisations were created for purposes of defence and collective security, and not all Member States of the EU are members of NATO and *vice versa*. EPC avoided discussing questions of defence and the mixed pictures of membership of the EU, NATO and WEU amongst the Member States, including a number of neutral states, meant that security and defence implications were not at the heart of the CFSP in its early days.

Due to the characteristics of the EU as a non-state actor with no military force of its own, the EU's foreign policy was claimed to bear the hallmarks of a 'civilian power' with the goal of contributing to global peace and stability through non-military means. Duchêne's characterisation of 'European civilian power' was made in 1972,<sup>65</sup> and therefore did not stem from the creation of the CFSP, but the term has remained a common characterisation of the EU's foreign policy to the present day. Since the enactment of the TEU, the goals of the CFSP are

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<sup>65</sup> F Duchêne, 'Europe's Role in World Peace' in R Mayne (ed) *Europe Tomorrow: Sixteen Europeans Look Ahead* (Fontana, London 1972).



embedded in the constitutional arrangements of the Union.<sup>66</sup> In utilising the CFSP instruments for purposes such as humanitarian aid, post-conflict reconstruction, supporting the peaceful resolution of disputes and sending election observers to states restoring democracy, the CFSP can be seen as ‘soft power’ in contrast to ‘hard power’ based on military strength. A further example of this is the Joint Action enabling EU participation in KEDO, the Korean Peninsula Energy Development Organisation which promotes the peaceful use of nuclear energy in North Korea through sharing expertise.<sup>67</sup> Whilst this is an issue connected with security, it does not involve any military or defence angle on the EU’s part. Manners has characterised these as examples of ‘normative power Europe’<sup>68</sup> which gives the system of governance in the EU’s external sphere a positive identity, differentiated from that of a nation state since the EU is able to focus its attention on matters other than defence.

This basis for European foreign policy is slowly undergoing change and it is now commonly debated as to whether ‘normative power Europe’ remains an appropriate description of the EU’s system of governance in the external sphere. The original TEU left open the question of if and when to form a common EU defence policy.<sup>69</sup> A significant step came in 1998 when the UK and France issued the St Malo declaration calling for an EU military dimension outside the NATO framework.<sup>70</sup> The European Security and Defence Policy (ESDP) was created following the Cologne European Council in 1999 and related to humanitarian, rescue and peace-making tasks and conflict-management as part of the progressive framing of a common defence policy. According to the Treaty of Nice, the EU is

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<sup>66</sup> Article 11 TEU.

<sup>67</sup> Council Joint Action 96/195/CFSP on participation by the EU in the Korean Peninsula Energy Development Organisation (KEDO) [1996] OJ L 63/1.

<sup>68</sup> I. Manners, ‘Normative power Europe: a contradiction in terms?’ (2002) 40:2 *Journal of Common Market Studies* 235-258; I. Manners, ‘Normative power Europe reconsidered: beyond the crossroads’ (2006) 13:2 *Journal of European Public Policy* 182-199.

<sup>69</sup> Article B TEU, repealed by the Treaty of Amsterdam.

<sup>70</sup> Joint Declaration issued at the British-French Summit on European Defence, St Malo, France, 4 December 1998.

responsible for carrying out the Petersberg tasks, previously the responsibility of the WEU. These are referred to in Article 17 TEU and cover humanitarian and rescue tasks, peace-keeping tasks and crisis management tasks.

The evolution of the CFSP from its inception until the present day demonstrates a gradual shift away from the notion of 'civilian power EU'. This represented a major decision for the EU, as a 'harder' military angle is now within its scope. The first military operation was launched by the EU in 2003, taking over from NATO as a peace-keeping force in the Former Yugoslav Republic of Macedonia (FYROM).<sup>71</sup> This has been followed by operation 'Artemis' in the Democratic Republic of Congo,<sup>72</sup> and the transition of the stabilisation force in Bosnia-Herzegovina from NATO to EU command in 2004.<sup>73</sup> The European Security Strategy, 'A Secure Europe in a Better World' was approved by the Council in 2003,<sup>74</sup> although as its title suggests, the underpinning principles of the ESS can be characterised as more globalist and internationalist rather than representing an effort to transform the EU into a state-like military actor.<sup>75</sup>

The EU has therefore shown through these missions that have become gradually larger in scale and progressively more ambitious, that it has 'the ability to break out of its self-imposed conceptual paralysis concerning military operations'.<sup>76</sup> It must be underlined here that the competences of the EU in the CFSP/ESDP remain limited, and even with the military angles within its scope, the emphasis on peace-keeping and humanitarian missions means that personnel operating under the EU

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<sup>71</sup> Council Decision 2003/202/CFSP [2003] OJ L 76/43.

<sup>72</sup> Council Decision 2003/432/CFSP [2003] OJ L 147/42.

<sup>73</sup> Council Joint Action 2004/570/CFSP [2004] OJ L 252/10.

<sup>74</sup> Council of the EU, 'A Secure Europe in a Better World: The European Security Strategy', 12 December 2003 [not published in the official journal].

<sup>75</sup> A Bergman and J Peterson, 'Security Strategy, ESDP, and Non-Aligned States' in J Peterson and R Dannreuther (eds) *Security Strategy and Transatlantic Relations* (Routledge, London 2006) 147.

<sup>76</sup> J Howarth, 'From Security to Defence' in C Hill and M Smith (eds) *International Relations and the European Union* (OUP, Oxford 2005) 194.

banner will not have direct combative roles. In terms of the EU's system of governance, the moves towards discussion and implementation of measures in the fields of security and defence demonstrate the gradually growing ambition on the part of the EU to move into areas previously fully in the realm of the Member States. This is a point which can be made with regard to the internal sphere of governance too.

### **Themes in the system of governance in the EU's internal sphere**

The nature of law and integration within the internal sphere of the EU's system of governance has come under increased scrutiny in recent years. Successive waves of enlargement have more than doubled the membership of the EU in less than 15 years since the entry into force of the Treaty of Maastricht, resulting in a larger and more diverse Union. Despite significant achievements in European integration, most notably the moves towards completion of the single market, the launch of the single currency and increased cooperation and competences in the field of Justice and Home Affairs, the EU faces fundamental questions relating to its law and policy-making, and their connection with national legislatures and policy-making processes.

One of the key issues facing the EU is how to make the necessary changes to law and policy-making in order to keep up with, on the one hand, an enlarged and more diverse Union, whilst bearing in mind the challenges of globalisation and the economic rise of, in particular, China and India. Making institutional changes which are acceptable to the citizens of the EU has also become a core issue. The key to integration through harmonisation has been the use of regulations and directives, as defined by Article 249 EC, and the principles of direct effect and supremacy of EC law as laid down by the ECJ. Enforcement of the EC Treaty provisions has been key in ensuring compliance by the Member States. This is often termed the 'Classic Community Method' (CCM) and

forms the basis of the traditional model of EU constitutionalism.<sup>77</sup> The CCM is the main factor in contributing to the emergence of a system of (supranational) governance at the EU level.

In recent years, 'new' governance has been increasingly discussed in relation to the EU. As identified earlier in this chapter, new governance does not have a settled meaning and can be used as a description of modes and techniques of governance which have emerged or a means to denote certain (usually positive) characteristics. In the following sections, the descriptive use of new governance is used in identifying the modes of governance emerging at the EU level. This helps to clarify the characteristics, methods and hallmarks of new governance visible in different internal policy spheres. The purpose therefore in the following sections is to explore the 'phenomenon'<sup>78</sup> of new governance, the policy areas in which it has been used alongside the Community Method, in order to reveal a more general picture of EU governance, bringing out themes, issues and challenges.

### **The Classic Community Method and 'new modes of governance'**

The CCM is built upon the Commission's exclusive right to initiate legislation and policy, with the Council and European Parliament exercising legislative functions. Qualified Majority Voting in the Council is an essential component in overcoming the difficulties of securing unanimity amongst the Member States. The presence of the European Court of Justice with the power to rule on the validity of legislative measures and infringements by the Member States of Community law is of paramount importance. According to the Commission,

The Community Method guarantees both the  
diversity and effectiveness of the Union. It

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<sup>77</sup> G de Búrca, 'The Constitutional Challenge of New Governance in the European Union' (2003) 28 *European Law Review* 814, 817.

<sup>78</sup> Scott and Trubek (n 31) 1.

ensures the fair treatment of all Member States from the largest to the smallest. It provides a means to arbitrate between different interests by passing them through two successive filters: the general interest at the level of the Commission; and democratic representation, European and national, at the level of the Council and European Parliament, together the Union's legislature.<sup>79</sup>

There is little doubt that the CCM has contributed to successful harmonisation of law and legal systems across the EU. It has formed the backbone of the integration through law process in the Union and without it, it is likely that the EU would not have been able to attain the level of integration that it has. However, the CCM as a means by which integration goals have been pursued during the history of the EU has been under pressure for three main reasons. First, the CCM has undergone changes, such as the greater role played by the (directly elected) European Parliament in the passage of legislation and the extension of qualified majority voting in the Council, but it remains in essence a method conceived for a polity of six states. Enlargement to 27 states has posed challenges for the effectiveness of legislative measures and the ability of the EU institutions to ensure that harmonisation occurs in practice as well as on paper. Directives, which require transposition in the Member States, are particularly at risk from uneven and insufficient application. Second, and in the context of enlargement, the nature of 'one size fits all' legislative measures applicable to a much more diverse EU has been raised. The issue of ensuring that the differences, for example in economic and social terms, are respected in the integration process is a apt one. Third, the competences of the EU have expanded into new areas where binding legislative measures are sometimes not possible or desirable. This can be because the goals to be achieved could not easily be obtained through regulation, for example in some aspects of social and economic

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<sup>79</sup> White Paper on Governance (n 4) 8.

policies, and/or because they are in areas which are 'sensitive' in terms of their closeness to the heart of state sovereignty, and thus face resistance from the Member States. Employment policy is one such example.

### **The Open Method of Coordination**

The clearest example of a new mode of governance in operation in the EU is the Open Method of Coordination (OMC). The OMC was explicitly recognised as a mode of governance at Lisbon European Council Summit in 2000, though its roots in EC/EU policy stretch as far back as 1958.<sup>80</sup> The OMC is composed of four elements; fixing short, medium and long-term goals and guidelines for the Union; benchmarking and using quantitative and qualitative indicators as a means of comparing best practice; translating the guidelines and goals into national and regional policies through specific targets; and using monitoring, evaluation and peer-review as mutual learning processes.<sup>81</sup> These characteristics therefore move the EU away from the top-down/command-and-control regulatory approach of the CCM, and do not seek to establish a single common framework, but instead place the Member States on a path towards achieving common objectives while respecting different underlying values and arrangements.<sup>82</sup> The OMC has been utilised in a number of policy areas, which according to de la Porte, are characterised as those in which there has been limited regulation (and therefore use of the Community Method), these include the information society, research and development, education, employment and social exclusion.<sup>83</sup>

It is interesting to note, however, that amongst the diverse origins of

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<sup>80</sup> D Hodson and I Maher, 'The Open Method as a New Mode of Governance: the Case of Soft Economic Policy Coordination' (2001) 39 *Journal of Common Market Studies* 719, 720.

<sup>81</sup> European Council, 'Presidency Conclusion of the Lisbon European Council' (Lisbon Strategy), 23-24 March 2000, 37.

<sup>82</sup> C de la Porte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' (2002) 8 *European Law Journal* 38, 39.

<sup>83</sup> de la Porte (n 82) 40.

the inspiration for the OMC, Hodson and Maher identify the monetary coordination procedure used in the Economic and Monetary Union (EMU) process as the model.<sup>84</sup> In this situation, Member States wishing to enter EMU agreed to adhere to certain benchmarks and policy guidelines: in the event of non-compliance, a non-binding recommendation could be made by the Council against a Member State. However, although this served as a model for the OMC, the situations in which the OMC have been applied, as listed above, have not operated within a comparable situation since the benchmarks in EMU revolved around a hegemonic force (i.e. the German economy), which is not the case for social and employment policy.<sup>85</sup> To take one example, social exclusion has been the focus of both Armstrong and de la Porte's research into the application of the OMC.<sup>86</sup> Tackling social exclusion is an example of a policy area generally seen as 'sensitive' for Member States, and harmonisation measures have been minimal. Non-binding mechanisms have long-since been used in this area in order to encourage Member States to act in a particular way, although the use of the OMC is a marked change since it is in effect a 'generalizable technique of governance', the characteristics of which are examined in the following section.

### **Characteristics of the new modes of governance and the White Paper on Governance**

One of the distinctive features of the OMC which allows Member States to fulfil these common objectives is the importance and role of a variety range of actors, and in particular 'social partners' and 'civil society'. This is also a common feature of other new modes of governance, such as mainstreaming and benchmarking, and suits the descriptive use of

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<sup>84</sup> Hodson and Maher (n 80) 727.

<sup>85</sup> Hodson and Maher (n 80) 729.

<sup>86</sup> K Armstrong, 'Tackling Social Exclusion through OMC: Reshaping the Boundaries of European Governance' in T Börzel and R Cichowski (eds) *The State of the European Union volume 6: Law, Politics, and Society* (OUP, Oxford 2003).

governance in the EU context as indicative of a wider range of actors involved in law and policy-making. Eberlein and Kerwer group the characteristics of the new modes of governance as follows:

new modes of governance depart from the Community methods of legislating through the use of regulations and directives. They build on the participation of private actors in policy formation, relying on broad consultation and substantive input. Policy-making follows a procedural logic in which there is joint target-setting and peer assessment of national performances under broad and unsanctioned European guidance.<sup>87</sup>

The engagement of non-governmental actors in policy processes is one of the strongest characterisations of a 'system of governance'. The inclusion of 'social partners' and 'civil society' also point to why talking about *new* governance can have ideological and normative connotations. The reasons why the Commission has considered new governance are explained in its White Paper. Despite the achievements of European integration, which has 'delivered fifty years of stability, peace and economic prosperity',<sup>88</sup> there is without a doubt the problem that many Europeans do not feel involved in, or close to, decision-making at the European level. Questions about the relationship between the EU and national policy-making processes become highly apt.

The White Paper identifies areas for action on the part of the institutions and Member States with the general aim of rendering decision-making clearer to the citizen, who should also be more involved (individually or as part of a group) in the formation of law and policy. This is especially true since the areas in which the EU institutions, particularly the Commission, had a clear mandate to pursue integration (especially the

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<sup>87</sup> B Eberlein and D Kerwer, 'New Governance in the European Union: A Theoretical Perspective' (2004) 42 *Journal of Common Market Studies* 121, 123.

<sup>88</sup> White Paper on Governance (n 4) 7.



Single Market) have largely been achieved.<sup>89</sup> These action points are underpinned by five principles of good governance, namely openness, participation, accountability, effectiveness and coherence, therefore making the link with the normative connotations of 'new' governance.<sup>90</sup> New governance approaches may offer enough flexibility so that the EU institutions are not faced with gridlock or an impossible task of ensuring implementation of directives and so on. There has also been the view amongst several Member States that the volume of binding legislation has become overly burdensome, and that there is a need for a reduction in the overall amount of regulations and directives in force. 'Better regulation' and the readiness to roll-back 'unnecessary red-tape' were stated objectives of the Barroso Commission upon taking office.<sup>91</sup>

As such, decision-making at all levels is the best way of ensuring that European citizens feel informed about how the EU and its policies affect their lives. Debates about global civil society have reflected similar arguments.<sup>92</sup> The White Paper speaks in terms of 'a reinforced culture of consultation and dialogue'<sup>93</sup> and 'network led initiatives'<sup>94</sup>. This would assist in adding democratic legitimacy to the Union's system governance, especially if it eventually results in the development of a European civil society, beyond the traditional boundaries of the Member States.<sup>95</sup>

By stressing the inclusiveness aspects of the new modes of governance, the White Paper demonstrates that 'new' governance as a term can come close to the meaning of 'good' governance, which in this

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<sup>89</sup> Caporaso and Wittenbrinck (n 23) 473.

<sup>90</sup> White Paper on Governance (n 4) 10.

<sup>91</sup> JM Barroso, 'Strategic Objectives' (Address to the European Parliament, Strasbourg, Speech 04/539, 14 December 2004).

<sup>92</sup> Wilkinson (n 3) 11; J Bartleson, 'Making Sense of Global Civil Society' (2006) 12 *European Journal of International Relations* 371.

<sup>93</sup> White Paper on Governance (n 4) 16.

<sup>94</sup> White Paper on Governance (n 4) 18.

<sup>95</sup> K Armstrong, 'Rediscovering Civil Society: the European Union and the White Paper on Governance' (2002) 8 *European Law Journal* 102, 105. Armstrong, in the same article, discusses the possible meanings of 'civil society' and 'European civil society' since these can be interpreted in vastly different ways.

scenario may help to legitimize the European integration process in the eyes of the citizens of the EU. It is also grounded in the language of reforming the European integration process and better engaging with citizens. It must also be borne in mind, however, that the Commission has an inherent self-interest in presenting the new modes of governance as a variation on the CCM (where it enjoys a monopoly on the initiation of legislative measures), rather than a more radical departure.<sup>96</sup> The White Paper was there notable for the importance placed on the continued need for the CCM, and the Commission's own interpretation of the place for the new modes of governance has provoked a great deal of debate.<sup>97</sup> Nevertheless, Eberlein and Kerwer warn against being overly sceptical;

one should not rush to dismiss new modes of governance as nothing but a smokescreen for the Commission as it attempts to pursue revitalised but old-style regulation. Most importantly, documents such as the White Paper cannot be viewed as authoritative guides to the 'real' policy approach of key actors such as the Commission. They are notoriously political, ambiguous, and thus difficult to decipher. And they are not reliable guides to a complex 'policy reality'.<sup>98</sup>

It may be the case that fewer regulations and directives are made than in the past, especially when compared to the period prior to the completion of the Single Market, but it should not be taken to mean that methods of new governance such as the OMC will always be appropriate as alternatives. Similarly, it should not be argued that one form of governance is necessarily superior to the other: the binding nature of rules and voluntarism of new modes of governance both have their place

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<sup>96</sup> D Wincott, 'The White Paper, the Commission and the Future of Europe' (2001) 14 *European Union Studies Association Review* 2

<sup>97</sup> For example; L Metcalfe, 'More Green than Blue: Positioning the Governance White Paper' (2001) 14 *European Union Studies Association Review* 4; Curtin and Dekker (n 28).

<sup>98</sup> Eberlein and Kerwer (n 87) 124.

within the European integration process depending on the aims and context. In this respect, discussion of ‘old’ governance (meaning the CCM) and ‘new’ governance (including the OMC) can be misleading. The important point to draw from this discussion for the purposes of this chapter is that the system of governance in the Union is more complex than the provisions laid down by the Treaty would suggest. Even a narrow view of the new modes of governance as limited to very specific instruments, such as the OMC, shows that understanding the ‘law’ in the internal sphere must take account of a greater variety of actors involved in the processes and the effects of measures which may not have explicitly stated binding characteristics.

### **Overcoming the external/internal division**

Earlier in this chapter, it was noted that a ‘system of governance’ is an appropriate characterisation of the EU, since its institutional arrangements and policy-making structures are unique, complex and materially different from those of a nation state. As the preceding part shows, the traditional community method of governance in the EU has been joined by a number of new modes of governance, which share similar characteristics and which are playing an increasingly prominent role.

The new modes of governance have, however, only been discussed as a current theme within the *internal* sphere of the EU’s system of governance. The examples of where specific new modes of governance, such as the OMC, have been used do not obviously apply in the Union’s external sphere. This includes migration, the subject of chapter five, since the OMC has only been used in the integration dimension of migrants, which cannot be accurately characterised as an external dimension to the sphere of governance. Considering that the new modes of governance have been used in areas ‘sensitive’ to Member States’ sovereignty, the lack of the new modes of governance in foreign policy may seem surprising: foreign

policy is clearly an area which lies at the core of a state's identity, and even more specifically, in the domain of the executive. Parliamentary and judicial control of foreign policy has traditionally been limited in nation states. Thus, many Member State governments are extremely wary of ceding any decision-making authority to the EU institutions, even though their support for a 'strong' EU as an international actor is often voiced.

The apparent lack of the presence of new modes of governance in the CFSP is indicative of a wider reticence to use either the language of governance in relation to the external sphere. There are two reasons which help to explain why this is so.

The first reason is that distinguishing the 'old' mode of governance (CCM) from the new modes of governance would seem not to apply to the CFSP, since it was never subject to the Community method, but had a decision-making process more readily seen as intergovernmental, separate from the 'hard' legal order of the Community. It is clear that when dealing with what is 'external', whether this is on the part of a nation-state or the EU, the language employed is that of foreign, external or international relations, foreign policy, trade links and so on. Hence, the CFSP is therefore seen more as a manifestation of a state-like foreign-policy. The characterisation post-1992 of the CFSP as an intergovernmental 'pillar' underlines the place of the Member States as the only significant actors in a forum where the supranational EU institutions seem to be excluded. The emphasis on a system of governance as being inclusive of a wider range of actors is often a means by which the role of civil society and experts is recognised.<sup>99</sup> This would not seem to be applicable to the CFSP, when seen in the light of the foreign policies of nation states more generally.

The second, and related, reason is that the institutions themselves seldom use the language of governance in relation to the external sphere. Returning to the White Paper, there is little evidence to demonstrate this

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<sup>99</sup> The expertise dimension to European integration is primarily identified with the work of Majone. See, for example, G D Majone, *Regulating Europe* (Routledge, London 1996).

aside from one reference to the EU's contribution to global governance:

in applying the principles of good governance to the EU's global responsibility, the Union should be more accessible to governmental and non-governmental stakeholders from other parts of the world. ... The Union should take the global dimension into account in assessing the impact of policies, in establishing guidelines for the use of expertise, and through a more pro-active approach to international networks.<sup>100</sup>

The last part of this quote does, nevertheless, reveal that parallels can be drawn between the Union's internal system of governance and the external sphere: the institutionalised networks including the EuroMed Partnership and Northern Dimension Initiative are examples of how this has been put into practice. Therefore, whilst it may seem that a division exists between the spheres of governance, in fact the external sphere already demonstrates some of the hallmarks of the system of governance in the internal sphere. Using the terminology of governance has a different focus to that of foreign policy, where the internal/external divide seems to be much clearer. With the importance of institutions and institutionalisation in mind, attention is not fixed solely on what are often termed 'high politics' issues, but longer-term process and multi-layered relationships.<sup>101</sup>

Bridging the internal/external division by using the language of governance also helps to clarify the role of the Union's common institutional framework. This resonates with a governance approach (according to the second meaning) where the institutional framework is taken as a starting point for analysing the methods, process and effects of the system of governance. This can take account of, for example, the role

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<sup>100</sup> White Paper on Governance (n 4) 27.

<sup>101</sup> B Tonra, 'Conceptualizing the EU's Global Role' in M Cini and AK Bourne (eds) *European Union Studies* (Palgrave, Basingstoke 2006) 120.

of the Commission being more important in the CFSP than suggested by the Treaty, which in Tonra's words did not 'follow the intergovernmental script'.<sup>102</sup>

Furthermore, by identifying and examining the current themes in the spheres of governance, whether in policies which can be characterised as generally internal or external, a number of key challenges to the EU and its legal and policy framework arise. The three most significant are the challenges of effectiveness, accountability and legitimacy. These questions have frequently arisen during the existence of the EU. As the competences of the EU have grown in both established and new policy areas,<sup>103</sup> and as the EU has faced several popular setbacks in the form of negative referenda results since the TEU,<sup>104</sup> these questions have become more pertinent. Revealing these common challenges again serves to demonstrate that the CFSP should not be considered as inherently separate from the 'governance' increasingly spoken of in relation to the 'internal' sphere.

Across the different policy areas, whether these are characterised as more internal or external, questions of effectiveness are constantly raised. These questions can pertain to the institutional decision-making processes and to decisions themselves. Due to the evolving nature of the EU, which is particularly evident through enlargement, criticism is often made of the constitutional structure of an integration project that began with six Member States. Leaving aside the important questions of effectiveness in terms of terms of democratic input (explored below in relation to accountability), the most significant questions for the governance of the EU are the following: how can effectiveness be measured? Can the laws and policies be (more) effective and if so, how can

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<sup>102</sup> Tonra (n 101) 121.

<sup>103</sup> de Búrca (n 77) 814.

<sup>104</sup> These were: Denmark (ratification of the TEU and on joining the euro-zone), Norway (adhesion to the EU in), Ireland (ratification of the Treaty of Nice and the Treaty of Lisbon), Sweden (joining the euro-zone), France and the Netherlands (ratification of the Constitutional Treaty).

they be seen to be effective by the Member States and their populations, and external actors?

As noted above in relation to the discussion on old and new governance, the CCM has been under pressure in recent years. Although the binding nature of treaty provisions, regulations and directives has been instrumental in integration, the greater number of Member States and their increasingly diverse nature, in terms of size, economic development and geography raises the issue of a 'one size fits all' approach and if greater flexibility is needed. The difficulties of enforcement and ensuring proper transposition on legal instruments has become a major preoccupation of the Commission, which has complained about the lack of resources available to pursue Member States in breach of their obligation. A haphazard application of EU law would undermine its effectiveness.

These are some of the practical reasons why the new modes of governance have emerged during the past decade, and these reasons explain the emphasis which has been placed upon them. In the context of an enlarged EU, some Member States have questioned the need for command-and-control regulation, and have argued for a more flexible approach to ensuring effectiveness. These arguments are particularly in evidence in areas where Member States guard national sovereignty very closely, such as employment policy. The new modes of governance are notable for their lack of legal enforceability, though they carry the dual risks of uncertainty of how to measure their effectiveness, and the limited means by which their aims can be enforced if necessary.

The CFSP has been subject to intense criticism since its inception. The main reason for this has been the paradox that is seemingly inherent in the CFSP: the Member States have made a commitment to establish a *common* foreign policy but the same states seem to be too easily divided on important international issues. The CFSP in particular was heavily criticised for failing to ensure a common European response to the break-up of Yugoslavia, or issues further away, such as in Rwanda. Even with a

number of successful operations completed and renewed enthusiasm for a security and defence dimension to the EU, the divisions of Member States seem too evident, which is paramount in the perception of having an effective policy. The intergovernmental nature of the CFSP demonstrates the lack of will on the part of the Member States to pool sovereignty in terms of their national foreign policies, and the difficulties in enforcing compliance when the policy has the appearance of a voluntary agreement to be respected when it suits the actors. The common denominator arising in the internal and external spheres is that the legal instruments have come under pressure in recent years.

In a similar vein, the accountability of the EU institutions for internal and external policies is a core issue. Whilst the parliaments of Member States have (potentially) a greater formal role to play in the scrutiny of internal and external policies,<sup>105</sup> the European Parliament is often regarded as the most suitable place for ensuring the democratic accountability of EU policies away from purely national interests. The constitutionalisation process of the EU has seen increased supervisory, budgetary and legislative powers granted to the European Parliament. This has been the key to addressing questions of accountability of the other EU institutions, in particular relating to internal policies. The intergovernmental nature of the second pillar has meant a less extensive role for the European Parliament, although it has managed to exert increasing influence in the CFSP by means of interinstitutional agreements with the Commission and Council.<sup>106</sup> Even when compared to nation states, whose parliaments have varying degrees of control over

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<sup>105</sup> The Treaty of Lisbon retained some of the proposals made in the Constitutional Treaty on the role of national parliaments, including having draft legislation forwarded to them, evaluating the implementation of policies in the field of Freedom, Security and Justice and taking part in the revisions of the Treaties: Article 12(a)-(f) TEU, as inserted by the Treaty of Lisbon, Article 1(12).

<sup>106</sup> A Maurer, D Kietz and C Völkel, 'Interinstitutional Agreements in the CFSP: Parliamentarization through the Back Door?' (2005) 10 *European Foreign Affairs Review* 175.



foreign policy, without formally increasing the powers of the European Parliament in the field of the CFSP, the EU's external governance is faced with even greater accountability issues than its internal policies. It was noted at the beginning of this chapter that seeing the EU in terms of a system of governance underlines the multi-level nature of decision-making and also the involvement and roles of private actors in achieving policy goals, especially when the methods and processes used are not command-and-control style regulations. Involvement of private actors necessarily raises questions of accountability, and elected bodies may have imperfect control over the practical outcomes of decisions.<sup>107</sup> The usual way to resolve accountability issues is through democratic participation in policy-making, through traditional or non-traditional means. The importance of democratic participation was stressed in the White Paper on European Governance. Nevertheless, given that governance is often seen as a more applicable descriptive term because of the limitations of talking about 'government' at the EU level, this also risks moving away from the democratic legitimacy of elected governments:

If governance designates the institutionalized observation of nation-states, its legitimacy may be found in the output of a working self-government. But it is questionable whether it is legitimately possible to organize democracy without any democratic origin of this rule. Thus, we are dealing with a well-known dilemma: the creation of democratic accountability would undermine the structure of governance institutions, it would also require formal rule-making powers and it could annihilate the expertocratic criteria as well as the external observing perspective. But this does not mean that governance structures do

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<sup>107</sup> M A Pollack, 'Theorizing EU Policy-Making' in H Wallace, W Wallace and MA Pollack (eds) *Policy-Making in the European Union* (5th edn, OUP, Oxford 2005) 38.

not need democratic legitimacy.<sup>108</sup>

Finally, the European integration project faces increasingly fundamental questions of legitimacy. Sceptics point to the negative referenda results in France and the Netherlands on the Constitutional Treaty and in Ireland on the Treaty of Lisbon as evidence of disillusionment with the integration project. This is in terms of the goals and means of the integration process and the perceived distant and non-democratic nature of the institutions, despite the fact that the Constitutional Treaty in particular was the product of the Convention on the Future of Europe, designed to be a more inclusive project than the usual intergovernmental conferences by including more input from national Parliamentarians and civil society groups. At the heart of the issue is the fact that the EU is not a state and has only fragile democratic legitimacy which may or may not require it to meet the same standard of legitimacy as required for nation-states.<sup>109</sup>

## **Conclusion**

This chapter began by classifying the different uses of governance and noting that as a contested term, its usefulness in describing the way in which the EU operates is accompanied by its broad use as an academic approach to studying the Union and, especially when employed by the EU institutions, indicative of particular qualities which suggest that 'governance' automatically carries with it democratic connotations. Using the descriptive qualities of governance reveals common challenges arising from themes in the external and internal spheres of governance.

The discussion of 'new governance' and 'new modes of governance' has generally been restricted to policies which are seen as internal, such

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<sup>108</sup> Möllers (n 14) 320.

<sup>109</sup> C Lord and D Beetham, 'Legitimizing the EU: is there a 'Post-Parliamentary Basis' for its Legitimation?' (2001) 39 *Journal of Common Market Studies* 443.

as social, economic and employment policies. 'Governance' terminology is much less employed when discussing the external sphere. It is contended here that since the CFSP can also be identified as a system of governance, the external/internal division is more blurred than would appear from a pillar-based analysis of the EU's constitutional order. The single institutional framework is key in understanding this, and theme of institutionalism in the external sphere is indicative of the importance placed by the EU on creating multilateral institutional networks, a point which is elaborated in the case study on the Euro-Mediterranean Partnership in chapter four.

In order to demonstrate to what extent the external/internal division is blurred, and how overcoming it can aid our understanding of the relationship between the overlapping systems of governance in the EU, including that in the CFSP, a more theoretically-informed 'governance approach' is used. This draws on insights from institutionalism, the institutional theory of law, and social constructivism, and is designed to recognise and emphasise the social reality and institutional environment in which the CFSP exists and contributes to. In doing so, this thesis builds on the scholarly work already undertaken on the CFSP, a review of which is the subject of the following chapter.



## Chapter 2: Approaches to the Analysis of the Common Foreign and Security Policy

Analysis of the external relations of the EU is not limited to the CFSP. Important 'external' powers most notably include the Common Commercial Policy<sup>1</sup> and the power to conclude association agreements.<sup>2</sup> These have attracted extensive academic attention since their creation. Prior to the establishment of the CFSP in the Treaty on European Union, the political external relations within European Political Cooperation had been the focus of a number of studies.<sup>3</sup> Post-1992, the study of the CFSP has been approached by legal scholars and political scientists from different traditions and theoretical and methodological standpoints. For some, the CFSP represents a challenge to traditional concepts of law, foreign policy, sovereignty, national interests and identity.<sup>4</sup> Others see the CFSP as a more limited forum for discussion between nation states. An increasing number of works have begun to look beyond the CFSP as a distinct 'pillar' within the structure of the EU in order to assess the state of the EU's external relations more holistically. There has more recently emerged a strand of literature identifying the 'external governance' of the EU, which is beginning to demonstrate how external relations can be framed within the language and context of governance. Evidence of EU foreign policy 'in action', for example, the various EU missions in the Balkans, Congo and the Palestinian Territories, and the heightened engagement in the EU's neighbourhood have resulted in an increased

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<sup>1</sup> Articles 131-4 EC.

<sup>2</sup> Article 310 EC.

<sup>3</sup> Notable works on EPC include: P Ifestos, *European Political Cooperation: Towards a Framework of Supranational Diplomacy?* (Avebury, Aldershot 1987); S Nuttall, *European Political Cooperation* (Clarendon Press, Oxford 1992); M Holland, *The European Community and South Africa: European Political Cooperation under Strain?* (Pinter, London 1988).

<sup>4</sup> E U Petersmann, 'From State Sovereignty to the 'Sovereignty of Citizens' in the International Relations Law of the EU?' in N Walker (ed) *Sovereignty in Transition* (Hart, Oxford 2003) 149-151.

number of empirical studies. These help to show how the Treaty-based competences of the CFSP work in practice.

The previous chapter introduced some of the current themes in EU governance and explored the main issues and challenges confronting both external and internal governance. The purpose of this chapter is to identify the paradigms within which the CFSP has been an object of study, to assess the state of the field in the various disciplines and review the most important contributions to the study of the CFSP. This will, in turn, reveal the limitations of, and gaps in, the field and provide a basis upon which the institutional constructivist framework of legal analysis is developed in chapter three as a means by which the CFSP can be better understood. The contributions to this field of study are considered below, broadly, as legal and political science approaches.<sup>5</sup>

### **Legal approaches to the CFSP**

Examining the state of the art with regard to legal approaches to the CFSP largely depends on one's definition of 'law'. If great importance is attached to the well-known characterisation of the EU as a 'three pillar' structure, then a contrast can immediately be made between the first pillar, where the Community Method applies, and the second pillar (CFSP) where it does not. As identified in the introduction to this thesis, the Treaty of Lisbon would formally abolish the pillar structure, yet the CFSP would remain subject to 'specific rules and procedures',<sup>6</sup> which strongly suggests that the CFSP would remain characterised by lawyers as an intergovernmental 'special case' within the EU's constitutional order. A doctrinal approach to the law of the European Union is certainly possible within the first pillar, where 'hard' legal instruments and decisions of the

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<sup>5</sup> The majority of works cited are by authors working in the English language, many based in the UK. Attention is also paid to emerging paradigms and research in other Member States, particularly in the Netherlands and Germany.

<sup>6</sup> Article 24(1) TEU, as amended by the Treaty of Lisbon, Article 1(27).

ECJ abound, yet when this approach is applied to the CFSP, analysis is generally limited to, for example, a review of the competences of the actors involved, the procedural aspects of agreeing the CFSP instruments (Joint Actions, Common Positions and Common Strategies) and the legal effect of economic sanctions against third countries. The ECJ is not competent to deal with the substance of many the CFSP issues, and the instances where it has given judgments on the CFSP (such as the terrorist financing cases examined in the introduction to this thesis) occur, generally speaking, when there is an overlap with other institutional competences. Hence, in the absence of first pillar binding legislative instruments such as regulations, directives and decisions and judgments of the ECJ, the intergovernmental nature of the CFSP has allowed some legal scholars to view it as lacking in sufficient 'legal' qualities for it to be treated as an object of legal research. Such a view treats the CFSP rather more as the domain of political scientists and foreign policy analysts. Legal analysis of the CFSP has the tendency to be detailed in description but, with some exceptions, limited in scope of analysis and lacking a holistic vision of how the CFSP works within the Union's legal order. This thesis addresses this gap by enlarging the scope of legal analysis to include practices, norms and institutions.

In this respect, *External Relations of the European Union: Legal and Constitutional Foundations*<sup>7</sup> is typical of one type of legal scholarship of the CFSP. For Eeckhout, the instruments used under the CFSP are not 'legal' instruments. The 'Joint Actions' and 'Common Positions' provided for under the Article 14-15 TEU are not drawn from established legal instruments in domestic, EC or international law. They are not comparable to the regulations and directives used under the first pillar, and although they are supposed to be binding under international law, no

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<sup>7</sup> P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, Oxford 2004).

means for enforcement at the EU level were provided for.<sup>8</sup> Indeed, ‘the TEU appeared to have created some kind of halfway house between informal co-ordination of policies and the adoption of formal legal instruments with specific legal effects’.<sup>9</sup> The scope of the CFSP is limited to what is not covered by the EC Treaty, and as such, is framed within the context of the debate over whether the Union (as distinct from the Community) enjoys legal personality.

For Eeckhout, only limited legal analysis of the CFSP is possible, despite the signs it shows of ‘significant expansion’.<sup>10</sup> Even after Treaty modifications at Amsterdam and Nice and the increasing use of the instruments provided for in the Treaty, the lack of judicial scrutiny over the ill-defined the CFSP instruments prevents the type of legal analysis possible in other aspects of external relations, such as the Common Commercial Policy and the conclusion of international agreements. The emphasis of legal scholarship here is on the competence of the actors (especially the uncertain remits of the institutions)<sup>11</sup> and the situations where, for example, a Joint Action rather than a Common Position has been used in a specific situation. Full legal analysis of the CFSP would only be possible in the case of comprehensive parliamentary and judicial oversight of the CFSP and ‘strong constitutionalism’,<sup>12</sup> but this was not foreseen in the Constitutional Treaty and hence was not a feature of the Treaty of Lisbon.

Such approaches to the CFSP are found in other works on the legal and constitutional arrangements of the EU. Lenaerts and van Nuffel also describe the objectives, instruments and procedures laid down by the Treaties<sup>13</sup> and their relationship with Community law, but without

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<sup>8</sup> Eeckhout (n 7) 142.

<sup>9</sup> Eeckhout (n 7) 398.

<sup>10</sup> Eeckhout (n 7) 420.

<sup>11</sup> Eeckhout (n 7) 396-421.

<sup>12</sup> Eeckhout (n 7) 420.

<sup>13</sup> K Lenaerts and P van Nuffel, *Constitutional Law of the European Union* (2nd edn, Sweet & Maxwell, London 2005) 864-875.



pointing to the existence of a single legal framework in the Union.<sup>14</sup> The CFSP is similarly treated as a separate entity to the EC's legal order in other legal works.<sup>15</sup> German legal scholars have, however, increasingly begun to show that the EU can indeed be seen as a single legal entity, which has important consequences for the CFSP.<sup>16</sup> In areas where the activities of the EC and EU meet, such as external trade policy, there is no hierarchy between the pillars, or supremacy of one over the other.<sup>17</sup> This is not a debate addressed directly in this thesis, but it does demonstrate that the CFSP plays an increasingly important role in the construction of European constitutional law.

Notable exceptions to the limited legal scope of analysis appeared during the early 2000s, in particular the works by Denza, Koutrakos and Wessel. Denza's *The Intergovernmental Pillars of the European Union*<sup>18</sup> is a legal analysis of the institutional structure of the second and third EU pillars, and of their respective strengths and weaknesses. The importance of the pillar structure in her legal analysis is underlined; she claims that attention to the CFSP and Justice and Home Affairs (the third pillar) is necessary because of a lack of widespread legal understanding of these pillars and the fact that 'they are often presented as inferior to the European Community in their methods and results and as adulterating the pure liquid of the Community legal order'.<sup>19</sup>

Her starting point is the examination of the similarities and

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<sup>14</sup> Lenaerts and van Nuffel (n 13) 808-809.

<sup>15</sup> For example, J Fairhurst, *Law of the European Union* (5th edn, Pearson, Harlow 2006); P S R F Mathijsen, *A Guide to European Union Law* (8th edn, Sweet & Maxwell, London 2004).

<sup>16</sup> A von Bogdandy, 'The Legal Case for Unity: the European Union as a Single Organization with a Single Legal System' (1999) 36 *Common Market Law Review* 887.

<sup>17</sup> W Schroeder, 'European Union and European Communities' (2003) New York University School of Law, Jean Monnet Working Paper No. 09/03 <<http://www.jeanmonnetprogram.org/papers/03/030901-08.pdf>> (accessed 25 July 2008) 36. The 'specific rules and procedures' provision in the Treaty of Lisbon suggests that the debate over the relationship between CFSP and non-CFSP legal instruments will continue, even if the Treaty does not enter into force.

<sup>18</sup> E Denza, *The Intergovernmental Pillars of the European Union* (OUP, Oxford 2002).

<sup>19</sup> Denza (n 18) 3.

differences between EC law and public international law. The intergovernmental pillars of the EU, being outside the scope of EC law, the ECJ and so on, do not form part of the supranational body of law as created by the EC, but neither can they be regarded as examples of purely public international law. Instead, she contends that there are points of convergence between the two; EC law is best regarded as a 'particularly effective form of regional international law' yet despite the characteristics of EC law which do not exist in public international law (particularly the supremacy of EC law over national law), the intergovernmental pillars of the EU are a 'specially designed method based on public international law'.<sup>20</sup> This is not a new argument as Wyatt has already claimed in 1982 that Community law should be acknowledged to be in the mainstream of public international law, even before the pillar structure came into being.<sup>21</sup> However, taking into account the legal nature of the CFSP, for Denza it is:

... a unique experiment by EU Member States in forming a harmonious approach to the wider world. The voices of the Member States are to sign in harmony but not necessarily in unison. Where sweet singing in the choir is not enough, the necessary tools, whether carrot or stick, must be borrowed from the European Community or the Member States. While the music itself – the common policy – has to be agreed unanimously, there is room for solo signing – delegated action – by some voices only and even for qualified majority voting in taking implementing decisions. The Member states take it in turn to conduct the choir, but the powers of the conductor are very limited. No singer can be forced to sing, and a determined singer can put a stop altogether to

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<sup>20</sup> Denza (n 18) 32.

<sup>21</sup> D Wyatt, 'New Legal Order, or Old?' (1982) 7 *European Law Review* 147.

a song whose tune he dislikes.<sup>22</sup>

By using examples of where the CFSP has been put in practice, regarding third states (for example, Russia and Bosnia-Herzegovina) and specific subjects (for example, landmines), and the changes made to the CFSP by the Treaty of Amsterdam, Denza analyses the CFSP in practice. Unlike Eeckhout, who refrained from using the term 'legal' when applied to the instruments such as Common Positions and Joint Actions, Denza does qualify these as 'legal' instruments and shows how their meanings have been refined through practice. The operational aspects of the CFSP are important in her analysis, in a more meaningful way than a simple list of measures taken pursuant to each Treaty provision.

The evolving refinement of the CFSP instruments does not mean that they are the sole focus of research on the second pillar. The aim of the CFSP is not simply to adopt binding measures on the Member States which could result in the ECJ solving potential disputes,<sup>23</sup> but to share information and facilities which may lead to Common Positions on a particular subject.<sup>24</sup> In this sense, the achievements of the CFSP should not be seen purely in the volume of 'legal' instruments adopted since its inception, but the way in which it has contributed to a 'habit of solidarity'<sup>25</sup> amongst Member States which has become more frequent on a number of issues. As a consequence of this, Denza contends that the CFSP has served as a means by which Member States have avoided public divergences on international issues, such as on Yugoslavia:

The consequence is that issues such as nuclear testing and the disintegration of Yugoslavia which might have provoked rivalries and public disputes among certain Member States did not do so. The CFSP was not meant to be a

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<sup>22</sup> Denza (n 18) 90.

<sup>23</sup> Denza (n 18) 312.

<sup>24</sup> Denza (n 18) 30.

<sup>25</sup> Denza (n 18) 121.

mechanism for settlement of disputes among Member States, but by happy chance it has proved to be one.<sup>26</sup>

This comment was published before the very public divisions between Member States over the war in Iraq in 2003. Nevertheless, this comment forms one of themes of the thesis, namely the explanation of how and why the CFSP creates norms and logics of appropriateness which the Member States follow despite the lack of formal enforcement mechanisms in the Treaty.<sup>27</sup>

A further example of a comprehensive approach to the EU's external relations, including the CFSP, is provided by the work of Koutrakos. *Trade, Foreign Policy and Defence in EU Constitutional Law*<sup>28</sup> and *EU International Relations Law*<sup>29</sup> concern the substantive law on the relationship with GATT/WTO, the regulation of sanctions, exports of dual-use goods and armaments. These case studies shed light on the interactions between trade and foreign policy in EU law, and specifically between the EC and the CFSP. This, he claims, is of particular importance because of the EC's exclusive competence over the Common Commercial Policy on the one hand, and the 'right of the Member States to conduct their foreign policy as fully sovereign subjects of international law' on the other.<sup>30</sup> The development of EPC and the CFSP has reflected the development of the Community itself, that is to say by an incremental process of *ad hoc* arrangements turning into a foreign policy *sui generis*.<sup>31</sup> Although the CFSP operates in a distinct legal framework from the Community Method, it is unrealistic to assume that foreign policy and

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<sup>26</sup> Denza (n 18) 121.

<sup>27</sup> This is explored in more detail in the following chapter.

<sup>28</sup> P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Hart, Oxford 2001).

<sup>29</sup> P Koutrakos, *EU International Relations Law* (Hart, Oxford 2006).

<sup>30</sup> Koutrakos (n 28) 3.

<sup>31</sup> Koutrakos (n 28) 15.

trade policy can be treated as separate areas of activity.<sup>32</sup>

Koutrakos suggests that the rules and actions taken under the CFSP are dynamic and wide-ranging yet incomplete.<sup>33</sup> Rather than concentrating on how public international law can be used to shed light on the CFSP, he examines the rules and procedures of the TEU and concludes that ‘the effectiveness of the CFSP activities is not entirely dependent on procedural provisions or their absence’.<sup>34</sup> This is due to the fact that there may be sharp differences in opinion between the Member States on certain issues: Koutrakos illustrates this with reference to divisions over condemning China’s human rights record. Actions or decisions made under the CFSP need unanimity, but he contends that even if majority voting existed, this would not necessarily make the CFSP more credible or influential in the activities it undertakes.<sup>35</sup> However, given that the aim of the CFSP is the attempt to narrow the gap between its considerable international economic strength and its comparatively weak political strength, it can be seen from the reactive and declaratory nature of its track record that the framework is rather limited.

These characteristics of the CFSP lead Koutrakos to speculate on its nature as a legal entity *sui generis* capable of operating as a functional system.<sup>36</sup> This he achieves by examining the institutional interactions between the EC and the CFSP and the institutional, substantive and administrative difficulties encountered therein. Whilst these issues no doubt exist, he contends that the EU has addressed them by the reforms in the Treaty of Amsterdam. Like the EU itself, processes of interaction have developed incrementally and interaction is most likely to occur in areas covered by both the first and second pillars (including economic sanctions, dual-use goods and arms exports) which pose a challenge to the

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<sup>32</sup> Koutrakos (n 29) 442.

<sup>33</sup> Koutrakos (n 28) 25.

<sup>34</sup> Koutrakos (n 28) 25.

<sup>35</sup> The example employed is that of the differing attitudes between Member States towards China and its human rights policy: Koutrakos (n 28) 25.

<sup>36</sup> Koutrakos (n 28) 34.

legal regimes in force. These case studies show that because of the inter-relationships of trade and foreign policy, the pillars are not separate as perhaps they were envisaged at the signing of the TEU. In terms of practicality, the ECJ's jurisprudence in the areas given as examples show that there is significant scope for overlap between the issues and hence also the powers of the institutions. The maintenance of the two legal regimes of the EC and the CFSP is possible, and abolition of the pillar structure would not, he claims, solve the legal problems associated with the linked trade and foreign policy issues.

The apparent division between the legal and political science approaches to the CFSP has been the product of a traditional reluctance on the part of legal scholars to involve themselves in questions of foreign policy. However, as stated above, the CFSP as an object of 'legal' study depends on what is understood to count as law. This issue has been debated amongst international lawyers for many years, in particular with regard to the practices of actors in humanitarian intervention. As the CFSP matures, greater opportunities arise for examining the practices of the CFSP and their impact on the legal order. The institutional theory of law, the theoretical basis of which is explored in the following chapter, does not rely merely on the words of the Treaty or ECJ judgments, but looks beyond these to how a legal order can be conceived in terms of institutions.

Such an approach is exemplified by *The European Union's Foreign and Security Policy* by Wessel.<sup>37</sup> In contrast to other legal studies, Wessel approaches the topic from a legal institutional perspective, by which he attempts to see whether the CFSP can be considered as a separate legal order, and if so, how it is to be interpreted.<sup>38</sup> The institutional theory of law he employs first appeared in the work of MacCormick and Weinberger

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<sup>37</sup> R A Wessel, *The European Union's Foreign and Security Policy* (Kluwer Law International, The Hague 1999).

<sup>38</sup> Wessel (n 37) 13.

in 1986.<sup>39</sup> It was subsequently employed by Curtin and Dekker to explain the EU as a:

... highly sophisticated 'layered international organisation', harbouring beneath its outer shell various autonomous and interlinked entities with their own specific roles and legal systems ... The legal structures of the Union are very complex, housing a variety of legal persons more reminiscent in structural terms of an old-fashioned 'Russian doll' than any architecturally ambitious 'temple' or 'cathedral'.<sup>40</sup>

Wessel uses the insights developed by institutional legal theorists in identifying norms applicable to the legal order of the CFSP. He analyses the legal bases and nature of the CFSP decisions and decision-making, without needing to analyse the *effectiveness* of such decisions.<sup>41</sup> His intellectual framework focuses on the systemic relations between legal norms. As the TEU is the most important source upon which the CFSP decisions are validly derived the CFSP should not, he contends, be analysed separately as merely a form of diplomatic political cooperation:

[The] concept of legal order assumes an objective presence of legal norms when relations between states are concerned. It even implies that socio-political studies, regardless of their claims to provide a pure 'power analysis', implicitly make use of legal rules in identifying the relevant actors (states, the Council, the Commission, etc.), the relevant outcomes (legally defined decisions) and the

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<sup>39</sup> N MacCormick and O Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Kluwer Academic Publishers, Dordrecht 1986)

<sup>40</sup> D M Curtin and I F Dekker, 'The EU as a "Layered" International Organisation: Institutional Unity in Disguise' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (OUP, Oxford 1999) 132.

<sup>41</sup> Wessel (n 37) 15.

tactics used (for instance the use of a veto).<sup>42</sup>

For Wessel, the TEU is the source of the legal norms surrounding the CFSP. Applying the institutional theory of law to the CFSP means that the policy is more than a purely intergovernmental form of international cooperation.<sup>43</sup> Drawing on parallels with the literature on multi-level governance, Wessels advances the view that the different issue areas of the Union cannot be compartmentalised as ‘supranational’ or ‘intergovernmental’ but instead combine and contribute to the emergence of a ‘multilevel constitution’ at the Union level.<sup>44</sup> Despite the fact, as noted by many scholars in this field, that the CFSP does not replace the foreign policies of the Member States, but exists in parallel to it, Wessel cites various ‘serious constraints’ on the ability of Member States to conduct their individual policies. The ‘institutional system’ in which the CFSP decision-making takes place is evident in that Member States, who nevertheless control the outcome of the CFSP, do not in general try to act in an incompatible way; ‘it is certainly possible to witness a ‘European reflex’ where systematic cooperation is concerned’.<sup>45</sup> Since the same EU institutions serve the three pillars through a single institutional framework, there is substantial mutual influence between the CFSP and other two pillars. As the foreign policy of the Union can be found in measures taken under the first pillar (food and humanitarian aid, environmental and development policy are cited as examples) the two are necessarily linked and have a legal effect on the Member States. Furthermore, the lack of supervisory role of the Commission or any other body in ensuring that the CFSP is carried out does not negate the existence of legal norms; it is desirable for Wessel that such mechanisms

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<sup>42</sup> Wessel (n 37) 46.

<sup>43</sup> Wessel (n 37) 319.

<sup>44</sup> R A Wessel, ‘The Multilevel Constitution of European Foreign Relations’ in N Tsagourias (ed) *Transnational Constitutionalism: International and European Perspectives* (CUP, Cambridge 2007).

<sup>45</sup> Wessel (n 37) 321.



would make the CFSP 'work' better so that the legal norms can mould the 'real' or 'social' world, that is to create a common policy.<sup>46</sup>

Wessel subscribes to the view of some legal scholars post-Maastricht<sup>47</sup> that, in legal terms, the European Communities and the European Union have merged. Wessel expands on this unity in later pieces and claims that the 'bits and pieces' making up the Union are now seen as more connected than in the early days of the CFSP.<sup>48</sup> In doing so, he addresses the issue of potential conflicts between norms in the EU's external relations with third states which raises questions about the existence of a hierarchy of norms and how such issues can be solved. If, as he suggests, there is a unity between the pillars, the question of the international legal personality of the Union must be revisited. As 'legal personality is nothing more (or less) than independent existence within the international legal system', the Union has this personality, although because it is not a state, its legal capacity exists only according to the specific competences attributed to it.<sup>49</sup> This in turn poses the questions of how the capacities of the Union are delimited with respect to the Member States and within the different policies of the Union.<sup>50</sup> Wessel concludes that despite some areas where actions taken under the CFSP could have been achieved under Community law (the observance of elections in Russia and the Korean Energy Development Organisation are examples) which has led to a partial 'PESCalization' of Community principles,<sup>51</sup> in practice overlapping competences are rare:

Delimitation proves to be possible not only

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<sup>46</sup> Wessel (n 37) 241.

<sup>47</sup> A von Bogdandy and M Nettesheim, 'The Fusion of the European Communities into the European Union' (1996) 2 *European Law Journal* 267.

<sup>48</sup> In particular; R A Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations' (2000) 37 *Common Market Law Review* 1135.

<sup>49</sup> Wessel (n 48) 1141-2.

<sup>50</sup> Wessel (n 48) 1142.

<sup>51</sup> PESC is the equivalent acronym for the CFSP in French and Italian, Spanish. Wessel (n 48) 1154.

where the competences of the Member States are concerned, but also where competences within the various Union areas are at stake. Even in the event of a close link between the CFSP and Community issues (such as in the case of economic sanctions), the Treaty clearly divides the competences. The choice for the correct legal basis seems to depend on the issue in question (the content of the decision) rather than on the prima facie general rules of supremacy of the Community provisions.<sup>52</sup>

Legal approaches to the CFSP have, until recently, often been limited to a description or analysis of the institutional competences and operate, according to Wessel, within research communities divided along content-driven ‘pillar’ lines.<sup>53</sup> There appears to have been a reluctance to deem as ‘legal’ the operational aspects of the CFSP. In comparison to the more extensive treatment of the external relations of the first pillar (in particular the CCP) and issues such as mixed agreements, the CFSP has often been regarded as the domain of political scientists and foreign policy analysts. This is certainly true where the scope of ‘legal’ analysis is limited to binding legislative or regulatory acts, or the decisions of the ECJ, neither of which are applicable to the CFSP. The institutionalist legal scholars are a marked exception to this. Whilst there have been recent attempts to enlarge the legal paradigm to include, in particular, analysis of the instruments available for use under the second pillar, the CFSP has often been characterised as ‘political’ and as such, the task of critical analysis of the CFSP has been seen as the domain of political scientists. Political scientists from different traditions and methodological standpoints have varied in their approaches to the EU and the CFSP, to

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<sup>52</sup> Wessel (n 48) 1170.

<sup>53</sup> R A Wessel, ‘The EU’s Foreign, Security and Defence Policy Fifteen Years after Maastricht: A Constitutional Momentum?’ in HG Ehrhard, S Jaberg, B Rinke and J Waldman (eds) *Die Europäische Union im 21. Jahrhundert Theorie und Praxis europäischer Außen-, Sicherheits- und Friedenspolitik* (VS Verlag für Sozialwissenschaften, Wiesbaden 2007) 305.

which discussion now turns.

### **Approaches to the CFSP in political science**

Political scientists from a number of different traditions have paid increasing attention to the emergence of an EU foreign policy since the creation of the CFSP. Although the EPC had been the focus of a number of works, the commitment in the TEU to the explicit creation of a common foreign policy for the EU has prompted a diverse field of literature on the characteristics, methods, policy-outcomes and decision-making features of the CFSP/European foreign policy. Analysis of the institutions involved in the broad sphere of EU foreign policy has also been undertaken by political scientists, and case studies on policies towards specific regions and issues are numerous.<sup>54</sup> In a similar way to certain recent legal works explored above, some have looked beyond the pillar structure in their analysis, and taken 'European foreign policy' to include external relations competences from outside the scope of the CFSP.<sup>55</sup> Such a definition of 'foreign policy' is offered by K. Smith as:

an explicit plan of action, a strategy designed to serve specific objectives (an activist conception), or it can mean a series of habitual responses to events in the international realm. The Union has frequently been criticised as capable only of reacting to outside events, rather than initiating active policies, in the sense of long-term strategies to pursue its

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<sup>54</sup> Selected examples include; Y Buchet de Neuilly, *L'Europe de la politique étrangère* (Economica, Paris 2005) J Peterson and H Sjursen (eds), *A Common Foreign Policy for Europe?* (Routledge London 1998); H Maull, G Segal and J Wanandi, *Europe and the Asia Pacific* (Routledge, London 1998); H Smith, *European Foreign Policy and Central America* (St Martin's Press, New York 1995); A Clapham, 'Where is the EU's Human Rights Common Foreign Policy, and how is it Manifested in Multilateral Fora?' in P Alston (ed) *The European Union and Human Rights* (OUP, Oxford 1999).

<sup>55</sup> As example of this integrated approach; H. Smith, *European Union Foreign Policy* (London: Pluto Press, 2002); R Dannreuther (ed), *European Union Foreign and Security Policy: Towards a Neighbourhood Strategy* (Routledge Abingdon 2004); C Hill and M Smith (eds), *International Relations and the European Union* (OUP Oxford 2005).

interests. Its reactions could, though, still be considered policy ... Pulling together these various elements, a common, consistent foreign policy thus means that the member states and EC institutions have expressed a unified position in response to external events and/or formulated a plan of action directed towards the fulfilment of specified political/security objective, and have agreed to use Community/the CFSP instruments and/or instruments under national competence in a coordinated way to implement it.<sup>56</sup>

International Relations (IR) scholarship is where the major debates about the nature and relevance of the CFSP have taken place. Much of the debate centres on the key question which arises as soon as the CFSP/European foreign policy is considered: is it comparable to the foreign policy of a nation state, or is it *sui generis* requiring separate and distinct attention? This question is intrinsically linked to the study of the EU as a whole: is the EU itself a *sui generis* entity, or can it be treated with the same methodological tools as when studies of nation states are undertaken? If the EU's foreign policy is to be analysed (whether as a comparison to that of a nation state or not) then is there a need for some adjustment to the state-centric focus of traditional foreign policy analysis?<sup>57</sup>

In IR scholarship, approaches vary in their ability to conceive the CFSP as being potentially significant and/or effective. There has also been discussion on whether the study of the CFSP and European foreign policy 'belongs' within IR or European integration theory.<sup>58</sup> This debate also has its roots in the questions that have arisen by the very existence of the EU

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<sup>56</sup> K E Smith, *The Making of EU Foreign Policy: the Case of Eastern Europe* (Palgrave, Basingstoke 2004) 4.

<sup>57</sup> B White, 'Foreign Policy Analysis and European Foreign Policy' in B Tonra and T Christiansen (eds) *Rethinking European Foreign Policy* (Manchester University Press, Manchester 2004).

<sup>58</sup> J C Øhrgaard, 'International Relations of European Integration: is the CFSP *sui generis*?' in B Tonra and T Christiansen (eds) *Rethinking European Foreign Policy* (Manchester University Press, Manchester 2004) 26.

and to what extent its political authority replaces that of the Member States or represents a challenge to the Westphalian state.

For neorealists, states exist in an anarchic international system. As such, they protect their own security and sovereignty above all else, and are not constrained by any higher authority. States are the only components in the international system that matter and they are unitary and rational.<sup>59</sup> They share similar interests in safeguarding their security, but according to neorealists, this means that the logic of anarchy cannot be overcome. Not all states are the same, but it is only the unequal distribution of power capabilities amongst them which explains their different behaviour in given circumstances, and not ideology.<sup>60</sup> Although neorealists recognise that states form alliances in order to protect their own security interests, cooperation is inherently difficult because, fundamentally, states do not trust each other in the context of fear and uncertainty in the anarchic international system.<sup>61</sup> The EU has posed a challenge to neorealist thought, because of the gradual integration of its members. Neorealists point to the intergovernmental nature of the CFSP as evidence that nation states do not want to cede their competences in foreign policy to another body.<sup>62</sup>

Neoliberal institutionalists see the possibilities for cooperation through shared interests between the states, while maintaining that there is a logic of anarchy, and neofunctionalism (which itself developed in the context of European integration in the 1950s and 60s) allows for increasing integration through the 'spillover' effect, although the lack of communitarisation of the CFSP poses further problems for the use of neofunctionalism as an explanation of the CFSP.<sup>63</sup> More recent works have

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<sup>59</sup> S Krasner, 'Realism, Imperialism, and Democracy' (1992) 20 *Political Theory* 39, 47.

<sup>60</sup> K Waltz, *Theory of International Politics* (McGraw-Hill, London 1979) 96.

<sup>61</sup> S Collard-Wexler, 'Integration under Anarchy: Neorealism and the European Union' (2006) 12 *European Journal of International Relations* 397, 403.

<sup>62</sup> J Mearsheimer, 'The False Promise of International Institutions' (1994) 19 *International Security* 5.

<sup>63</sup> K E Smith (n 56) 16-17. For an application of neofunctionalist thought to the CFSP, see; J

combined elements of neorealism and neoliberalism under the nomenclature 'rationalism'<sup>64</sup> to argue how a communitarisation of the CFSP would improve its effectiveness.<sup>65</sup> Rationalism as a school of thought in international relations theory drew on aspects of the more-established theories of realism and liberalism: 'like realism, rationalism begins with the condition of anarchy [in the international political sphere] but it is more inclined than realism to underline the ways in which the sense of belonging to the community of humankind has had its civilizing effect on international relations'. Wagner's concept of 'ineffectiveness' refers to the capacity of the EU to produce collective decisions rather than to the impact on events, since the former is necessary for the latter.

Constructivist approaches in IR developed during the early 1990s<sup>66</sup> and have been enormously influential in international relations scholarship in the post-Cold War world. Arguing that the neorealist view of the world in particular is simplistic, constructivists do not see a state's interests as given. Instead, they explain interest formation by focusing on the social construction of identities.<sup>67</sup> Constructivists are much more positive about the role of the EU and the possibility for states to cooperate to the extent that a CFSP is possible. Although a wide term applied to a

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C Øhrgaard, 'Less than Supranational, More than Intergovernmental: European Political Cooperation and the Dynamics of Intergovernmental Integration' (1997) 26 *Millennium: Journal of International Studies* 1.

<sup>64</sup> A Linklater, 'Rationalism' in S Burchill, R Devetak, A Linklater, M Paterson, C Reus-Smit and J True (eds) *Theories of International Relations* (2nd edn, Palgrave, Basingstoke 2001) 104.

<sup>65</sup> Wagner highlights the intergovernmental character of the CFSP as the main source of criticism, with the failure to prevent the escalation of violence in the former Yugoslavia as the most concrete example of this failure; W Wagner, 'Why the EU's Common Foreign and Security Policy will remain Intergovernmental: a Rationalist Institutional Choice Analysis of European Crisis Management Policy' (2003) 10 *Journal of European Public Policy* 576, 577.

<sup>66</sup> J Baylis and S Smith, *The Globalization of World Politics* (2nd edn, OUP, Oxford 2001) 242.

<sup>67</sup> C Reus-Smit, 'Constructivism' in S Burchill, R Devetak, A Linklater, M Paterson, C Reus-Smit and J True (eds) *Theories of International Relations* (2nd edn, Palgrave, Basingstoke 2001) 217.

number of approaches, constructivists focus their attention on the social origins of behaviour.<sup>68</sup> They look to the development of EPC and the CFSP as a case of social construction: the increased levels and frequency with which foreign ministers have engaged in dialogue have led to what Glarbo terms a 'co-ordination reflex', that is a single Member State or group of states have become accustomed to discussing a proposed policy or action with their European partners before embarking on it, even if they are not seeking a common action or any of the instruments available under the CFSP.<sup>69</sup> The notion of framing and reframing of EU foreign policy is stated by M.E. Smith to be a reflection of the interaction between three separate 'layers': ideas, institutions and policies.<sup>70</sup> As far as the latter is concerned, Smith is also cautious about seeing the CFSP in the context of how the foreign policies of nation-states are perceived:

If policy is taken to consist of a sustainable balance between interests, commitments and capabilities, rather than simply the elaboration of institutional frameworks or the construction of a 'club' of likeminded states, then many would judge the EU still to be sorely lacking ... But of course, this lack of European identity and solidarity is only a problem if the template or the frame for 'policy' is taken to be essentially that of 'modernist' foreign policy: a monolithic pattern of nation-state action, with a unified national government acting in the national interest and with the capacity to deploy the full range of coercive and persuasive instruments.<sup>71</sup>

Alternative insights into the CFSP in the field of political science

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<sup>68</sup> F Andreatta, 'Theory and the European Union's International Relations' in C Hill and M Smith (eds) *International Relations and the European Union* (OUP, Oxford 2005) 31.

<sup>69</sup> K Glarbo, 'Wide-awake Diplomacy: Reconstructing the Common Foreign and Security Policy of the European Union' (1999) 6 *Journal of European Public Policy* 634, 644.

<sup>70</sup> ME Smith, 'The Framing of a European Foreign and Security Policy: Towards a Post-Modern Policy Framework?' (2003) 10 *Journal of European Public Policy* 556

<sup>71</sup> ME Smith (n 70) 565.

have been through the perspective of governance which, as noted in the previous chapter, is a relatively new endeavour in terms of external relations. Since 'governance' alone has insufficient theoretical and methodological detail to constitute a self-standing approach, this use of governance relies on insights from other strands of scholarship. Insights from institutionalist and constructivist scholars have, for example, employed the language of governance in their analyses.<sup>72</sup> The use of a governance approach has already gained in influence during the last few years concerning internal policies of the EU, but in the field of external relations, the governance approach has found difficulties precisely because of the lack of supranationalism (and the supranational institutions) over the CFSP.<sup>73</sup> European foreign policy is not yet, according to Hill and Smith, capable of being identified as a form of multi-level governance.<sup>74</sup>

Koenig-Archibugi challenges the perception of international cooperation (of which the CFSP is an example) as the usual way in which governments attempt to solve problems on behalf of their societies when unilateral actions are insufficient.<sup>75</sup> Instead, as an alternative interpretation, 'governments, far from being faithful agents of societal groups, pursue their own goals and are prepared to collude with other governments against their own societies if this helps them attain those goals'.<sup>76</sup> Koenig-Archibugi does not intend this 'collusive delegation' account to be taken as a full theory of the level of institutionalism of the CFSP; the other theories and hypotheses in international relations scholarship can be employed in a complementary fashion in order to shed

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<sup>72</sup> This is explored in more detail in chapter three.

<sup>73</sup> F Schimmelfennig and W Wagner, 'External Governance in the European Union' (2004) 11 *Journal of European Public Policy* 655, 657.

<sup>74</sup> Hill and Smith (n 55) 6.

<sup>75</sup> M Koenig-Archibugi, 'International Governance as a new *raison d'état*? The Case of the EU Common Foreign and Security Policy' (2004) 10 *European Journal of International Relations* 147, 147.

<sup>76</sup> Koenig-Archibugi (n 75) 148.



light on the complexity of the CFSP:

The exploration of the diversity of government preferences concerning the institutional structure of the CFSP suggests that collusive delegation is best seen as part of a multicausal account of intergovernmental cooperation rather than as an explanation superseding all other. This is one reason why it is appropriate to distinguish the collusive delegation thesis – a set of empirically testable hypothesis – from the new *raison d'état* perspective – a conceptual lens that makes visible certain patterns in world politics.<sup>77</sup>

The enlargement of the EU in May 2004 which brought in eight new Member States from Central and Eastern Europe served as an interesting case study for the proponents of what was identified in the previous chapter as the use of 'governance' as an approach to understanding the EU. Schimmelfennig and Sedelmeier's 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe'<sup>78</sup> examines the process of rule transfer from the EU to the new Member States and outlines a theoretical framework to study governance modes, in the external context of enlargement.<sup>79</sup> Their research points to the effectiveness of rule transfer as explained by the 'external incentives model'; during the accession process, the EU is capable of bargaining with the new Member States in order for them to adopt the *acquis communautaire*, with membership of the EU as the 'prize'.<sup>80</sup> This can be seen an example of using its bargaining power to full effect when dealing with non-Member States, which therefore goes some way in explaining its dealings on the international plane.

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<sup>77</sup> Koenig-Archibugi (n 75) 176.

<sup>78</sup> F Schimmelfennig and U Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Easter Europe' (2004) 11 *Journal of European Public Policy* 661.

<sup>79</sup> Schimmelfennig and Sedelmeier (n 78) 662.

<sup>80</sup> Schimmelfennig and Sedelmeier (n 78) 663.

A more explicit academic approach to 'external governance' has been put forward by Lavenex, with the focus on the European states which have applied to join the EU.<sup>81</sup> Although using 'external governance' is a perspective in its infancy, shifting boundaries through enlargement and the attempts to promote EU policies outside the geographical borders of the EU have been particularly appropriate in using 'governance' to characterise the lead-up to the 2004 expansion into Central and Eastern Europe.<sup>82</sup> External governance, as Lavenex states, is particularly apt for the EU since, unlike nation states, legal and institutional boundaries are not necessarily fixed: the *acquis communautaire* applies to Member States, some non-Member States who have adopted it because they hope to join the EU through the enlargement process, or because it allows for specific advantages short of membership which they do not seek (for example, the EEA states). Enlargement is the primary field in which the blurring of what is internal and external can be felt, though this is also true of the EU's interactions with other states, such as those in the Euro-Mediterranean Partnership and the ACP, where conditionality has been used as an important tool in the EU's pursuit of expanding 'its boundaries of order'.<sup>83</sup> Other policies outside the scope of the CFSP also have strong external dimensions, as Lavenex has explored in relation to immigration policies.<sup>84</sup> Conditionality has become a strong feature of enlargement and related external policies, including the European Neighbourhood Policy: this is an example of a highly important tool at the disposal of the EU in order to influence the choices of non-Member States. Using governance as an approach takes account of this political power and influence which in the ENP context means offering certain advantages associated with EU

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<sup>81</sup> S Lavenex, 'EU External Governance in "Wider Europe"' (2004) 11 *Journal of European Public Policy* 680.

<sup>82</sup> L Friis and A Murphy, 'The European Union and Central and Eastern Europe' (1999) 37 *Journal of Common Market Studies* 211, 216.

<sup>83</sup> Lavenex (n 81) 684.

<sup>84</sup> S Lavenex and E M Uçarer, 'The External Dimension of Europeanization: the Case of Immigration Policies' (2004) 39 *Cooperation and Conflict* 417

membership, short of membership itself.<sup>85</sup> Whereas traditional research on the EU's external relations has focussed on economic relations and the CFSP, her alternative view is that EU external relations with peripheral states are shaped by 'the external dimension of internal politics'.<sup>86</sup> Lavenex's approach to external governance is returned to in chapter five, which helps to explain the process of 'externalisation' of law and policy in the context of the Euro-Mediterranean Partnership and the issue of migration.

The variety of approaches to the CFSP, European foreign policy and the EU as an international actor by IR scholars has demonstrated a number of key focuses which differ substantially from the analyses by legal scholars. Whilst many legal texts describe the Treaty basis of the CFSP and competences, often citing it as a relatively unsuccessful policy when placed next to the first pillar, political scientists have addressed important questions such as 'does the EU have a foreign policy?', 'can it be compared to the foreign policy of a nation state?', 'can it be considered to have become a coherent and strategic actor?' and, if the previous question is answered in the negative, 'how can the foreign policy be strengthened?'. In attempting to offer answers to these important questions, it is clear from the research undertaken in recent years that political scientists have not only become diversified in their methods of analysis, but have begun to use increasingly diversified policy analysis frameworks when looking at the external spheres of activity of the EU.

## **Conclusion**

The CFSP has become a significant area of research since its creation. The recognition of the need to redress the image of the EU as an 'economic giant but political dwarf' through the establishment of the CFSP has

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<sup>85</sup> C Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 *Common Market Law Review* 313, 317.

<sup>86</sup> Lavenex (n 81) 681.

prompted extensive and comprehensive works on both the CFSP as an individual object of research, or as part of the EU's external relations. This has been particularly true for IR scholars, and not only from those who have traditionally engaged in foreign policy analysis as, for example, the work on developing theoretical approaches to understanding the EU based on governance demonstrates.

An analysis of the literature in the field reveals, however, that approaches by legal scholars have often been limited to a competence-based analysis of the CFSP. This reflects the traditional reticence to deal with foreign policy in a national context, unless there is a 'hard' legal angle such as the imposition of sanctions, or the contractual or constitutional relations with other states or international organisations. Recent works by legal scholars have begun to buck this trend, demonstrating the importance of the CFSP for the legal order of the EU. In this sense, scholarship of the CFSP is beginning to follow a similar pattern as that which relates to the 'internal' sphere. Lawyers were originally concerned with the formalism of the Treaty provisions, decisions of the ECJ and legislative instruments, and have more recently used less black-letter approaches in looking at the EU. This has included underlining the importance of soft law, as identified in chapter one, and also understanding the EU as a system of governance. The contribution of this thesis is to take forward this research agenda on governance by including the role of the CFSP. In order to do so, it is necessary to build a more robust theoretical framework than the contested and malleable term 'governance' as an academic approach implies. The following chapter builds an institutional constructivist framework of legal analysis in order to explore the institutional practices and social reality with which the CFSP operates and exists.

### **Chapter 3: An Institutional Constructivist Framework of Legal Analysis for the CFSP**

The study of the European Union and its Common Foreign and Security Policy is a challenging subject for traditional approaches to law and politics. Understanding the CFSP using existing legal and political science approaches demonstrates the limitations in comprehending the external relations of the EU as a non-state polity. The literature available on the CFSP shows that legal scholars have tended to focus on the competences of the institutions. The weight attached to the intergovernmental nature of the CFSP as a 'pillar' of the EU's structure, as distinct from the supranationalism and 'hard' legal instruments in the Community pillar, has largely prevented a more comprehensive understanding of how the CFSP works as a self-standing policy, how it fits into the European integration process and is linked to the other EU policy fields. Legal scholars have tended to leave analysis of the success or failure of the CFSP to those in the political science and International Relations disciplines. They, in turn, have found difficulty in applying the dominant theoretical paradigms to the EU as a non-state actor in international affairs.

The EU and the CFSP are not completely unsuited to analysis through traditional frames of reference used by legal and political scholars, which are centred on the nation state. Yet, the quest for legality in classical legal methodology is insufficient if the search is to explain the 'law' of the CFSP, beyond the treaty-based competences of the institutions. More sophisticated tools of analysis are required to reach beyond the study of the competences of the CFSP laid down in the Treaties. By the same token, the EU's external relations cannot be contained within traditional boundaries of foreign policy analysis, which for International Relations scholars has generally been within intergovernmentalist

paradigms.<sup>1</sup> Recalling the discussion in chapter one, a system of governance is an attractive characterisation of the EU's law and policy-making, but as an academic approach, governance has received only limited application towards the external sphere. It was also noted that governance by itself in an insufficient conceptual framework for analysis and lacks the necessary theoretical refinement for evaluating the role of practices, norms and institutions, but it can be used a starting point for an exploration of the modes, methods and processes associated with systems of law and policy-making and their effects. Using the terminology of governance also transcends what is seen as 'legal' and 'political' in the EU's activities, encompassing its various multi-level, institutional formats and its policy areas.

The overall aim of this thesis is to contribute to a sharpening of the analytical lenses through which we can study the EU, in order to see how and to what extent the CFSP, as a system of governance, relates to the other spheres of governance within the EU and impacts on the Union's wider external relations. The emphasis within this aim is placed upon using a theoretical framework to explain *how*, rather than *why*, the CFSP works. This necessitates bridging two divides which hinder the understanding of the CFSP and its place in the constitutional and political order of the European Union: the academic divide between legal and political science approaches, and the divide between the 'internal' and 'external' spheres of governance. Having confronted these challenges in the previous two chapters, the purpose of this chapter is to identify and develop the more specific approach taken in order to test the hypothesis and answer the research questions, positioning and delimiting theoretical

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<sup>1</sup> F Schimmelfennig and W Wagner, 'External Governance in the European Union' (2004) 11 *Journal of European Public Policy* 655, 657. It should also be noted there that a further body of scholars working in the field of European/European Union studies, and often positioned somewhere between comparative politics and international relations have made important advances in integration theory: A Warleigh, 'Learning from Europe? EU Studies and the Re-thinking of International Relations' (2006) 12 *European Journal of International Relations* 31.

framework.

This chapter builds a theoretical framework using mutually compatible insights from institutionalism (in particular new institutionalism) as a tool drawn from political science, the institutional theory of law, and constructivism. This first entails a survey of theoretical considerations and limitations of the approaches drawn upon; institutionalism, constructivism and the institutional theory of law. Both institutionalism and constructivism as theoretical approaches entail divergent concepts and methodological strands.

This framework is termed an ‘institutional constructivist framework of legal analysis’. The emphasis on the social practices within the CFSP and the norms that these practices create suggests that constructivism is a useful means by which a broad interest in the key role of institutions in the ‘reality’ of the CFSP can be refined. This approach allows for a legal analysis of the CFSP beyond the Treaty-based competences and the changes which have occurred through the operation of the CFSP in practice, informed by theories in law which are sensitive and responsive to the law-like qualities of the system of governance. This chapter proceeds by firstly identifying the role of institutions in systems of governance and discussing institutionalism, identifying the different strands within this broad paradigm. Of these different strands, institutional constructivism is considered to be the most appropriate because of the importance of longer-term institutional development and the importance of social practices and patterns of change, positioning it most closely within the scope of the characteristics of governance identified in chapter one. As such, the framework employed here is that of a toolkit for understanding ‘governance’. After clarifying more fully the limits of the ‘institutions’ sought in this research project, discussion then turns to constructivism and the institutional theory of law. These two theoretical approaches are used to complement and refine the research on institutionalism in the CFSP. Constructivist insights help to see the

norms and identities and consequently the social reality in which the CFSP exists and which it contributes to. The institutional theory of law is used because of the search for the specific 'legal' quality of the norms and practices which arise in the CFSP, and their (legal) effects. The combination of these three mutually compatible paradigms is explored at the end of this chapter.

### **Bringing institutions to the fore: institutionalism old and new**

Recalling the discussion of the diverse meanings of 'governance' in chapter one, and the growing institutionalisation noted in the EU's spheres of governance, the existence, development and role of institutions is vital in understanding the operation of the CFSP beyond the Treaty provisions. The starting point for developing the theoretical framework is the place and role of institutions in governance. Examining the role, power and influence of institutions allows for questions of institutional arrangement rather than 'black letter' legality to arise.<sup>2</sup> Institutionalisation has been one of the dominant themes of the CFSP during its lifetime, as was explored in chapter one. In accentuating the institutional dimensions of the CFSP, the broad-based governance approach drawn on here is one that 'is at its conceptual heart not a legal concept but an institutional framework'.<sup>3</sup> Consequently, the emergence, nature and construction of institutions and institutionalist theories warrant further attention in order for them to be used as a basis of the analytical framework.

First, it is necessary to distinguish the theoretical underpinnings of 'old' and 'new' types of institutionalism. Both are relevant in the construction of the analytical framework and both have close associations with the place and role of law and rule-based behaviour. According to

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<sup>2</sup> C Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 *Common Market Law Review* 313, 318.

<sup>3</sup> Möllers (n 2) 322.



Peters, the roots of political science are in the study of institutions.<sup>4</sup> Institutional enquiry is thus fundamental to the study of how politics and political organisation works, and such enquiry was closely related to legal study. During the past few decades, institutionalism lost ground in political science disciplines in favour of behaviouralism and rational choice theory. However, from the 1980s onwards, institutionalism has enjoyed a revival as both a distinct (if broad) theoretical approach, and also as a variant or slant on competing theories, for example, the institutionalist input into rational choice theory.<sup>5</sup> If the various approaches are grouped together as 'new institutionalism', they appear to have regained at least some of the ground lost to competing theories since 1945.

Traditional institutionalism, dating from the late 19<sup>th</sup> century, focused on the central place of law in government, and on the importance of structure as a determinant of behaviour.<sup>6</sup> The structures that institutionalists were mainly concerned with were the formal and static types of government in operation in given states, such as presidential or parliamentary systems, the political organisations of government and institutions of the legal system, such as the courts. The emphasis on law meant that their analyses were formal and not concerned with the more abstract features or influences of structures on society. This also demonstrates the close association with legal study of government and political organisation. There was furthermore a strong normative element to the work of 'old' institutionalists, as they saw part of their role as the promotion of better government.

During the 'behavioural revolution' which occurred within political science scholarship during the 1950s and 60s, behaviourists and rational

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<sup>4</sup> B G Peters, *Institutional Theory in Political Science: The New Institutionalism* (Pinter, London 1999).

<sup>5</sup> K Dowding, 'Institutionalist Research on the European Union' (2000) 1 *European Union Politics* 125.

<sup>6</sup> Peters (n 4) 6-7.

choice analysts challenged the structural nature of the institutionalists' views, especially on the grounds of the place of the individual:

This approach [behavioural and rational choice analysis] can make a strong claim that individuals are the appropriate focus for social and political analysis. Social collectivities such as political parties, interest groups, legislatures or whatever do not make decisions. The people within those collectivities make the decisions, and there are then rules to permit the aggregation of the individual behaviors. The institutionalist answer, however, is that *the same people would make different choices depending upon the nature of the institution within which they were operating at the time.*<sup>7</sup> (emphasis added)

The last sentence reveals to some extent how institutionalists have responded to claims that institutions alone do not make decisions, and also shows how institutionalism can offer new slants on what have been seen as opposing theories. The revival of institutionalism (which has since become identified as 'new institutionalism') was pioneered by March and Olsen in their work undertaken jointly and separately since 1984.<sup>8</sup> 'New' institutionalist perspectives draw on the institutionalist tradition noted above, but are substantially wider in terms of what can be termed as an 'institution' and capable of structuring and organising behaviour. Despite this fundamental shift in the core object of their research, new and old institutionalism do share enough core ideas for the new to be seen as bringing back in what had become seen to be an outdated approach to politics.<sup>9,10</sup> March and Olsen's principal rationale for reviving an

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<sup>7</sup> Peters (n 4) 14.

<sup>8</sup> JG March and JP Olsen, 'The new Institutionalism: Organizational Factors in Political Life' (1984) 78 *American Political Science Review* 734

<sup>9</sup> J G March and J P Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organization* 943, 948.

<sup>10</sup> V Lowndes, 'Institutionalism' in D Marsh and G Stoker (eds) *Theory and Methods in Political Science* (2nd edn, Palgrave, Basingstoke 2002) 90.

institutionalist perspective was their criticism of dominant political science theorising which they contended to be overly preoccupied with the rational self-interested motivations of individual actors.<sup>11</sup> Behaviouralists and rational choice theorists had dismissed institutions as simply the aggregation of individual preferences. As in the institutional theory of law (explored below), March and Olsen avoided reductionism in political analysis (reducing collective behaviour to individual behaviour) since they contend that this hinders analysis of the wider impact of structures on society.<sup>12</sup> New institutionalism therefore avoids a return to the overly historical-descriptive, legalistic approach of 'old' institutionalism<sup>13</sup> and concerns itself not only with the impact of institutions on individuals but the interaction between institutions and individuals.<sup>14</sup> Although new institutionalism may seem to be more divorced from legal study, they nevertheless continue to stress the importance of rule-based behaviour within institutions.

Variants and strands which are grouped together as new institutionalist approaches have become increasingly widespread since the mid-1980s. The need for renewed interest in institutions is in part represented by the existence of the EU itself, a legal and political entity with no parallel elsewhere in the world. An 'institutionalist turn' occurred in the study of the EU amongst political scientists during the 1990s.<sup>15</sup> For institutionalists, the EU is a unique form of supranational political community,<sup>16</sup> with evolving standards of conduct and common goals set

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<sup>11</sup> R A W Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Open University Press, Buckingham 1997) 78.

<sup>12</sup> JG March and JP Olsen, *Rediscovering Institutions* (Free Press, New York 1989).

<sup>13</sup> J P Olsen, 'Political Science and Organisation theory: Parallel Agenda but Mutual Disregard' in RN Czada and A Windhoff-Héritier (eds) *Political Choice: Institutions, Rules and the Limits of Rationality* (Westview Press, Colorado 1991) 112.

<sup>14</sup> Lowndes (n 10) 91.

<sup>15</sup> Two prominent examples are: S Bulmer, 'The New Governance of the European Union: a New Institutional Approach' (1994) 13 *Journal of European Public Policy* 351; P Pierson, 'The Path to European Integration: a Historical Institutional Analysis' (1996) 29 *Comparative Political Studies* 123.

<sup>16</sup> March and Olsen (n 12) 127.

out in the Treaties, first and foremost, ‘an ever closer Union amongst the peoples of Europe’. The significance of the Treaty-based goals which set the EU apart from other international organisations is the legal integration of European society they represent. Further, the European integration process has produced a great number of institutions and structural features, which have gradually expanded through waves of enlargement across much of the continent.<sup>17</sup> The nature of the EU as an expanding polity demonstrates the blurred and therefore limited significance of the internal/external division. The growing involvement of non-EU states and actors in internal policy fields, such as the environment and transport, also contributes to this view. Because of the nature of the EU, which has evolved throughout its history by growing in both size and with respect to its competences, understanding its institutional dynamics and the way in which it operates is essential in explaining the structure of the system of governance of the Union and its political organisation.<sup>18</sup> This suggests that in terms of the CFSP, institutionalism can take account of the multi-level nature of the EU and consequently avoids overly emphasising the role of states by recognising the role of other actors and institutions.

It is useful to briefly note some of the variants of institutionalist perspectives which have arisen since the revival of the approach.<sup>19</sup> March and Olsen’s version of institutionalism, has been termed as ‘normative institutionalism’ by Peters due to ‘the very strong emphasis these authors place on the norms of institutions as a means of understanding how they function and how they determine, or at least shape, individual behavior’.<sup>20</sup> Normative in this sense however, is different to normative theory as

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<sup>17</sup> This also feeds into one of the uses of the term ‘Europeanization’, which Olsen discusses in: J P Olsen, ‘The Many Faces of Europeanization’ (2002) 40 *Journal of Common Market Studies* 921, 924.

<sup>18</sup> J P Olsen, *Europe in Search of Political Order* (OUP, Oxford 2007)

<sup>19</sup> This categorisation is drawn from: Peters (n 4) 17-21.

<sup>20</sup> Peters (n 4) 19.

promoting particular norms.<sup>21</sup> By contrast, rational choice institutionalists are functionalist in nature, and see institutions as 'systems of rules and inducements to behavior in which individuals attempt to maximise their own utilities'.<sup>22</sup> Their starting point is the assumption that actors in decision-making arenas behave strategically in order to reach their preferred outcome.<sup>23</sup> Within the context of the EU, this strand of institutionalism has helped identify the relative powers of different actors, in particular the five institutions.<sup>24</sup> Rational choice institutionalists therefore see institutions as thin structures, with their scholarly attention concentrated on the role of individuals within these structures,<sup>25</sup> rather than factors such as culture.<sup>26</sup> In terms of the CFSP, these institutionalists see the role of the political leaders as paramount and their focus would therefore be on the interests each Member State has in the CFSP and how they maximise these interests. This is similar to the view of neo-realists in international relations scholarship. Historical institutionalism contends that the history of a policy or system results in choices being made which then have a strong bearing on decisions taken afterwards. This incorporates ideas of 'path dependency'<sup>27</sup> and the association of critical junctures as representing branching points from where historical development moves along a new path.<sup>28</sup> A historical institutionalist perspective on the CFSP suggests therefore that the 'critical junctures' would be changes brought about by the Treaty

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<sup>21</sup> Lowndes (n 10) 95.

<sup>22</sup> March and Olsen (n 12) 19.

<sup>23</sup> M Aspinwall and G Schneider, 'Institutional Research on the EU' in M Aspinwall and G Schneider (eds) *The Rules of Integration: Institutional Approaches to the Study of Europe* (Manchester University Press, Manchester 2001) 7.

<sup>24</sup> Dowding (n 5) 133 and G Tsebelis, 'The Power of the European Parliament as a Conditional Agenda Setter' (1994) 88 *American Political Science Review* 128.

<sup>25</sup> J T Checkel, 'Social Construction and Integration' (1999) 6 *Journal of European Public Policy* 545, 546.

<sup>26</sup> Aspinwall and Schneider (n 23) 10.

<sup>27</sup> S Krasner, 'Approaches to the State: Alternative Conceptions and Historical Dynamics' (1984) 16 *Comparative Politics* 223.

<sup>28</sup> P A Hall and R Taylor, 'Political Science and the three New Institutionalisms' (1996) 44 *Political Studies* 936.

amendments which have modified the way the CFSP works, and other junctures, such as the Franco-British St Malo Declaration on European defence cooperation in 1998.<sup>29</sup> These 'internal' factors which become critical junctures could also be joined by 'external' factors, which could include how 9/11 has prompted decisions to be made within the CFSP which have a strong security dimension.

Empirical institutionalists, as their name suggests, concentrate on empirical research into the effect of structures on political processes.<sup>30</sup> International institutionalism looks at the structure surrounding the behaviour of states and individuals in the international arena, for example international regime theory.<sup>31</sup> The emphasis of this perspective is rather more on states, rather than on non-state actors, which does not wholly make it suitable for use as an analysis of the CFSP as emerging from a non-state polity. Network institutionalism looks at the structured interaction between official actors in the government process. This perspective has already been applied in the field of EU external relations.<sup>32</sup> A further strand of institutionalism, institutional constructivism, is used in this thesis and is developed in more detail below.

### **Defining an 'institution'**

Despite their contrasting approaches, there are certain elements which make up the common core of contemporary strands of institutionalism known collectively as 'new institutionalism'. Widening the scope of what counts as an 'institution' lies at the core of new institutionalism. March

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<sup>29</sup> AE Juncos, 'The Institutionalisation Process of CFSP: a Historical Institutional Approach' (2005) CFSP Forum No. 3(5)  
<<http://www.fornet.info/documents/CFSP%20Forum%20vol%203%20no%205.pdf>>  
(accessed 25 July 2008).

<sup>30</sup> Peters (n 4) 19.

<sup>31</sup> S Krasner, *International Regimes* (Cornell Press, Ithaca 1983).

<sup>32</sup> M S Filtenborg, S Gänzle and E Johansson, 'An Alternative Theoretical Approach to EU Foreign Policy: 'Network Governance' and the Case of the Northern Dimension Initiative' (2002) 37 *Cooperation and Conflict* 387

and Olsen's own definition of an institution is:

a relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations. Such practices and rules are embedded in structures of meaning and schemes of interpretation that explain and legitimize particular identities and the practices and rules associated with them.<sup>33</sup>

With the notion that an institution is not necessarily a formal structure, (new) institutionalism then follows from this as,

a general approach to the study of political institutions, a set of theoretical ideas and hypotheses concerning the relations between institutional characteristics and political agency, performance and change. Institutionalism emphasizes the endogenous nature and social construction of political institutions.<sup>34</sup>

First, to recognise the existence of an institution, there is a need for some kind of structural feature. These can be either formal (a legislature, an agency or some other legal framework) or informal (network of interacting organisations, set of shared norms) which allows the analyst to see 'some sort of patterned interactions that are predictable based upon specified relationships among the actors'.<sup>35</sup> Institutions may be defined as organisations which are endowed with personnel, buildings and funds but also as social structures.<sup>36</sup> Second, there is a need for some stability over time. Regular meetings could therefore be an institution in this sense,

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<sup>33</sup> March and Olsen (n 9) 948.

<sup>34</sup> JG March and JP Olsen, 'Elaborating the "New Institutionalism"' (2005) University of Oslo Centre for European Studies, ARENA Working Paper No. 11/05 <[http://www.arena.uio.no/publications/working-papers2005/papers/05\\_11.xml](http://www.arena.uio.no/publications/working-papers2005/papers/05_11.xml)> (accessed 25 July 2008) 4.

<sup>35</sup> Peters (n 4) 18.

<sup>36</sup> A H eritier, *Explaining Institutional Change in Europe* (OUP, Oxford 2007) 59-60.

which can apply in the EU context even without a formal legal basis. Third, the institution must affect individual or group behaviour by constraining the behaviour in some way either formally or informally. Fourth, there is a need for some degree of shared values. The operation of institutions in practice goes beyond the 'hard' institutions set up, in the case of the EU, by the Treaties to see the existence of other institutions which are not as readily visible and the significance of which have been often ignored or unaccounted for.

Institutions therefore include, but are not limited to, the examples given in chapter one, such as the High Representative for the CFSP, the Northern Dimension Initiative and the Euro-Mediterranean Partnership. Institutions go beyond into the realm of the more informal practices and rules which govern the conduct of those involved in the CFSP and result in changing behaviour and interests of the actors. For example, the institutionalisation of constant communication and consultation between the foreign ministries of Member States has had a great impact on working practices, which in turn feed into the creation of common interests and identities at EU level.<sup>37</sup>

The sub-policies of the CFSP contain institutions of their own, such as dialogues, committee frameworks and regular practices. The implications of this here is that the CFSP can be seen not only through a competence-based lens as limited to 'outputs' in the form of Joint Actions, Common Positions and Common Strategies as adopted in the Council. Neither is the CFSP limited to the relations between the Member States who control the 'intergovernmental pillar'. Instead, the CFSP can be understood as a more inclusive institutional field where the practices of the High Representative, agencies, and the variety of other actors count. This perspective of enlarging the scope of what might be seen as an

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<sup>37</sup> A Hyde-Price, 'Interests, Institutions and Identities in the Study of European Foreign Policy' in B Tonra and T Christiansen (eds) *Rethinking European Foreign Policy* (Manchester University Press, Manchester 2004) 104.



institution brings in the possibility of seeing the links with other EU policies and breaking-out of the ‘intergovernmental pillar’ mould of analysis of the CFSP.

This perspective is not without its limitations. What ‘counts’ as an institution within the definition above remains somewhat undefined, and the criteria of ‘relatively stable’ is not sufficient in itself to categorise the rules and practices as institutions or not. A specific issue in relation to the EU is that it has a relatively recent history and periodic enlargements have a great effect on its operation. Thus, whilst old Member States have institutionalised frameworks of consultation and cooperation, admission of new Member States (especially in the ‘big bang’ enlargement of 2004) means that the existence of such institutions needs re-evaluation in the light of such changes and the incorporation of new actors who contribute to institution-building. Furthermore, there is seemingly little attention given to when an ‘institution’ can no longer be termed as such. For example, if a Member State elects a Eurosceptic government that ignores the consultative and cooperation frameworks built up as institution in the CFSP, does that mean that the institution is dead? This may depend on whether the institution continues to affect individual or group behaviour, which may be difficult to ascertain.

March and Olsen do not contend that institutionalism is, or claims to be, a ‘full-blown theory’ of political institutions.<sup>38</sup> It is for this reason that institutionalism is combined with insights from constructivism in this thesis. The contribution of institutionalism is, however, to allow insight into systems of governance which operate ‘below the surface’, in order to discover to what extent institutions direct the actions and processes of the actors associated with them. Institutions are ‘living’ and more than the simple sum of calculated self-interests.<sup>39</sup> In this sense, what ‘counts’ as an institution will depend on the circumstances of the field under

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<sup>38</sup> March and Olsen (n 34) 6.

<sup>39</sup> March and Olsen (n 12) 159.

analysis. Establishing strict criteria of when an institution starts and stops being as such would deflect attention from the utility of the perspective in seeking to understand the role of institutions in the reality of the CFSP.

The evolution of institutions, and the potential for their demise, makes 'living' an appropriate characterisation of their existence in time and space. As 'living' suggests, institutions are not static, making their identification sometimes problematic, yet their defence by 'insiders' and validation by 'outsiders' make them both visible and resistant to rapid changes.<sup>40</sup> The significance placed on the social construction of institutions underlines that the creation of institutions is in part through social interaction as well as formal, legal decision-making. Within the CFSP, the practices of the Council Presidency in issuing Declarations on specific issues and events on behalf of the EU regularly and consistently contributes to the 'living' nature of the CFSP as an institution. Underlining the 'living nature of institutions helps to explain why changes may occur progressively and why institutions are often resistant to rapid changes. This resistance places the institutionalists' emphasis squarely on the long-term<sup>41</sup> and, with the exception of rational choice institutionalists, institutionalists also eschew being overly concerned with critical junctures, in favour of development through socialisation processes, where actors are induced into the norms and rules of a given community.<sup>42</sup> In following this logic of socialisation processes, viewing the CFSP as merely an intergovernmental forum constituted by periodic summits and occasional operations on the ground is avoided. The Council does indeed have the key role in the CFSP, but understanding the CFSP as a living institution takes into account the effect regular contact and

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<sup>40</sup> This point is explored below in relation to the constructivist strand of institutionalism.

<sup>41</sup> D Kostakopoulou, 'Ideas, Norms and European citizenship: Explaining Institutional Change' (2005) 68 *Modern Law Review* 237

<sup>42</sup> M Zürn and J T Checkel, 'Getting Socialized to Build Bridges: Constructivism and Rationalism, Europe and the Nation-State' (2005) 53 *International Organization* 1045.

decision-making has on decision-makers across the Member States and how ideas and socialisation process are built-up.<sup>43</sup> Elites across the EU become more familiar with the CFSP as an arena in which foreign policy decisions can be taken, and new actors (most evidently the new Member States) are induced to the values, identities and ideas contained within. Specifically, it becomes normal and expected for both Member States and outsiders to look to the EU for its view on a particular issue or event occurring beyond its borders. Even if the Member States do not agree to put in place a Treaty-based instrument, the mere fact that they discuss issues of foreign policy within this institutional frame contributes to the dynamism of the CFSP as a living institution. As such, an analysis of the CFSP is not only possible in terms of ‘outputs’ (that is, the formally created legal instruments) but also the *effect* it has on ‘insiders’ (EU institutions and Member States, for example), ‘outsiders’ (third states) and other policy areas, whether these relate to external relations in full, in part or not at all. These effects are often less visible or quantifiable, but a greater understanding of the role of the CFSP beyond the Treaty competences can be sought as a changing and developing institution over time.

Changes in institutions can be manifested by changes in rules, routines, norms and identities<sup>44</sup> and brought about by social, economic, technical and cultural changes.<sup>45</sup> It is not necessarily the highly visible changes which are the product of processes of ‘grand designs’ that result in institutional changes.<sup>46</sup> In the context of the CFSP, changes are not limited to those brought about by Treaty amendments. To again take the example of the post of High Representative of the CFSP, this was

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<sup>43</sup> M E Smith, 'Toward a Theory of EU Foreign Policy-Making: Multi-Level Governance, Domestic Politics, and National Adaptation to Europe's Common Foreign and Security Policy' (2004) 11 *Journal of European Public Policy* 740, 746.

<sup>44</sup> March and Olsen (n 34) 13.

<sup>45</sup> March and Olsen (n 34) 14.

<sup>46</sup> Héritier (n 36) 1.

introduced by a Treaty amendment at Amsterdam.<sup>47</sup> Whilst the Treaty defines the role of the post, it can be seen to have changed (or rather, developed) because of the identification of Javier Solana, the only person to hold the post, as ‘Mr the CFSP’ or ‘Europe’s foreign minister’ by many both inside and outside the EU. A cultural perception of this identity demonstrates how an institution created by a Treaty article has changed, and that it is not necessary for a formal change in a Treaty (such as the proposal for ‘upgrading’ the High Representative to become a Union *Minister* for Foreign Affairs)<sup>48</sup> for changes to arise. An even earlier example of change in European foreign policy before the CFSP was created was by technical means: the COREU telex network between national foreign ministers greatly aided the institutionalisation of constant consultation between Member States from its creation in 1973.

Institutions undergo processes of learning to adapt to changing circumstances in order to take advantage of opportunities and bypass threats.<sup>49</sup> This includes replicating other institutions.<sup>50</sup> Institutions provide an abstract definition of standards of behaviour and a ‘compass’ for the assessment of attempts at change.<sup>51</sup> The task for institutionalists regarding change is thus:

to go beyond a focus on how a specific institution affects change and attend to how the dynamics of change can be understood in terms of the organization, interaction and collisions among competing institutional structures, norms, rules, identities, and

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<sup>47</sup> ‘The ... High Representative ... shall assist the Council in matters coming within the common foreign and security policy, in particular through contributing to the formulation, preparation and implementation of policy decisions, and, where appropriate and acting on behalf of the council at the request of the Presidency, through conducting political dialogue with third parties’: Article 26 TEU.

<sup>48</sup> Article I-28, Treaty Establishing a Constitution for Europe.

<sup>49</sup> Peters (n 4) 33.

<sup>50</sup> March and Olsen (n 12) 137.

<sup>51</sup> DG Dimitrakopoulos, ‘Norms, Interests and Institutional Change’ (2005) 53 *Political Studies* 676, 677.

practices.<sup>52</sup>

Further explanation is needed here of the significance of 'logics of appropriateness' and the importance of such logics in shaping change. According to March and Olsen, politics is organised by such logics. That is to say that if an institution is effective in influencing the behaviour of its members through its rules and routines, those members will think more about whether an action conforms to the norms of the organization than about what the consequences would be for him/herself.<sup>53</sup> In a multi-national diplomatic setting such as the CFSP, this does not mean that the Member States will always necessarily have the same view on a specific issue. What it does mean is that before embarking on a course of action, the Member State will at least consider whether it would be contrary to the norms of the institution (that is, the CFSP), and if it does not, then to recognise this and attempt to justify the action, perhaps by referring to the support of other Members. The opposite of logics of appropriateness are logics of consequentiality, where actors anticipate consequences according to their personal preferences and interests.<sup>54</sup> The latter explains foreign policy as an interpretation of the outcomes expected by the state: the EU itself exists because of the strengthening of national governments and their collective decision-making.<sup>55</sup> Whilst logics of consequentiality may not be wholly absent from the institutionalist approach, what is appropriate in decision-making and institutional design plays a large part in explaining how institutions work and change.<sup>56</sup> March and Olsen's approach is to recognise and prioritise the role of logics of appropriateness over the logics of consequentiality.

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<sup>52</sup> March and Olsen (n 34) 17.

<sup>53</sup> March and Olsen (n 12) 160.

<sup>54</sup> March and Olsen (n 9) 951.

<sup>55</sup> This logic is found in the liberal intergovernmentalist analysis of the EU: A Moravesik, 'Preferences and Power in the European Community: a Liberal Intergovernmentalist Approach' (1003) 31 *Journal of Common Market Studies* 473.

<sup>56</sup> A Wendt, 'Driving with the Rearview Mirror: on the Rational Science of Institutional Design' (2001) 55 *International Organization* 1019, 1024.

It is not therefore necessary for ‘extreme’ situations to arise which give appreciation to the logic of appropriateness, which in a CFSP context would mean an urgent international crisis in which Member States are sharply divided over two fundamentally different decisions to take. Institutions affect the ways in which individuals and groups interact inside and outside established institutions, and create the aspirations of political community and the meaning of concepts such as democracy. Appropriateness refers to the iterative processes of matching behaviour to different situations as and when they arise.<sup>57</sup> Institutions adapt to environments and environments adapt to institutions.<sup>58</sup> Identities and interests that are formed gain and lose salience, which is a central process of governance.<sup>59</sup> the CFSP is, therefore, not merely an intergovernmental forum in which Member States periodically agree to do or say something on a particular issue in the world, but also an institution capable of creating logics of appropriateness that affect its Member States and possibly non-Member States too. For example, rather than simply issuing a policy on developments in a non-Member State, such as a military coup or a humanitarian crisis, Member States are likely to behave in a way which takes into account what other Member States are likely to think and integrate this. A clear example in practice is the death penalty: the Council regularly issue condemnations of executions carried out in non-Member States and consistently refer to the shared view on opposition to the death penalty amongst the Member States. These are likely to be accompanied by a similar the CFSP declaration from the Council.<sup>60</sup>

From this it follows that it is not necessarily only the most visible aspects of the CFSP ‘on the ground’, such as the operations under the EU banner in Bosnia or Congo which give rise to the logics of

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<sup>57</sup> JG March and JP Olsen, *Democratic Governance* (Free Press, New York 1995), 30.

<sup>58</sup> March and Olsen (n 9) 951.

<sup>59</sup> March and Olsen (n 57) 12.

<sup>60</sup> For example, Council of the EU, ‘Declaration by the Presidency on behalf of the EU on the Occasion of the Third World Congress against the Death Penalty’ Press Release 5863/07, 31 January 2007.

appropriateness. The declaratory aspects of the CFSP, and the informal processes associated with the involvement of the actors in the CFSP are a fertile source for looking for where the logics of appropriateness arise and to what extent they influence members and non-members.

The reason for seeking out the logics of appropriateness in the CFSP is the light it sheds on the nature of the values built up within the CFSP. It has already been noted that 'civilian power Europe' has long been seen as a hallmark of the foreign policy of the EU, even before the CFSP was created in the TEU. The key place of non-military issues, conflict resolution, and environmental protection and so on has been emphasised as the contribution the EU has to make in world affairs. That is not to say that nation states cannot have these factors as the (dominant) focus of their foreign policies,<sup>61</sup> but the CFSP acts as a further Europe-wide 'layer'. More recently, Manners has convincingly argued that 'normative power Europe' is an accurate depiction of the EU's foreign policy.<sup>62</sup> The death penalty issue as noted above comes within the depiction of the normative power that the EU uses. It is one example of the norms and values that the logic of appropriateness allows us to see in terms of its effect on members and non-members. In terms of research, however, seeking to understand how these logics influence and guide actors has a serious potential drawback as there is no independent means of ascertaining whether norms and values contributed to behaviour and in what measure. There is hence no way of arguing that norms and values were *not* the root causes of the behaviour.<sup>63</sup>

In this thesis, the law-like quality of norms to which other norms are added is highlighted by using insights from the institutional theory of law. This assumes that there is a strong social norm of compliance with law

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<sup>61</sup> For example, Sweden's 'social democratically inspired internationalism': A Bergman, 'Co-constitution of Domestic and International Welfare Obligations: the Case of Sweden's Social Democratically Inspired Internationalism' (2007) 42 *Cooperation and Conflict* 73.

<sup>62</sup> I Manners, 'Normative Power Europe: a Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235.

<sup>63</sup> Peters (n 4) 141.

and legal norms and stresses the logics of appropriateness arising from values as well as from the rules and practices laid down in the Treaties and other sources of law. The suggestion is that a system of governance operates on the basis of rule-based behaviour and a combination of different instruments and processes, which may be identified as hard or soft law if the latter includes the social norms which have arisen through institutional practices and behaviour. Testing the hypothesis seeks to demonstrate that the CFSP impacts on the EU's external sphere of governance and constitutional order beyond the measures provided for the CFSP in the Treaty. The wider impact of the CFSP as a system of governance can only be understood if the logics of appropriateness and law-like quality of norms are part of a process which operates in a linear direction or in a more diverse way. The importance of the social construction of institutions was highlighted as being part of March and Olsen's 'new institutionalism' approach. Social constructivism rejects the notion of linear causality and the (realist) contention that individual preferences are fixed and given. Instead, constructivism opts for a discussion of how preferences and choices come about in relation to the strategic aims of actors. This suggests that the work of constructivists within international relations scholarship can be used in order to supplement the theoretical framework insofar as the search for how the social reality in which the CFSP exists and contributes to works.

### **Refining institutionalism: the construction of social reality**

One branch of institutionalism has incorporated insights developed by constructivists, which came to prominence during the 1990s.<sup>64</sup> Hall and Taylor identify this approach as 'sociological institutionalism',<sup>65</sup> but 'institutional constructivism' is the term preferred by Peters, whose

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<sup>64</sup> A Wiener, 'Constructivism and Sociological Institutionalism' in M Cini and A Bourne (eds) *European Union Studies* (Palgrave, Basingstoke 2005).

<sup>65</sup> Hall and Taylor (n 28) 942.



typology was followed above, and it is this latter term which is used in this thesis.<sup>66</sup> The literature also refers to this branch as ‘modern’ or ‘conventional’ constructivism.<sup>67</sup> Constructivism has gained in academic popularity within scholars of European integration, although it does not purport to be a substantive theory of EU integration. Indeed, constructivism came relatively late to this field.<sup>68</sup> Although constructivism has become influential in the International Relations discipline, it is also relevant for legal scholars seeking to transcend the law/political science divide in scholarship by attempting to comprehend both the rules and shared norms that make up the EU and its development.<sup>69</sup>

Constructivism is a specific position in the philosophy of the social sciences,<sup>70</sup> and it is difficult to define succinctly, in part because it also covers a variety of approaches. It is best understood as an approach to understanding systems of governance, rather than as a self-standing theory.<sup>71</sup> As a central thrust, constructivists claim that social realities only exist by human agreement through intersubjective understanding and are therefore susceptible to change. Consequently, *institutional* constructivism pays particular attention to the role of institutions in

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<sup>66</sup> Some scholars, notably Kostakopoulou, have noted that institutional constructivism is not merely the combination of social constructivism with sociological institutionalism: Kostakopoulou (n 41) 236. Wiener equates the terms as being substantially the same approach (n 64) 37. Johnston point to the inheritance of the epistemology of sociological institutionalism by constructivists generally: AI Johnston, 'Treating International Institutions as Social Environments' (2001) 45 *International Studies Quarterly* 487, 492.

<sup>67</sup> A Wiener, 'Constructivist Approaches in International Relations Theory: Puzzles and Promises' (2006) University of Bath, Constitutionalism Webpapers ConWEB No. 5/2006 <<http://www.bath.ac.uk/esml/conWEB/Conweb%20papers-filestore/conweb5-2006.pdf>> (accessed 25 July 2008) 11.

<sup>68</sup> The first work to consider constructivism and European integration appeared in 1999. The authors noted the lack of systematic attention from constructivist scholars into *la construction européenne* and puts forward the potential for a constructivist research programme to overcome limitations in the integration theory field: T Christiansen, KE Jørgensen and A Wiener, 'The Social Construction of Europe' (1999) 6 *Journal of European Public Policy* 528.

<sup>69</sup> Christiansen, Jørgensen and Wiener (n 68) 539.

<sup>70</sup> Christiansen, Jørgensen and Wiener (n 68) 530.

<sup>71</sup> T Hopf, 'The Promise of Constructivism in International Relations Theory' (1998) 23 *International Security* 171, 196.

these realities. Institutional constructivism places emphasis on the importance of institutions in the constitution of actors and their interests. Through processes of interaction, institutional constructivists see the construction of identities and interests of those involved in systems of governance.<sup>72</sup> The aim is not to seek to predict behaviour of institutions, but to provide an explanation of reasons for outcomes and changes<sup>73</sup> and to provide theoretical and empirical explanations of social institutions and social change.<sup>74</sup> Such changes can include the processes of norm transfer and the adoption of, for example, democratic standards in the countries which applied to join the EU during the 1990s and, within the EU, the shaping of domestic legal practices in the Member States by the ECJ.<sup>75</sup>

As March and Olsen tell us, 'institutionalism emphasizes the endogenous nature and social construction of political institutions'.<sup>76</sup> Constructivists regard institutions as important, as they see within institutions both formal rules and informal norms which constitute their interests, identities and preferences. This demonstrates the generally greater interest constructivists have in discussing ontological issues over epistemological debates.<sup>77</sup> Institutionalism and constructivism complement each other without major conceptual difficulty. The significance of this is that constructivists focus their research more on the construction of social reality by norms and rules than on the processes of how this reality is created. They go much further than other

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<sup>72</sup> Checkel (n 25) 547-8.

<sup>73</sup> CO Meyer, 'Convergence Towards a European Strategic Culture? A Constructivist Framework for Explaining Changing Norms' (2005) 11 *European Journal of International Relations* 523, 527.

<sup>74</sup> E Adler, 'Seizing the Middle Ground: Constructivism in World Politics' (1997) 3 *European Journal of International Relations* 319; M Finnemore, 'Norms, Culture, and World Politics: Insights from Sociology's Institutionalism' (1996) 50 *International Organization* 325.

<sup>75</sup> AM Burley and W Mattli, 'Europe Before the Court: a Political Theory of Legal Integration' (1993) 47 *International Organization* 41.

<sup>76</sup> March and Olsen (n 34) 4.

<sup>77</sup> A Wiener, 'Constructivism: the Limits of Bridging Gaps' (2003) 6 *Journal of International Relations and Development* 252, 258.

institutionalists, particularly rationalist and historical institutionalists, in recognising the role and significance of norms, ideas and culture.<sup>78</sup> These norms and rules structure and provide actors with direction and goals for action.<sup>79</sup> This point marks out their difference from realists/neo-realists who assume that actors' self-interests are both given and fixed.<sup>80</sup> For institutional constructivists, the goal is to take the impact of social factors such as ideas and norms seriously.<sup>81</sup> International agreements embody shared norms which modify behaviour, interests and identities.<sup>82</sup> In order for this modification to take place, however, norms and ideas must have authority and legitimacy and evoke trust. Not all ideas, therefore, become influential because they first need to be accepted and supported with power derived from the institution.<sup>83</sup>

The significance of ideas, knowledge, intersubjectivities and discourses are upgraded within the study of institutions.<sup>84</sup> Ideas are socially embedded and involve a social structuring element. They represent shared reference points that not only send the same message to different actors but which also cause the same behaviour among these actors through interpretation of these ideas.<sup>85</sup> It therefore becomes possible for researchers to analyse how different actors behave in different contexts. The death penalty is again a good example here. The idea that abolition of the death penalty is part of modern, democratic statehood is shared by the Member States and has evolved into a pre-requisite to membership of the EU. As such, it forms part of the civilian power/normative power Europe arguments identified above. In terms of

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<sup>78</sup> Aspinwall and Schneider (n 23) 13.

<sup>79</sup> Adler, 'Seizing the middle ground: constructivism in world politics', p. 329.

<sup>80</sup> Wiener (n 67) 11.

<sup>81</sup> Wiener (n 67) 12.

<sup>82</sup> KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421, 425.

<sup>83</sup> Adler (n 74) 340.

<sup>84</sup> B Rosamond, 'Conceptualizing the EU Model of Governance in World Politics' (10) 4 *European Foreign Affairs Review* 463, 472.

<sup>85</sup> Wiener (n 64) 44.

the CFSP, the death penalty issue often arises in the political dialogue with third states that retain it. However, the behaviour of the EU can be markedly different depending on whether dialogue is with a democratically (such as the United States or Japan) or with a developing state in Africa or elsewhere. Analysis of the discourse employed by the EU could be a means by which the different behaviour as dependent on context could be seen. The difficulty in this is identifying when an 'idea' is the subject of common agreement, since in the absence of this it will be open to many different potential interpretations. However, that is not to say that this is alien to the study even of 'hard' law: in the context of the EU, a directive may be subject to different interpretations in Member States. The importance, therefore, in the absence of an arbiter (such as the European Court of Justice) is to emphasise the importance of ideas having been *institutionalised*.

Once institutionalised, these norms and ideas contribute to an understanding of the social reality in which the actors exist, the identity of the actors, and in turn, the shaping of their interests by the formation of identities.<sup>86</sup> The use of 'identities' in the plural is deliberate. This is particularly apt in the EU context, where the Member States have both individual and shared identities at national, EU and global level, which was evident over the Iraq issue in 2003. Applying these constructivist insights to European integration accounts for the impact the EU institutions have on the behaviour *and* the preferences and identities of individuals and Member States and *vice versa*.<sup>87</sup>

The evolving nature of the CFSP fits with the focus on institutions as both catalysts for and agents of change.<sup>88</sup> By highlighting and refining the role of institutions in the process of the construction of reality, institutional constructivism pays attention to the shaping of ideas and

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<sup>86</sup> Hopf (n 71) 176.

<sup>87</sup> Christiansen, Jørgensen and Wiener (n 68) 529.

<sup>88</sup> Kostakopoulou (n 41) 236.

norms through discursive practices by institutional power.<sup>89</sup> As institutions, the EU and the CFSP can be seen, therefore, as means by which foreign policy ideas of the Member States can be changed over time.

Institutional constructivism treats law as one of many tools which is capable of transforming the behaviour of actors by changing identities, aims and preferences in opposition to other disciplines in IR, primarily neorealism, in which law acts as a constraint on actors with fixed preferences.<sup>90</sup> In seeking the ideas that are present in the EU and the CFSP as an institution, institutional constructivism accommodates the view that the EU is not an actor in international affairs in the conventional sense.<sup>91</sup> Moreover, as an institution, it embodies a collective identity based on shared principles, ideas and norms:

the constructivist approach ... is to take account of the motives of actors, and the objective and social reality in which decisions are made. What is relevant here is the way in which actors interpret their reality, and often the importance that is attached to the role of ideas. Institutional rules and the ideas and norms that underpin them have significance for the behaviour of actors, shaping and changing their behaviour. The EU as an institution that embodies certain principles, including democracy, the rule of law, respect for human rights and free markets, offers a set of standards for the members to follow, to incorporate within the national structures, and hence the collective (international) identity of the European Union is formed.<sup>92</sup>

Identifying this institutional identity of the EU has significant

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<sup>89</sup> Kostakopoulou (n 41) 236.

<sup>90</sup> D Trubek, P Cottrell and M Nance, 'Soft Law', 'Hard Law' and EU Integration' in G de Búrca and J Scott (eds) *Law and New Governance in the EU and the US* (Hart, Oxford 2006) 70.

<sup>91</sup> Rosamond (n 84) 471.

<sup>92</sup> M Farrell, 'EU External Relations: Exporting the EU Model of Governance?' (2005) 10 *European Foreign Affairs Review* 451, 455.

implications for the characteristics of the CFSP as a system of governance. Seeing the EU as an 'open, pacific, principled, consensual network characterized by an unconventional, contra-Westphalian nature',<sup>93</sup> provides a starting point for discussion of the extent to which this impacts on the CFSP as the focal point of the EU's external relations. Using the constructivist approach to the CFSP underlines the centrality of collective values and on the view that actors are often motivated by moral or social concerns.<sup>94</sup>

In this study, the collective values of the system of governance of the Union are sought, especially those which have been created and have evolved and been expressed in the context of the CFSP and the Euro-Mediterranean Partnership. These reveal the extent to which the CFSP can be characterised as a system of governance endowed with a set of values, which help to illuminate how and why the EU has attempted or succeeded in promoting these values beyond its borders. The constructivists' view that identities are multiple fits with the institutional arrangement of the CFSP, where different actors (Council, High Representative, Member States) play roles within the system of governance and may have differing values or be responsible for the promotion of certain values over others. Furthermore, identifying the core principles that the EU stands for goes some way towards examining whether these principles create norms which, through institutionalisation, influence others. Using constructivism in tandem with institutionalism points to the longer-term emergence of principles and the shaping of institutions, in contrast to rational choice institutionalism, which is more concerned with decision-making and short-term effects. If the EU can be seen as a normative power, the

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<sup>93</sup> B Tonra, 'Conceptualizing the EU's Global Role' in M Cini and AK Bourne (eds) *European Union Studies* (Palgrave, Basingstoke 2006) 128.

<sup>94</sup> Abbott and Snidal (n 82); JG Ruggie, 'What Makes the World Hang Together? Neoliberalism and the Social Constructivist Challenge' (1998) 52 *International Organization* 855, 856.

emergence of this normative power not only defines the EU as an international actor but also underlines the importance of collective norms (both implementation of and transfer of norms) as a specific mode of international relations.<sup>95</sup> The normative dimension to the EU as a *power* can also be found in the pursuit of non-interest based policies that are constructed through ethical reasoning. Thus 'normative' is more than adopting a set of norms or allowing for norms to effectively impact upon the Union's international behaviour.

Using constructivism to supplement the institutionalist approaches means that less emphasis is placed on how things *are* than how things *became* what they are, since the social construction of reality is process-based.<sup>96</sup> This chimes with the view of March and Olsen that institutions should be seen as processes rather than fixed organisations. Constructivists also see the processes of learning which result in socialisation and appropriate behaviour: March and Olsen's 'logics of appropriateness' fit comfortably within the combination of these approaches.<sup>97</sup> In the context of this thesis, the CFSP can be understood as an evolving process of institution and norm-building, which exists in and contributes to a social reality which can be observed. By exploring the way in which the CFSP operates beyond the Treaty-based competences, it becomes possible to evaluate how, in the context of European integration, it has engaged in an 'open-ended institutional search process'.<sup>98</sup>

Whilst the complementary approaches of institutionalism and constructivism focus on understanding the social reality in which institutions exist and evolve, their combined emphasis is on the emergence of *social* norms and their effects. The relationship between social and legal norms is less clear, and in order to offer answers to the

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<sup>95</sup> Farrell (n 92) 458.

<sup>96</sup> Trubek, Cottrell and Nance (n 90) 73.

<sup>97</sup> J Jupille, JA Caporaso and JT Checkel, 'Integrating Institutions: Rationalism, Constructivism, and the Study of the European Union' (2003) 36 *Comparative Political Studies* 7.

<sup>98</sup> Olsen (n 18) 16.

research questions within a legal context, the quality of legal norms merits attention. For this purpose, insights from the institutional theory of law are employed.

### **The institutional theory of law**

A modern institutional tradition has arisen within legal theory, in which scholars have sought to approach law as an institutional normative order and the pursuit of identifying the nature of legal norms.<sup>99</sup> The institutional theory of law was principally developed by MacCormick and Weinberger. Their ideas were refined separately at the outset but essentially contained a similar, innovative approach to legal theory: the avoidance of reducing law to duty-imposing norms by enlarging the scope of study to include principles, value and consequentialist argumentation relevant to legal decisions.<sup>100</sup> This entailed a combination of legal positivism with Searle's institutionalism and speech-act theory, whereby social facts depend on human agreement in order for them to exist.<sup>101</sup> The institutional theory of law is part of the legal positivist tradition in that it assumes that the nature and existence of legal norms cannot be accounted for in terms of morality of brute fact, that is to say that their existence does not depend on satisfying any particular set of moral values of universal application to all legal systems.<sup>102</sup> MacCormick and Weinberger's joint aims in elaborating the institutional theory of law are set out as follows:

Our institutional theory of law aims first to  
provide a sound ontological and

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<sup>99</sup> N MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP, Oxford 2007) 11.

<sup>100</sup> N MacCormick and O Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Kluwer Academic Publishers, Dordrecht 1986) 8.

<sup>101</sup> RA Wessel, *The European Union's Foreign and Security Policy* (Kluwer Law International, The Hague 1999) 22-3.

<sup>102</sup> MacCormick and Weinberger (n 100) 128; HM de Jong and WG Werner, 'Continuity and Change in Legal Positivism' (1998) 17 *Law and Philosophy* 233, 249.



epistemological foundation for two equally valid and mutually complementary disciplines: legal dogmatics and the sociology of law. It aims second to make a contribution to the understanding of legal structures and to the methods proper to legal study. And it aims finally to show the place (and the limits) of practical reason in law and on human social life. These are matters with which any comprehensive theory of law must deal.<sup>103</sup>

These legal structures can be seen as legal *institutions*. These legal institutions create institutional legal facts, for example, contracts, trusts, personality, ownership etc.<sup>104</sup> They can appropriately be termed as ‘legal institutions’ since they have a specific legal existence, albeit possibly in a temporal rather than spatial sense.<sup>105</sup> There may not even be a physical existence in either space or time, but the institutional facts are nevertheless commonly thought of as existing<sup>106</sup> because they are not merely concepts, but are given specific meaning through rules and conventions.<sup>107</sup> Institutions can arise even without being specifically created by legislation, for example, by case law or conventions. It is possible to analyse constitutional norms as evolving through social practices<sup>108</sup> and it is therefore perfectly possible to have a normative order without explicitly formulated norms.<sup>109</sup> Constitutional norms can emerge and become respected not because they carry with them any formal enforcement mechanisms but because general opinion suggests that they should be followed. It is not necessarily the case that this general opinion is universal and it is likely that depending on the circumstances or social

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<sup>103</sup> MacCormick and Weinberger (n 100) 27.

<sup>104</sup> MacCormick and Weinberger (n 100) 10, 51.

<sup>105</sup> MacCormick and Weinberger (n 100) 52.

<sup>106</sup> M de Groot and M Oude Vrielink, 'Legal theory and Sociological Facts' (1998) 17 *Law and Philosophy* 251, 253.

<sup>107</sup> MacCormick and Weinberger (n 100) 11.

<sup>108</sup> Wiener (n 64) 54.

<sup>109</sup> MacCormick (n 99) 18.

setting, the norm may exhibit flexibility.<sup>110</sup> For example, the CFSP declarations which express Union concern at events in a third country may depend on the sensibilities of the individual Member States or the healthiness of the relationship with the third state concerned. According to MacCormick, the acquisition of a more formal character in the use of norms leads to the expression of an institutional normative order, and therefore law.<sup>111</sup> The emergence, development or evolution of *norms* can concurrently be a process of the emergence, development or evolution of *institutions*.

March and Olsen contend that the basic building blocks of institutions are rules, a view which is certainly compatible with any legal analysis of institutions.<sup>112</sup> According to the logic of appropriateness, actions are seen as rule-based.<sup>113</sup> Social constructivists also point to the importance of rules and norms in the make-up of the EU.<sup>114</sup> Yet, rules are not only regulative but constitutive, that is they define a set of practices which make up a particular social activity: recognition of this is at the heart of the distinction between constructivists and neorealists.<sup>115</sup> This is common to MacCormick and Weinberger's view of legal systems as dynamic systems which do not only result from the substantive and procedural rules of law.<sup>116</sup> They also recognise that nation states are not the only instances of institutional normative order in the world, as demonstrated by the existence of regional and global institutions and organisation including, *inter alia*, the EU and UN.<sup>117</sup> The EU in particular represents a challenge to traditional notions of sovereignty for the Member States and the institutional theory of law is open to the

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<sup>110</sup> MacCormick (n 99) 19.

<sup>111</sup> MacCormick (n 99) 20.

<sup>112</sup> March and Olsen (n 12) 22.

<sup>113</sup> March and Olsen (n 9) 951.

<sup>114</sup> Christiansen, Jørgensen and Wiener (n 68) 539.

<sup>115</sup> Ruggie (n 94) 871.

<sup>116</sup> March and Olsen (n 34) 19.

<sup>117</sup> N MacCormick, 'Norms, Institutions, and Institutional Facts' (1998) *Law and Philosophy* 301, 331.

possibility of pluralism in sovereign (or even post-sovereign) legal orders.<sup>118</sup> Although the notion of a 'dynamic legal system' is credited to Kelsen and his Pure Theory, the institutional theory of law rejects Kelsen's view that legal dynamics are 'internal' and shielded from observable social processes. The institutional theory of law underscores the interplay of socially existent norms and observable features of social life, and takes the basis of legal dynamics to lie in this interplay.

Legal institutions can be treated as distinct social phenomena.<sup>119</sup> This, however, poses the issue of how social and legal institutions are distinguished or distinguishable. According to Ruiter, there is a corresponding relationship between legal and social institutions. A legal institution is a system of a state of affairs and activities which must have a counterpart in social reality so that the institution can also exist as a social institution.<sup>120</sup>

The system determines the institution's objectives, its internal and external organization, and the ways in which it can be developed. Thus, it provides an elaborate picture of a practice that counts as the corresponding social institution. Accordingly, a social institution is a collection of social relationships that is treated as a distinct social phenomenon because it is organized in conformity with the overall picture presented by a valid legal institution and its regime.<sup>121</sup>

The distinction is also made between normative and real institutions, though the category of 'real' includes socially-constructed institutions as well as those in material existence. Normative institutions are 'institution-concepts' which make up a legal system, and determine

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<sup>118</sup> N MacCormick, *Questioning Sovereignty: Law, State, and Practical Reason* (OUP, Oxford 1999) 78, 137-156.

<sup>119</sup> DWP Ruiter, 'A Basic Classification of Legal Institutions' (1997) 10 *Ratio Juris* 357, 358.

<sup>120</sup> Ruiter (n 119) 358.

<sup>121</sup> Ruiter (n 119) 363.

what possibilities for action exist within a legal system.<sup>122</sup> Real institutions are the practices associated with normative institutions:

In the case of ideal entities, their character as real will appear to be in the one hand founded upon their connection with the sphere of material reality and to be on the other hand conditioned by the facts which allow one to pick out ideal entities as constituent parts of real events and therefore as something participating in temporal existence.<sup>123</sup>

MacCormick, in an article published in 1998,<sup>124</sup> accepts criticism of his earlier notion that there is a need for rules (normative institutions) before there can be institutional facts. This is relevant here, especially when considering the practices taken under European Political Cooperation before the CFSP was more clearly defined in the TEU. The issue is therefore to return to consideration of when something ‘counts’ in institutional terms. According to Searle’s notion of a ‘constitutive rule’:

That the one counts as the other depends on the possibility of interpreting what occurs in the light of a norm or norms, that may range from the most informal implicit norm or convention to the most highly formalized and articulated rule.<sup>125</sup>

The existence of the legal system, therefore, within the institutional theory of law, is not only in the ‘normative system’ but also in the fact that it is visible as ‘a matter of what is actually existent in social reality’.<sup>126</sup> In using the institutional theory of law, it is therefore possible to conceive the CFSP as a *legal* institution, which is equipped with rules and procedures and as an institutional order, since it represents a shared

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<sup>122</sup> de Groot and Oude Vrielink (n 106) 257; MacCormick and Weinberger (n 100) 33-5.

<sup>123</sup> MacCormick and Weinberger (n 100) 38.

<sup>124</sup> MacCormick (n 117) 323.

<sup>125</sup> MacCormick (n 117) 333.

<sup>126</sup> March and Olsen (n 34) 20.

framework of understanding an interpretation amongst actors within a social setting.<sup>127</sup> Within MacCormick and Weinberger's theory, therefore, it is impossible to consider the legal system without reference to social reality. Ruiter claims that the question is no longer how the concept of a legal system can help us to legitimise legal norms of conduct. Moreover, the question is 'what kind of results stemming from human activity, can obtain legal validity as elements of a legal system?'.<sup>128</sup> Norms of conduct develop over time, since 'practices evolve and develop as people find ways of articulating or realizing aims, ends, or values'.<sup>129</sup> One issue which remains problematic is the distinction between rules and habits, and under what circumstances the former can become the latter and *vice versa*. This would seem to be an important distinction to make, because an understanding of 'law' places emphasis on the existence of rules. However, it is not necessarily the case that habits or practices always necessitate the explicit formulation of rules; this may only occur if a practice is breaking-down or being questioned.<sup>130</sup> What this signifies here is that rules, which are often formulated in institutionalised contexts, do not account for a full description of the workings of either the institutions or wider society. Hence, institutional forms and practices are just as relevant in considering the existence and operation of a system of governance as formal rules.

The institutional theory of law has been employed by Curtin and Dekker<sup>131</sup> to explain the set-up and workings of the EU's legal system by the application of the concept of 'legal institution' to the EU. They contend that the Union has a unitary, if complex, legal system which

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<sup>127</sup> N MacCormick, *Rhetoric and the Rule of Law: a Theory of Legal Reasoning* (OUP, Oxford 2005) 6.

<sup>128</sup> Ruiter (n 119) 363.

<sup>129</sup> MacCormick (n 117) 333.

<sup>130</sup> MacCormick (n 99) 68.

<sup>131</sup> DM Curtin and IF Dekker, 'The EU as a "Layered" International Organisation: Institutional Unity in Disguise' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (OUP, Oxford 1999).

emerged from the TEU.<sup>132</sup> From this, it follows that the traditional, doctrinal legal analysis of the CFSP would be to examine its legal base within the Treaty, including the competences of those involved (the Council, High Representative etc.). The institutional theory of law, however, looks beyond what is merely written in the text, in order to allow for an analysis of the CFSP as a 'legal institution'. This makes it possible to conduct a legal analysis of what has been done under the CFSP since its creation in order to complete a fuller picture of the CFSP as a legal institution. Curtin and Dekker underline the importance of legal practices which recognise the existence of a phenomenon and hence a legal institution.<sup>133</sup> These 'legal practices' are actions which make the legal institution an 'operational entity'. An 'operational entity' does not necessarily entail the type of formally constituted (that is, Treaty-based) outputs in the CFSP, but acts of cooperation and negotiation in a legal institution, adherence to general principles, the establishment of decision-making or executive organs, of procedures followed in order to ensure compliance with legal norms or in the appointment of agents for the implementation of regulations.<sup>134</sup>

Curtin and Dekker in their analysis of the EU as a layered international organisation see the CFSP as a sub-legal system emerging from the EU's legal order.<sup>135</sup> They point to the legal practices of the CFSP, such as Joint Actions and Common Positions as indicative of the actorship, presence and capability of EU in conducting a foreign policy.<sup>136</sup> If it is therefore possible to regard the CFSP as an institution, and to examine the practices associated within it as institutionalised, it is also therefore possible to search for institutional *facts*. These can arise beyond the formal, Treaty-based legal practices. Hulsen, in his exploration of the

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<sup>132</sup> Curtin and Dekker (n 131) 85.

<sup>133</sup> Curtin and Dekker (n 131) 88.

<sup>134</sup> Curtin and Dekker (n 131) 92.

<sup>135</sup> Curtin and Dekker (n 131) 86.

<sup>136</sup> Curtin and Dekker (n 131) 109.

emergence of institutional facts, states that;

the facticity of an institutional fact depends on its being internalized by the members of a group. For it is only on this condition that an institutional fact can have the same kind of incontestability as a brute fact. In short, it is only in this way that an institutional fact can be a fact.<sup>137</sup>

It follows from this that the CFSP becomes a socially constructed institution if it is accepted as such by the members of the group.<sup>138</sup> the CFSP should not just be seen as a form of intergovernmental political cooperation, but as a 'living institution' of the type identified earlier in this chapter, capable of producing effects beyond those laid down in the Treaty:

The presented concept of legal order assumes an objective presence of legal norms when relations between states are concerned. If one is prepared to accept the systemic relations between legal norms, one can also accept the existence of a CFSP legal order as a system of valid legal norms derived from the competence of states to conclude international legal agreements.<sup>139</sup>

In this respect, the CFSP is taken to be a self-standing institution which is capable of building up norms. The question is then whether these norms can diffuse to other policy areas within the EU's system of governance. This does not entail looking for ground-breaking changes which can be traced to a particular moment in the institution's development. Indeed, more routine standards of behaviour are significant, and 'in this normative conception of institutions it is the routine and the

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<sup>137</sup> P Hulsen, 'Back to Basics: a Theory of the Emergence of Institutional Facts' (1998) 17 *Law and Philosophy* 271, 285.

<sup>138</sup> Wessel (n 101) 27.

<sup>139</sup> Wessel (n 101) 318.

mundane that appear most important'.<sup>140</sup>

## **Conclusion: creating an analytical framework**

The purpose of this thesis is to engage in analysis of the CFSP by going beyond traditional, competence-based legal approaches and characterising the CFSP as both a sub-legal system within the EU's legal order, and as a system of governance. This helps to explain how the formal-legal constitutionalism of the Union's legal order works in practice.<sup>141</sup> In order to do so, the norms and institutions which have arisen in the practice of the CFSP are sought. It is necessary to look for both norms and institutions in equal measure, so that the practices, ideas and identities of the actors involved in the CFSP demonstrate how the policy works in practice and the effects it has on other policy areas. Through an institutional constructivist framework of legal analysis, the institutions and social practices of the CFSP are brought to the fore. In accounting for the presence of the institutions and social practices in the CFSP, the next step is to consider what consequences arise for the future of the policy, the EU's external relations in general and other 'internal' policy areas. The task then is to identify the institutions, according to March and Olsen's definition, which have arisen in the context of the CFSP and their relationship with norms. The relationship between norms and institutions should be two-way: institutions structure the social reality in which the CFSP exists, and permit norms to arise and sustain them. This is termed the 'dual quality' of norms.<sup>142</sup> In turn, the norms influence the changing nature of institutions and institutional development. Taken together, it is possible to identify the logics of appropriateness which

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<sup>140</sup> Peters (n 4) 29.

<sup>141</sup> JP Olsen, 'Reforming European Institutions of Governance' in J Weiler, I Begg and J Peterson (eds) *Integration in an Expanding European Union: Reassessing the Fundamentals* (Blackwell, Oxford 2003) 56.

<sup>142</sup> Wiener (n 64) 47.



influence not only the institutions and Member States of the EU, but possibly also other actors too, in particular, non Member States. This is important because of the contribution to fulfilling the aims of the CFSP that could be made if the norms and institutions can be seen as having a substantial impact on both members and non-members. It is also important in seeing how the relationship between the CFSP and other policy areas is evolving, if at all, and what effects the norms and institutions have beyond this policy area. This will enable answers to the central hypothesis to be offered through a detailed case study.

The case-study chosen in this thesis is the Euro-Mediterranean Partnership (EuroMed) and, as a substantive law and policy sphere within this partnership, the issue of migration. This has been chosen as a case study for five principal reasons. First, the Mediterranean is a geographical and policy area upon which the EU has placed considerable importance and devoted significant financial and other resources. Although there have been marked periods of greater or lesser activism in relation to the Mediterranean, it is nevertheless one of the prime regions which has occupied the foreign policy agenda of the Union since the creation of the CFSP and even before. EuroMed has a longer history, but exists in a parallel, complementary way to the more recent European Neighbourhood Policy (ENP). Taking into account the problem of when practices become regular enough to be seen as an institution, as EuroMed is almost as old as the CFSP itself, a longer term perspective of its development can be made. The Mediterranean is an area of global strategic importance, in which all EU Member States have an interest (to a greater or lesser extent) and one within which Europe as a whole has a vital role to play. The Partnership was not created by a CFSP instrument, or indeed on the basis of any formal Treaty article, but it consequently became the subject of the CFSP Common Strategy for the Mediterranean.<sup>143</sup> The links which can be made

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<sup>143</sup> Common Strategy of the European Union 2000/458/CFSP on the Mediterranean region

between the objectives of the CFSP and the system of governance which has been created in EuroMed helps to make the process of identifying processes and norms more visible.

Second, there are clear links that can be made with other policy spheres because of the proximity of the Mediterranean states. Migration, trade, the environment and intercultural dialogue are prominent examples which have played a role in the Partnership. These have all been the focus of attention within the institutions of the partnership. Migration has been selected because it is of particular importance to the EU institutions, and EU and non-EU states which are part of the Partnership, and there has been a great increase in the instances where the importance of migration issues are underlined both internally and externally. Migration is interesting because it did not appear initially as a *raison d'être* of the Partnership in the early official documentation, but has since become a central theme in Euro-Mediterranean relations, the analysis of which allows for a rich source of interactions between spheres of internal and external governance. Discussion of and action on migration has become increasingly present on the agenda of the EU institutions.

Third, the Euro-Mediterranean Partnership is an arrangement between the EU, its institutions and Member States, and partners around the Mediterranean. The latter, stretching from Morocco in the West to Jordan in the East, do not form a homogenous group. The Partnership is therefore much more complex and dynamic in its multi-level relationships than is the case for the EU's bilateral relations with a single third country. Considerable emphasis has been placed on the 'joint ownership' of the policy and institutions between the EU and the partners. Migration also reflects this multi-faceted nature of EuroMed relations, since the different dimensions of migration in the

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[2000] OJ L 183.

Mediterranean cover regular and irregular migration flows with the Partner States as both sending and transit countries for migrants to the EU.

Fourth, and following from this, the Mediterranean is a case where the ‘blurring’ between what is seen as internal and external policy-making is particularly evident. Some Partner States have completed the transition to full EU members, and others may follow. Since EuroMed exhibits features familiar to the enlargement process, and in a sense could be seen in similar terms of extending the Union’s system of governance model.<sup>144</sup> Questions about to what extent traditional nation state borders apply in this institutional framework are of great significance.

Finally, the policy has specific aims, objectives and tools, as demonstrated by the elaborate institutional framework which has been set up. This makes it appropriate for an analysis of institutions and norms created within, and the logics of appropriateness which both constrain actors and create opportunities and expectations for action. Once these norms have been identified, it is possible to see how and to what extent they reflect the characteristics of governance, how the CFSP has developed and what effect it has had on other spheres.

In order to use EuroMed as a case study, it is necessary to revisit the hypothesis and research questions identified in the introduction and pose additional questions tailored to the empirical scope of analysis, on the basis of the theoretical framework elaborated in this chapter. This will, in turn, allow for answers to the main research questions to be offered in the final chapter. To recall the hypothesis and research questions posed in the introduction:

- Assuming that it is possible to characterise it as a system of governance, the CFSP can be seen to have consequences beyond the Treaty-based instruments and, as such, it is an integral part of the

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<sup>144</sup> Farrell (n 92) 458.

constitutional order of the European Union.

and further,

- First, what are the characteristics of ‘governance’ and how and why is this term appropriate for characterising the CFSP?
- Second, how does this approach to understanding the CFSP differ from a traditional, diplomacy-based foreign policy? What are the goals and instruments associated with foreign policy that could be expected to be seen within the CFSP?
- Third, does the use of the terminology of ‘governance’ help to explain the institutional development of the CFSP and if so, how?
- Fourth, what are the legal outcomes in the EU’s external relations, which can be traced to the institutional development of the CFSP?
- Fifth, how can the relationship between the CFSP and other EU policies with an external dimension be characterised, and is this relationship evolving or static?

The characteristics and uses of ‘governance’ in both the general and EU sense have already been addressed in earlier chapters. The empirical focus of the case study of EuroMed and migration will help to offer answers to the above questions through the following lines of inquiry:

- How has EuroMed developed and what practices or sets of practices have arisen from its institutional structure?
- To what extent does EuroMed exhibit the goals and instruments that we would expect to see in foreign policy?
- Can EuroMed be characterised as a system of governance and what does the social reality it exists in and contributes to reveal about the relationship between EuroMed and the CFSP?
- What is the relationship between EuroMed and ‘internal’ policy making? Can the legal outcomes visible in the area of migration law

be traced to the CFSP?

The following chapters explore the Euro-Mediterranean Partnership, the development of migration law and policy at EU level and the relationship between these and the CFSP. In doing so, the thesis demonstrates that although the CFSP instruments have been used only sparingly in the context of the Mediterranean, the advent of the Barcelona Process and its development has been used to fulfil goals in both the CFSP and migration law and policy. It is possible therefore to see the development of discursive links emerging from the CFSP and its intergovernmental frame. This has promoted discussion of foreign policy issues within the wider context of European integration, to the use of the system of governance in the Euro-Mediterranean Partnership and the 'external' dimension of migration policy for the fulfilment of the CFSP goals as laid down in the Treaty.



## **Chapter 4: The Euro-Mediterranean Partnership as a System of Governance**

Understanding the CFSP of the EU as a system of governance requires greater scrutiny of the complexity of the EU's relationships with non-Member States. The Euro-Mediterranean Partnership (EuroMed/the Barcelona Process) provides a rich source of interactions within the context of an elaborate institutional framework and against the background of a complex history in the region. It must be noted at this juncture that EuroMed was not the direct product of one of the CFSP instruments provided for in the TEU. Although it was subsequently the subject of a CFSP Common Strategy in 2000, EuroMed was not created pursuant to any specific Treaty article. Nevertheless, analysis of its aims and development demonstrates that it shares close affinity with the Treaty-based aims of the CFSP.

EuroMed is a general and holistic framework for relations between the EU and the states around the Mediterranean Sea, initially created by the Barcelona Declaration 1995.<sup>1</sup> As made explicit through the subsequently created the CFSP Common Strategy in 2000, it is also the frame within which the EU conducts its foreign policy towards the region and the states in the region. The stated aim of the Barcelona Declaration was to create an area of peace, stability and prosperity across the Mediterranean through cooperation amongst the partners in areas characterised as 'baskets': a political and security partnership to establish a common area of peace and stability; an economic and financial partnership, and a partnership in social, cultural and human affairs. Cooperation on migration, social interaction, justice and security has been added as a fourth area of cooperation since 2005.<sup>2</sup> It is not without

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<sup>1</sup> Euro-Mediterranean Ministerial Conference, 'Final Declaration of the Barcelona Conference and its Work Programme (Barcelona Declaration) (1995).

<sup>2</sup> Euro-Mediterranean Ministerial Conference, 'Five Year Work Programme' (Barcelona,

significance for the arguments here that EuroMed is known as the Barcelona *Process*: the gradual institutionalisation of the framework across the baskets towards the general aim of creating a shared area of peace, stability and prosperity serves as a useful concept in seeing EuroMed as a way of moving towards substantial change in the governance of the Mediterranean area. The task here is to demonstrate how EuroMed has emerged as a system of governance, strongly inspired by that of the EU but including non-Member States as actors.

The institutional framework and the extensive historical and economic relationships which form the backdrop to EuroMed do not automatically make a 'system of governance' an appropriate characterisation of the partnership. What does allow for this characterisation is the nature of the relationships which function through multilateral, bilateral and unilateral forms, and as a result setting EuroMed apart from, for example, the EU's relations with a single third-state. The multilateral aspects of EuroMed are the most significant in terms of seeing it as an example of regional governance at work, yet understanding it in this way also relies on comprehension of how the bilateral and unilateral aspects shape the progress of the Barcelona Process. Recalling the exploration of EU governance in chapter one, where the internal/external policy division was seen to be of increasingly limited significance, the Mediterranean provides a good example of why this is so. This is in part due to the proximity of the Mediterranean states, some of which have been included in the enlargement process, but also by the impact of political and economic decisions and policies by the EU on the Partner States and, to a certain extent, *vice versa*. One particular area where this is clear is migration law and policy, explored in the context of EuroMed in chapter six. Migration law and policy is not an area of specific competence of the CFSP, but it does demonstrate how the foreign policy

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27-28 November 2005).



goals as articulated in the Treaty are translated into legal and policy outputs in an area and in a manner which blurs the internal/external dimensions.

The purpose of this chapter is to provide an introduction to EuroMed and to explore the development and operation of its institutions, relationships and the system of governance that has consequently emerged. This involves analysis of the institutional framework as elaborated by the Barcelona Process, and also the institutions (according to March and Olsen's definition) which have emerged from the sets of practices and rules which define appropriate behaviour.<sup>3</sup> The chapter also places EuroMed within the context of the more recent European Neighbourhood Policy, which does not replace the Barcelona Process, but which covers all the EuroMed partners (except Turkey, Albania and Mauritania) in addition to the Union's neighbours in the East. The 'Barcelona Process: Union of the Mediterranean' initiative of the French EU Presidency is also examined. This is followed by a discussion of the (emerging) characteristics of the system of governance of the EuroMed space, and in particular whether the principle of joint ownership of the Barcelona Process by the EU and the Partner States is substantiated.

### **EuroMed and 'the Mediterranean' region**

Before considering the institutionalisation of the relationships between actors in the region, it is important to note the complexities of this geographical and political space. Although the Mediterranean Sea is a defined geographical feature, 'the Mediterranean' as a political space is less evident. Covering parts of Europe (including the Western Balkans), North Africa and the Middle East, 'the Mediterranean' does not easily fit into existing structures in International Relations as a defined region. The

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<sup>3</sup> JG March and JP Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organization* 943, 948.

nature of the EU's engagement with the Mediterranean has not been consistent in terms of its geographical focus. Whilst the participants of EuroMed can be seen as divided between EU Member States to the North and non-members to the South, the geo-political map is complicated by the status of Ceuta and Melilla (Spanish enclaves in North Africa surrounded by Morocco), Gibraltar and the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus (all of which remain under UK sovereignty) at strategic points in the Mediterranean, and the growth of the EU to gradually take in states in the region, most recently Malta and Cyprus who have changed their EuroMed status from initial Partner States to full EU Member States. Croatia and Turkey are also currently pursuing this course, with Albania, Bosnia-Herzegovina and Montenegro as the only other EuroMed Partner States with both the ambitions and prospects of eventually joining the Union. Morocco's attempt to apply for membership in 1987 was firmly rejected by the Council,<sup>4</sup> and the TEU subsequently made clear that membership is only open to 'European' states.<sup>5</sup> This does not imply therefore that participation in EuroMed indicates potential future EU membership for those states not considered to be 'European'.

Amongst the non-EU partners of EuroMed, there exist great differences in political systems, levels of economic and democratic development and depth of neighbourly relations. Therefore, they cannot be characterised as collectively making up a region in any other way than their geographical proximity to each other. The region is also where some of the most complex and long-term issues in world affairs are centred, and as a result, the region is often characterised as perpetually embroiled in conflict, the threat of conflict or, at best, tension. For this reason, the Council is aware that fulfilling its objectives in the CFSP is inherently

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<sup>4</sup> Bulletin of the European Community, 9-1987, point 2.2.19.

<sup>5</sup> Article 49 TEU allows 'any European state' which respects the founding principles of the EU set out in Article 6(1) TEU (including democracy and the rule of law) to apply for membership.

related to regional policies, of which EuroMed is a prime example.<sup>6</sup> This is crucial in understanding how the relationship between the systems of governance in the EU, the CFSP and EuroMed exists.

Aside from the Barcelona Process, few projects for Mediterranean-wide economic or political integration have been sustained. Although regional organisations have been created from time to time, none have capitalised on promises for economic or political integration on a region-wide basis, or included all the (Southern) Mediterranean states.<sup>7</sup> Trade agreements have tended to be full of exceptions and rarely ratified or implemented. In this respect, the difference between the Southern partners compared to the emergent European identity in the states bordering the North of the Mediterranean Sea is stark. Many of the states around the Mediterranean have suffered from long-term political instability and frequent changes in governments and political directions. This has hampered long-term engagement projects with neighbouring states. In the post-Cold War era, the depth of relations each state has (or not) with the United States, and the emphasis each places within their national foreign policies, cuts across the area rather than unifies it. One point in common as far as the EU is concerned, however, is that all the states around the Mediterranean have strong connections with mainland Europe, stretching back to Antiquity. Colonisation of much of the Mediterranean, and the drawing up of post-war national boundaries by Europeans has left physical, political and cultural legacies on the Southern Mediterranean and contributed to issues at the forefront of domestic debates in EU states, such as migration. Economic ties between the EU and Mediterranean are extensive, although the economic strength of the two sides of the Mediterranean is vastly different.

As a consequence, understanding 'the Mediterranean' as a region of

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<sup>6</sup> Common Strategy of the European Union 2000/458/CFSP on the Mediterranean region [2000] OJ L 183.

<sup>7</sup> T Christiansen, F Petite and B Tonra, 'Fuzzy Politics Around Fuzzy Borders: the European Union's "Near Abroad"' (2000) 35 *Cooperation and Conflict* 389, 401.

political and economic interactions automatically makes the EU one of the actors in this space. The EU has always bordered the Mediterranean Sea since its creation,<sup>8</sup> and through successive enlargements has seen its frontiers extended along its shores. The EU Member States maintain their own bilateral relations with the non-Member States, and as may be expected, the Member States which have been most active in the development of the Euro-Mediterranean Partnership are France, Spain, Portugal, Malta, Italy and, to a more limited extent, Greece and Cyprus.<sup>9</sup> Nevertheless, other non-Mediterranean Member States have devoted significant resources and efforts in the Partnership, in particular Finland and Sweden.<sup>10</sup> In addition to the EC association agreements with individual states, which pre-date the Barcelona Process,<sup>11</sup> the Mediterranean has long been the focus of EU external policies, which were conducted under the auspices of European Political Cooperation (EPC), the Euro-Arab Dialogue and Global Mediterranean Policy during the 1970s, the Renovated Mediterranean Policy in the 1980s and the Venice Declaration on the Middle East 1980.<sup>12</sup> As the titles of these policies suggest, and given the unclear concept of 'the Mediterranean' as a region, policies were generally divided between those towards Maghreb (Morocco, Algeria and Tunisia) and the Mashreq (Egypt, Israel, Jordan, Lebanon and

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<sup>8</sup> It might also be noted here that pre-independence Algeria, being part of France, meant that in the 1957-62 period, the Community also had a Southern Mediterranean frontier.

<sup>9</sup> M Pace, *The Politics of Regional Identity: Meddling with the Mediterranean* (Routledge, Oxford 2006), 91. A recent example is provided by the Priorities in External Relations of the Portuguese EU Presidency 2007, where the Mediterranean was listed as the first priority: Portuguese Presidency of the Council, 'A Stronger Union for a Better World' (2007) <<http://www.eu2007.pt/NR/rdonlyres/B9B87547-C363-43FB-A5FF-67D4D2C39B72/0/PrioridadesEN.pdf>> (accessed 25 July 2008).

<sup>10</sup> Interview with Council Official (Brussels, September 2008).

<sup>11</sup> The first Association Agreements concluded by then European Community were with Greece (1961), Turkey (1963). These were followed by Agreements with Malta (1970), Portugal (1972), Cyprus (1973), Israel (1975), Algeria (1976), Tunisia (1976), Egypt (1977), Jordan (1977), Lebanon (1977), Syria (1977), and Morocco (1978).

<sup>12</sup> S Stavridis and J Hutchence, 'Mediterranean Challenges to the EU's Foreign Policy' (2000) 5 *European Foreign Affairs Review* 35, 38; F Tanner, 'North Africa: Partnership, Exceptionalism and Neglect' in R Dannreuther (ed) *European Foreign and Security Policy: Towards a Neighbourhood Strategy* (Routledge, Abingdon 2004).

Syria). It would be erroneous to suggest that the (Southern) Mediterranean has always been at the forefront of external policy-making. As Bicchi has noted, there have only been sparse periods of sustained activity on the part of the EU towards the region during its existence, with long periods in inactivity, such as the 1980s.<sup>13</sup> The first period of activity on the part of the EU was following the 1972 Global Mediterranean Policy. This aimed to create a wide free-trade area in industrial goods across the Mediterranean, with funds destined for economic development, but Member States could not agree on what trade concessions to make to the non-Member States (which included future EU Members such as Spain, Portugal and Greece), and the impetus for such a grand project was soon lost.<sup>14</sup>

The second period of activity in European policy-making in the Mediterranean occurred during and immediately after the geo-political changes at the end of the Cold War at the same time as the elaboration of the CFSP. Initiatives launched by EU Member States included the Conference for Security and Cooperation in the Mediterranean (CSCM)<sup>15</sup>, the Western Mediterranean Forum/5 + 5 Dialogue<sup>16</sup> and the Mediterranean

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<sup>13</sup> F Bicchi, 'Defining European Interests in Foreign Policy: Insights from the Mediterranean Case' (2002) University of Oslo Centre for European Studies, ARENA Working Paper No. 13/03 <[http://www.arena.uio.no/publications/working-papers2005/papers/05\\_11.xml](http://www.arena.uio.no/publications/working-papers2005/papers/05_11.xml)> (accessed 25 July 2008) 13.

<sup>14</sup> Tsoukalis, in an article published in 1977, notes that 'global' was a rather exaggerated term for a policy only dealing with trade and aid. The lack of concessions on trade in agricultural goods and the oil crises of the 1970s were also factors contributing to the demise of the Global Mediterranean Policy: L Tsoukalis, 'The EEC and the Mediterranean: is 'Global' Policy a Misnomer?' (1977) 53 *International Affairs* 422

<sup>15</sup> Proposed by the Spanish and Italian governments in 1990 and designed to include the EU, US, Mediterranean and Gulf States within a regional institutional framework, discussing and cooperating on issues including security and economics. The CSCM goals were never realised, although an Inter-Parliamentary Assembly has met on four occasions, most recently in Nafplion, Greece in 2005: Inter-Parliamentary Conference on Security and Cooperation in the Mediterranean, 'Final Declaration' (2005) <<http://www.ipu.org/splz-e/cscm05.htm>> (accessed 25 July 2008).

<sup>16</sup> The Western Mediterranean Forum was a French initiative proposed during the same period as for the CSCM, but as an informal forum for dialogue with no fixed goals. The participants were four EU states; France, Spain, Italy and Portugal with Malta and five North African states; Morocco, Algeria, Tunisia, Libya and Mauritania. The focus on cooperation was more on economic, rather than political, cooperation. It was frozen in 1992 but relaunched by Portugal in 2001 as the 5 + 5 dialogue by the Declaration of Lisbon of 26 January 2001. At the first meeting of Heads of State and Government in Tunis in

Forum.<sup>17</sup> A lack of institutionalisation in the frameworks has meant that the initiatives remained purely informal, *ad hoc* intergovernmental dialogues. As the Mediterranean began to feature more prominently on the foreign policy agenda of the Council, the need for a Mediterranean-wide policy was stressed by a number of Member States, in particular France and Spain, at a time when the EU's attention was fixed more closely on developments in Central and Eastern Europe. The limitations of informal processes of dialogue both past and present also provided the impetus for institutionalisation within EuroMed.<sup>18</sup> In this way, EuroMed can be seen as a successor to early projects, although the means and aims were substantially different. Positive developments in the Middle East Peace Process also gave impetus to the search for a new policy covering Eastern Mediterranean countries as well as those in Northern Africa.<sup>19</sup> Issues of concern to non-Mediterranean EU Member States, in particular migration and the effects of instability in the Middle East, mean that most EU members see the relevance of EuroMed within their domestic systems and the importance of stability and prosperity on the Southern borders as well as those in the East.<sup>20</sup> This period of activity eventually resulted in the Barcelona Declaration in 1995, during the Spanish Presidency of the EU, which launched the Euro-Mediterranean Partnership.

To these two periods of European activity towards frameworks for cooperation must be added a third. French President Sarkozy, during his national election campaign in May 2007, announced his proposal for a

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2003, the Dialogue was described in the final Declaration as a 'regional forum for consultation, cooperation and comprehensive thinking': Heads of State and Government of The Western Mediterranean Countries: the 5+5 Dialogue, 'Tunis Declaration' (2003) <[http://www.5plus5.tn/english/index\\_en.htm#](http://www.5plus5.tn/english/index_en.htm#)> (accessed 25 July 2008).

<sup>17</sup> Distinct from the Western Mediterranean Forum (now the 5 + 5 Dialogue) the Mediterranean Forum was a joint Egyptian and French initiative comprising of Algeria, Egypt, France, Greece, Italy, Malta, Morocco, Portugal, Spain, Tunisia and Turkey. It also operates on an informal basis and is only open to states wishing to discuss cooperative projects. Due to a lack of a funding mechanism, such projects have not been forthcoming.

<sup>18</sup> Christiansen, Petito and Tonra (n 7) 403.

<sup>19</sup> S Dosenrode and A Stubkjær, *The European Union and the Middle East* (Sheffield Academic Press, London 2002) 126.

<sup>20</sup> Christiansen, Petito and Tonra (n 7) 404.

*Union Méditerranéenne* (Mediterranean Union) as a key policy priority. The details of this plan were not supported by detailed policy documents. It was however clear from his speech in Toulon that the aim was for some type of Union between the EU Member States with Mediterranean coastlines (France, Spain, Italy, Slovenia, Malta, Greece and Cyprus) and South coasts of the Mediterranean, based on the early days of the Community, but a separate entity from the EU.<sup>21</sup> This would exclude non-Mediterranean EU Member States, which prompted German Federal Chancellor Merkel to express strong doubts as to the legal and political viability of doing so. The *Union Méditerranéenne* quickly became refashioned as a renewal of the Barcelona Process, to be understood as building on the progress made, rather than representing a break from the past.<sup>22</sup> It adopted a variety of innovations and working methods which had in fact already been discussed in EuroMed in recent years.<sup>23</sup> As a renewal of EuroMed as laid down in the content of the Joint Paris Declaration, the changes brought about to EuroMed are considered below.

The focus of this case study is the Euro-Mediterranean Partnership and 'the Mediterranean' is therefore understood as a political space, as opposed to a defined geographical space, which incorporates a variety of actors: all EU Member States, non-EU states bordering or in proximity to the Mediterranean Sea, the institutions of the EU (primarily the Commission, Council and Parliament), common institutions created by the Barcelona Process and the involvement of civil society, experts and non-governmental actors.

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<sup>21</sup> N Sarkozy, 'Presidential Election Campaign Speech in Toulon, France' (2007) <[www.sarkozy.fr/download/?mode=press&filename=7fevrier2007\\_Toulon\\_DiscoursNS.pdf](http://www.sarkozy.fr/download/?mode=press&filename=7fevrier2007_Toulon_DiscoursNS.pdf)> (accessed 25 July 2008). President Sarkozy angered Malta by omitting them from his list of Mediterranean EU Member States envisaged as participants: James Debono, 'Tough guy Sarko says désolé to Malta' Malta Today (Valletta, 25 April 2007) <[http://www.maltatoday.com.mt/2007/mw/mw\\_april25\\_2007/tl.html](http://www.maltatoday.com.mt/2007/mw/mw_april25_2007/tl.html)> (accessed 25 July 2008).

<sup>22</sup> Barcelona Process: Union for the Mediterranean, 'Joint Declaration of the Barcelona Conference and its Work Programme (Joint Paris Declaration)' (Paris, 13 July 2008).

<sup>23</sup> Interview with Council Official (Brussels, September 2008).

EuroMed is both a partnership between the EU and non-member Partner States and also a frame for the EU's foreign policy in the region. To what extent these two characterisations of EuroMed differ is explored later in this chapter. In contrast to the previous initiatives alluded to above, the Barcelona Process represents, for the first time, a holistic and comprehensive policy towards the entire Mediterranean region which addressing wide-ranging and cross-cutting issues. A reading of the founding text of EuroMed, the Barcelona Declaration, does not immediately suggest that the purposes of EuroMed are confined to any one particular sphere. The terminology in the Declaration refers to the 'strategic' importance of the Mediterranean for all those involved, and 'strategic' here has political and economic connotations. Reflecting the EU's importance in terms of its economic strength, trade and economic relations nevertheless feature strongly in the Declaration. This is a common feature of most of the EU's relationships with third states and regions across the globe. Yet few of the EU's external relationships have such an emphasis on non-economic issues as well. Indeed, the only instances where this does occur to such an extent is in the EU's other neighbourhoods, that is in the Western Balkans and with certain countries of Central and Eastern Europe which have not or not yet joined the EU. The Barcelona Declaration is also notable for the importance attached to intercultural dialogue, which has also begun to play a larger part in EuroMed than in the early stages of the Barcelona process, as a result of tensions between Europe and its Mediterranean Partners such as those surrounding the Danish cartoons in 2006. Intercultural dialogue is not restricted to state-to-state cultural dialogue, but cuts across national boundaries to cover, for example, dialogue between different religious faiths. Considerable importance is placed on promoting 'grassroots' cultural cooperation in a variety of different fields, which the Council



considers to be key to the value added nature of EuroMed.<sup>24</sup>

According to the Barcelona Declaration 1995, a ‘comprehensive partnership ... through strengthened political dialogue, the development of economic and financial cooperation and greater emphasis on the social, cultural and human dimension’ was created.<sup>25</sup> The partnership brought together the European Union and its ‘Mediterranean Partners’: Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey. All the Partners border the Mediterranean Sea except for Jordan, which has been included because of its proximity to the Mediterranean and influence in, specifically, the Palestinian Territories. The presence of Jordan underlines the context in which the Barcelona Declaration was agreed, namely the renewed hope for a lasting solution to the Middle East conflict in the early 1990s.<sup>26</sup> Balkan states were not invited to the first Barcelona Conference: given that the Middle East Peace Process was the catalyst for engaging more fully with the Mediterranean Partners, it was felt on the EU side that the Balkans (which was only just emerging from its own conflicts) would be best dealt with under a separate framework.<sup>27</sup>

Despite its lack of statehood, the Palestinian Authority is included as a full partner in EuroMed and although its bilateral agreement with the EU is different in some aspects of substance and form, for the purposes of EuroMed (and this thesis), it is referred to as a Partner State. Since the beginning of Barcelona Process, two of the partners, Malta and Cyprus, have become EU Member States. The first enlargement on the Partner State side occurred when Albania and Mauritania were invited to join EuroMed as full participants in November 2007. Albania requested to join EuroMed because it is a Mediterranean state and has an interest in advancing its EU membership ambitions through involvement in regional

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<sup>24</sup> Interview with Council Official (Brussels, September 2008).

<sup>25</sup> Preamble, Barcelona Declaration 1995.

<sup>26</sup> Interview with Council Official (Brussels, September 2008).

<sup>27</sup> Interview with Council Official (Brussels, September 2008).

fora. Its expression of interest in joining, along with that of Mauritania, was the subject of long discussion as it was felt on the EU side that the focus of EuroMed should remain on issues linked to developments in the Middle East. This has now changed given that the aims of the Barcelona Process have moved away from the Middle East Peace Process and into other areas including migration.<sup>28</sup> During its first months in participating, Albania has been active in finding a role as a bridge between the EU and Member States.<sup>29</sup> Mauritania does not border the Mediterranean Sea, but it was invited to the initial Barcelona summit as an observer, and subsequently requested full membership. It is a member of regional bodies including the Arab Maghreb Union (of which all other members are participants in EuroMed) and has been included in previous EU initiatives towards the Mediterranean.<sup>30</sup> Like Albania, it is also a sending and transit point for migrants to the EU, which is theme of the following chapters, and which helps to explain why its request to become a full participant in EuroMed has been accepted.

The Paris Summit of 13 July 2008 relaunched the remodelled EuroMed as: 'the Barcelona Process: Union for the Mediterranean' and widened the participation to include Croatia, Montenegro, Bosnia-Herzegovina and Monaco.<sup>31</sup> As all existing EU Member States are also members of EuroMed, the number of full EuroMed participants has grown though EU enlargements in 2004 and 2007 to 43. Besides the clear interest of Cyprus and Malta in EuroMed, some of the other new EU Member States have manifested a strong interest in the development of the Barcelona

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<sup>28</sup> Interview with Council Official (Brussels, September 2008).

<sup>29</sup> Interview with Council Official (Brussels, September 2008).

<sup>30</sup> Mauritania's membership was also supported by a European Parliament Resolution on EuroMed [2003] OJ C87E/500.

<sup>31</sup> Joint Paris Declaration 2008. The Commission's Communication to the Council in advance of the Paris summit made a distinction between the Partner States and Croatia, Bosnia-Herzegovina, and Montenegro as 'Mediterranean coastal states'. The final Joint Declaration made no such distinction, and for the purposes of this thesis, 'Mediterranean Partner State', unless otherwise stated, refers to the original signatories to the Barcelona Declaration with Mauritania and Albania: Commission (EC), 'Barcelona Process: Union for the Mediterranean' (Communication) COM (2008) 319 final, 28 May 2008.

Process.<sup>32</sup>

Tracing the membership of EuroMed around the Mediterranean region reveals only selected geographical gaps. Croatia's relationship with the EU was previously defined by the enlargement process and policies regarding the Western Balkans and was, until the Paris Summit, not to be a full member of EuroMed until it becomes an EU Member State.<sup>33</sup> This also appeared to be the case for other countries in South-Eastern Europe, but the states with Mediterranean coastlines (Albania, Montenegro and Bosnia-Herzegovina) have now been invited to join.<sup>34</sup> The initial rationale for excluding Balkan countries (that is, the emphasis on the Peace Process) was seemingly no longer present. With the exception of Albania, the other Balkan states were ambivalent about EuroMed but accepted the invitation to join: the aim on the part of the French Presidency was to ensure as wider participation around the Mediterranean Sea as possible in the new initiative. This is also the case for Monaco, which has now joined the relaunched EuroMed, although other non-EU microstates in the Mediterranean region (notably Andorra and San Marino) have not.

By far the most notable absentee amongst the EuroMed participants is Libya. At the time of the start of the Barcelona Process, Libya was subject to a UN sanctions regime<sup>35</sup> and was not invited to participate by

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<sup>32</sup> For example, Slovenia's representative at the Euro-Mediterranean Parliamentary Assembly (EMPA) in 2007 expressed an interest in hosting a Euro-Mediterranean University. This was subsequently supported by the Joint Paris Declaration. M Pavliha MP, Intervention at the Third EMPA (Tunis, 17 March 2007). The Czech Republic, which as EU President in early 2009 will co-chair the Barcelona Process under the new arrangements following the Paris Declaration, has also been playing a full part in preparation for this role: Interview with Council Official (Brussels, September 2008).

<sup>33</sup> This had also been the case for Albania, until it was invited to join.

<sup>34</sup> Joint Paris Declaration 2008.

<sup>35</sup> United Nations Security Council Resolution 748 (31 March 1992) UN Doc S/RES/748 imposed an arms and air embargo and a reduction of Libyan diplomatic personnel serving abroad; UNSC Resolution 883 (11 November 1993) UN Doc S/RES/883 tightened sanctions on Libya. In this resolution, the Security Council, among other items, approved the freezing of Libyan funds and financial resources in other countries and banned the provision to Libya of equipment for oil refining and transportation. UNSC Resolution 1192 (27 August 1998) UN Doc S/RES/1192 reaffirmed that the measures set forth in its Resolutions 748 and 883 remained in effect and binding on all Member States.

the EU with which it had no official relations. Following the lifting of UN sanctions in 2003,<sup>36</sup> many EU Member States reopened bilateral diplomatic relations with Tripoli and preliminary moves were quickly made to include Libya within the partnership. Libyan leader Colonel Gaddafi was invited in 2004 to visit to the institutions in Brussels and the Delegation of the European Commission in Tunis was subsequently accredited to cover Libya. Although not a full member of EuroMed, it has observer status since the EuroMed Ministerial Conference in Stuttgart in 1999. The EU has stressed that Libya is eligible for membership of EuroMed and participation in other frameworks such as the European Neighbourhood Policy, but must accept the relevant *acquis* first.<sup>37</sup> In July 2007, the Libyan authorities allowed five Bulgarian medics convicted of infecting several hundred children with HIV in a Benghazi hospital to return to Bulgaria, thereby ending a long-running impasse in EU-Libyan relations. A closer relationship with the EU was reported to be one of the conditions for their release,<sup>38</sup> which suggests that Libya's membership of EuroMed will be accelerated.<sup>39</sup> Following the call in the Council Conclusions of 15 October 2007, the Commission proposed a negotiating mandate for a Framework Agreement with Libya in February 2008.<sup>40</sup> This has not yet materialised. Libyan leader Muammar al-Gaddafi declined the invitation to participate in or send a Ministerial delegation to the relaunch of EuroMed in Paris in July 2008 and was reported in the Libyan

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<sup>36</sup> UNSC Resolution 1506 (12 September 2003) formally lifted the sanctions against Libya.

<sup>37</sup> This condition was stated in the conclusions of the Third Euro-Mediterranean Conference of Foreign Ministers (Stuttgart, 1999). It was also emphasised by the Commission's Head of Delegation to Tunisia and Libya in a speech in Tripoli in 2004.

<sup>38</sup> BBC News, 'Libya "wants EU ties for medics"' *BBC News Online* (London, 23 July 2007) <<http://news.bbc.co.uk/1/hi/world/africa/6912233.stm>> (accessed 25 July 2008).

<sup>39</sup> In her press release on arrival in Sofia with the Bulgarian medics, Commissioner Ferrero-Waldner stated, 'This decision will open the way for a new and enhanced relationship between the EU and Libya and reinforce our ties with the Mediterranean region and the whole of Africa': European Commission, 'Statement of Commissioner Ferrero-Waldner on her arrival with the Bulgarian Nurses in Sofia' Press Release IP/07/1165, 24 July 2007.

<sup>40</sup> Commission, 'Libya: Commission proposes negotiating mandate for a Framework Agreement' Press Release IP/08/308, 27 February 2008.

press to view the Union for the Mediterranean as a ‘colonialist’ and ‘racist’ enterprise.<sup>41</sup>

With the exception of Libya, for which the door to future membership of EuroMed remains open, and which maintains observer status, the partnership involves all the states around the Southern Mediterranean in some capacity. It is therefore possible to speak of EuroMed as a forum for a general Mediterranean policy on the part of the EU, although the connotations of ‘Mediterranean’ suggest the North African region rather than all the participants in EuroMed.

The Barcelona Declaration 1995 laid down the general guidelines and aims for EuroMed on the basis of cooperation around three ‘baskets’: economic, political and cultural. The Declaration was accompanied by a Work Programme for the period 1995-2000 which detailed the institutional level at which the framework was to put into action the aims agreed in the Declaration. A further work programme was agreed on the occasion of the 10<sup>th</sup> anniversary of the Barcelona Process in 2005, which added migration, social interaction, justice and security as a fourth area for cooperation,<sup>42</sup> and the Joint Declaration of the Paris Summit for the Mediterranean in July 2008 contained provisions for concrete cooperation projects. As part of the partnership, the EU has concluded EuroMed Association Agreements with each Partner State, excluding Albania and Mauritania.<sup>43</sup> These have either updated and expanded the bilateral Association/Cooperation Agreements concluded in the 1970s, or constituted the first comprehensive agreement between the Union and the state. The final EuroMed Association Agreement negotiations with Syria were concluded in late 2004, completing the web of bilateral

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<sup>41</sup> Tripoli Post, ‘Al-Qathafi: Union for the Mediterranean will fail squarely’ *Tripoli Post Online* (Tripoli, 14 July 2008) <<http://www.tripolipost.com/articledetail.asp?c=1&i=2105>> (accessed 25 July 2008).

<sup>42</sup> Euro-Mediterranean Ministerial Conference, *Five Year Work Programme* (Barcelona, 27-28 November 2005).

<sup>43</sup> Albania and Mauritania do not have bilateral EuroMed Association Agreements for the reasons explained below in section v, page 178.

agreements within the EuroMed framework. All the agreements are in force or are expected to enter into force in the near future and they are unaffected by the relaunch of EuroMed in July 2008. The basis of the system of governance in EuroMed is therefore both found in the legal texts concluded by the EU and the Partner States, and the multilateral layer of institutions, supported by funding mechanisms which operate on a unilateral basis. This level of institutionalisation across both sides of the Mediterranean is without precedent in the region in modern times.

It is impossible to discuss the external relations of the EU in the Mediterranean without reference to the conflict in the Middle East. Since the 1970s, when EPC was the forum for discussion by the Member States on foreign policy issues, the Union's stated goals have been to try to promote a peaceful and lasting solution to the conflict and this is often the tone of any initiative towards the more global Mediterranean region. The Union is well aware, however, of the complexity of the multiple issues arising from the sustained conflict and its shadowing effect on all multilateral and bilateral relationships with states in the Middle East and North Africa. It has already been stated above that the birth of the Barcelona Process was motivated by the prospect of a lasting solution to the Middle East conflict and the opportunities for economic, political and cultural cooperation that this would allow. However, in an attempt to avoid the Barcelona Process directly confronting the Middle East issues, the EU's Middle East Peace Process policy and the Strategic Partnership with the Mediterranean and the Middle East are officially separate policies, but 'complementary' to EuroMed.<sup>44</sup> The Middle East conflict and Peace Process inevitably play a large part in the relationships within the

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<sup>44</sup> For example, the European Neighbourhood and Partnership Instrument (ENPI), successor to the EuroMed (MEDA) funding programme, emphasises funding for Peace Process confidence-building measures as a strategic priority: Commission (EC), European Neighbourhood and Partnership Instrument Regional Strategy Paper 2007-2013 and Regional Indicative Programme 2007-2010 (2007), <[http://ec.europa.eu/world/enp/pdf/country/enpi\\_euromed\\_rsp\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_euromed_rsp_en.pdf)> (accessed 25 July 2008), 19.

EuroMed institutional framework at all levels to the extent that it has been difficult to ‘disentangle’ the two.<sup>45</sup> Due to the inclusion of Israel and all its neighbours in EuroMed, progress (or lack thereof) in the Barcelona Process, including its launch in 1995, has often been strongly tied to shifts in the relationships between, in particular, Israel and the Palestinian Authority, Israel and Syria and, more recently, Lebanon and Syria.

There are two consequences of the content and progress of the Barcelona Process which have significance in considering EuroMed as a system of governance. First, linking economic and non-economic issues within the same institutional framework (explored below) distinguishes EuroMed from a model of traditional bilateral relations between the EU and a third-state. Second, and a related point, is the involvement of an increased number of actors across the EU and Partner States in the issues which are covered by EuroMed. National Parliaments and civil society are two examples of such actors. As identified in chapter one, this is one of the hallmarks of using a system of governance (as opposed to simply ‘government’) to identify and characterise the formation and execution of policies in the EuroMed space. The emphasis on intercultural dialogue, civil society, science and technology can be seen as evidence of this.<sup>46</sup>

It is not suggested here that EuroMed is a law-making forum in a traditional sense. By characterising EuroMed as a system of governance, albeit one which is less sophisticated and developed than that of the Union itself, the extent to which logics of appropriateness are created becomes more visible. This allows for an assessment (though analysis of the specific policy area of migration) of the relative effect of EuroMed on ‘mainstream’ EU decision and law-making forms as found in the CFSP. To what the Barcelona Process is geared towards satisfying EU priorities rather than establishing a true partnership across the Mediterranean is

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<sup>45</sup> R Dannreuther, ‘The Middle East: Towards a Substantive European Role in the Peace Process?’ in R Dannreuther (ed) *European Foreign and Security Policy: Towards a Neighbourhood Strategy* (Routledge, Abingdon 2004), 158.

<sup>46</sup> Barcelona Declaration 1995, 7.

explored below. It is worth noting here that the political dimensions of EuroMed cover democratization in the region, security and migration, all of which have a direct impact on the domestic spheres of the EU Member States. These factors have also been cited in surveys on EU citizens' concerns about challenges facing the EU's relations with neighbouring countries.<sup>47</sup> The cross-cutting nature of many issues discussed within the context of the EuroMed demonstrates the relevance of avoiding too strong an attachment to the pillar structure of the EU in terms of competence, nor to issues seen as only 'political'. The baskets around which EuroMed functions do not separate out the institutional actors as to their subject-matter according to the pillar structure of the Treaties. This theme is returned to in the following chapter.

### **The aims of EuroMed and the relationship with the European Neighbourhood Policy**

The aims of the creation of EuroMed as stated in the Barcelona Declaration 1995 were to facilitate and promote cooperation amongst the partners around the following three 'baskets':

- A political and security partnership with the aim of establishing a common area of peace and stability;
- An economic and financial partnership with the aim of creating an area of shared prosperity;
- A partnership in social, cultural and human affairs in an effort to promote understanding between cultures and exchanges between civil societies.<sup>48</sup>

This comprehensive approach around the above baskets, coupled with an institutional framework for discussion and cooperation from the level of government down to grassroots and non-governmental

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<sup>47</sup> Commission (EC), 'The EU's relations with its neighbours: a survey of attitudes in the European Union' (2007) Eurobarometer Poll No. 285.

<sup>48</sup> Barcelona Declaration 1995. This remains unchanged by the Joint Paris Declaration 2008.



organisations, took into account the drawbacks or failures of previous initiatives for cooperation in the Mediterranean region during the early 1990s under EPC or by European states, which did not supplement diplomatic contacts with a network of state and non-state relationships across different policy areas.<sup>49</sup>

The creation of institutions is important for EuroMed, since it is not merely designed to be a forum for high-level dialogue but to promote practical cooperation on a continuous basis. There was an inherent recognition at Barcelona that the prosperity gaps between the Northern and Southern borders of the Mediterranean and economic instability hinder the search for political security and cooperation and therefore the key to promoting cooperation across the three baskets was by the creation of a Free Trade Area, drawing on the achievement of the Single Market amongst the EU's Member States.

Cultural cooperation has been the basket which has received the least high-level attention and seen the most limited institutional development for much of the lifetime of the Barcelona Process. It did become the focal point of greater attention in EuroMed after 9/11, as a result of the increased recognition by participating governments that EuroMed should not be restricted to governmental-level dialogue but to reach beyond into civil society in order to promote intercultural dialogue and understanding. It was in these terms that Belgian Presidency of the EU at the time of 9/11 saw the renewed utility of EuroMed.<sup>50</sup> The tenth anniversary Barcelona Summit in 2005 added cooperation on 'migration, social interaction, justice and security' as a fourth area in addition to the existing three baskets, although this is often abbreviated to simply the 'migration' basket.<sup>51</sup>

The Barcelona Process has been most visibly active around the

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<sup>49</sup> S Calleya, *Navigating Regional Dynamic in the Post-Cold War World: Patterns in Relations in the Mediterranean Area* (Brookfield, Dartmouth 1997).

<sup>50</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Brussels, 2001).

<sup>51</sup> Interview with Council Official (Brussels, September 2008).

economic basket, the principal aim of which is to create a Mediterranean Free Trade Area by 2010 to include the Union and all the Partner States. In the view of the Commission, progress in this basket has been the most extensive, if slow to demonstrate outcomes.<sup>52</sup> The Free Trade Area is to be achieved by putting in place the EuroMed Association Agreements between the Union and each partner as referred to above. The Partner States are, in turn, encouraged by the Commission and Council to engage 'horizontally' so as to promote greater free trade between them. This is an important factor in a region which has very limited cross-border economic integration. Although the Free Trade Area featured prominently in the publicised goals of EuroMed at its inception, it was not the case that the Free Trade Area would eventually result in the extension of the comprehensive EU single market to the Partner States.<sup>53</sup> Agricultural products, for example, are excluded from the Free Trade Area negotiations despite their importance for the economies of many Partner States.<sup>54</sup>

The Arab Maghreb Union and the League of Arab States (Arab League) are two regional organisations charged with facilitating regional economic integration between the states of North Africa and the Middle East. The Agadir Agreement, signed by Morocco, Tunisia, Egypt and Jordan in 2004, and which entered into force on 1 January 2006, has made some progress in this field, though there is little prospect at present of an integration process stretching across the whole of the Southern Mediterranean. The engagement of the Arab Maghreb Union and League of Arab States in this task is problematic, since the former has not held a high-level meeting in over ten years and the latter organisation includes many members in the Arabian Gulf and elsewhere in Africa who are not EuroMed Partner States. Israel and Turkey are not members of either

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<sup>52</sup> Commission (EC), 'The Middle East in the EU's External Relations' (Speech by Commissioner Ferrero-Waldner at the Madrid: Fifteen Years Later Conference, Madrid, 11 January 2007) [2007] SPEECH/07/7.

<sup>53</sup> Interview with Council Official (Brussels, September 2008).

<sup>54</sup> Interview with Council Official (Brussels, September 2008).

organisation.

Most of the Mediterranean Partners are also covered by the European Neighbourhood Policy (ENP) which was launched in 2004 and which has since been promoted by the Commission and Council as the prism for Union policy towards neighbouring states. The Partner States *not* covered by the ENP are Croatia and Turkey (which have begun accession negotiations), Albania, Bosnia-Herzegovina and Montenegro (covered by the framework for the Western Balkans, along with other states in the former Yugoslavia who are not in EuroMed or the ENP), Mauritania (which, as a sub-Saharan state, is part of the African, Caribbean and Pacific (ACP) framework and therefore covered by the Cotonou Agreement on ACP-EU Development Cooperation) and Monaco (to which no 'regional' policy applies). The ENP has not replaced EuroMed, but exists as a complementary means to support the Barcelona Process whilst ensuring consistency with policies towards the EU's other neighbours. Due to the financial and political emphasis which the EU institutions have placed on the ENP,<sup>55</sup> its impact on the EU's relationship with Mediterranean Partners and the system of governance in EuroMed merits some attention.

The development of the ENP is grounded in the enlargement process. As the EU moved towards the 2004 enlargement, moves to develop a new common policy towards the countries soon to be in close proximity to the new Eastern borders (Ukraine, Belarus and Moldova), but which had no prospect of successfully applying to join the Union until the very distant future, gained momentum. The Commission demonstrated its awareness that the removal of internal borders should not mean that new external dividing lines should be drawn between the new Members and the new

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<sup>55</sup> For example, the Commissioner for External Relations became the Commissioner for External Relations *and* Neighbourhood Policy in the Commission of President Barroso from 2004.

neighbours in its Communication on 'Wider Europe'.<sup>56</sup> Recalling the post-Cold War emphasis on Central and Eastern Europe, and the subsequent context this provided for the development of the ENP, some EU Member States and EuroMed partners considered that the Mediterranean could be sidelined in a new EU initiative towards neighbouring regions. These fears arose because of the original proposal for the ENP was entitled 'Wider Europe', which appear to point to the Eastern, rather than Southern, dimension to the EU's neighbourhood. Partner States also expressed concern at the shift in language from 'partnership' with the EU, which implies inclusiveness based on a close relationship of equals, to that of mere 'neighbours'.<sup>57</sup> The coexistence of EuroMed and the ENP was quickly underlined by the Commission. In reassuring the EuroMed Partner States immediately after the launch of the ENP, Commissioner Wallström at the EuroMed Parliamentary Assembly in 2005 stated that:

the Barcelona Process remains key to relations between the European Union and the Southern Mediterranean. It is not a matter of recasting Barcelona but rather rereading it, rediscovering it and realising, as certain analysts have said, its potential. ... Whilst the action plans already agreed with the first signatory Mediterranean countries contain differences, they are also the bedrock of shared values and objectives which the Commission deems indispensable if we are to avoid divergent paths.<sup>58</sup>

The ENP was designed and adopted to cover all neighbours to the

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<sup>56</sup> Commission (EC), 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Communication) COM (2003) 104 final, 11 March 2003.

<sup>57</sup> Interview with European Parliament Official (Brussels, September 2008).

<sup>58</sup> Commission (EC), 'The European Neighbourhood Policy and the Euro-Mediterranean Partnership' (Speech by Commissioner Wallström at the Euro-Mediterranean Parliamentary Assembly plenary, Cairo, 14 March 2005) [2005] SPEECH/05/171.

East and South of the Union's territory.<sup>59</sup> Due to the inclusion of the EuroMed partners, the designing and drafting of the ENP allowed for an assessment of the Barcelona Process and to address its shortcomings and successes. As examined at the end of this chapter, although progress in achieving the goals of the Barcelona Declaration has been slow, it is significant that the emphasis was placed on strengthening EuroMed and underlining the complementary nature of the ENP, rather than abolishing it. This was also demonstrated by the relaunch of the Barcelona Process in 2005, soon after the creation of the ENP, and more recently by the Union for the Mediterranean initiative. With the launch and relaunch of initiatives, it is not always clear (even in the EU institutions) whether the primary emphasis on the EU's policy towards the states concerned should be placed on the ENP or EuroMed in Council conclusions. The track record shows that the practice is not consistent.<sup>60</sup>

It is contended here that far from replacing EuroMed, the ENP has added an additional dimension to the system of governance in EuroMed. The exploration of the institutional development of EuroMed below reveals that there is significant overlap between the ENP and its instruments and the institutions and instruments of EuroMed, but this does not necessarily demote the latter to the status of a mere fore-runner to the ENP. Many common objectives are shared in EuroMed and the ENP. The stated aim of the ENP is to 'share the benefits of the EU's 2004 enlargement with neighbouring countries in strengthening stability, security and well-being for all concerned'.<sup>61</sup> It is not yet fully apparent which benefits are referred to, though this is understood to be the economic benefits of accession to the EU and, consequently, the political stability which should ensue. The overarching aim of the ENP is to bring together all the countries in the vicinity of the EU's territory under one

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<sup>59</sup> Commission (EC), 'European Neighbourhood Policy Strategy Paper' (Communication) COM (2004) 373 final, 12 May 2004.

<sup>60</sup> Interview with Council Official (Brussels, September 2008).

<sup>61</sup> European Neighbourhood Policy Strategy Paper (n 59) 3.

policy in order to create a 'ring of friends' sharing the EU's fundamental values.<sup>62</sup> A more critical view is that it groups together the countries which are not envisaged as future EU Member States, which explains why states in the Balkans and Turkey are not included, and pacifies them with references to sharing the benefits of enlargement rather than being directly involved in the enlargement process. The ENP also excludes Russia with which the EU has agreed a separate 'Strategic Partnership'. This appears to emphasise the greater importance on relations with Russia than other neighbours despite the stated aim of the policy to be comprehensive and for all the EU's neighbours.

The reference by the Commission in its Strategy Paper to the perceived benefits through the ENP for non-members after the completion of the enlargement processes highlights the nature of enlargement as the most successful external policy the EU has put into practice. But it also draws attention to the importance of the land borders with the new, post-enlargement EU neighbours, rather than the Mediterranean partners, whose relationships with the EU have been less affected by recent enlargements. By putting both the Mediterranean partners and the Eastern neighbours within the same policy, the Commission is trying to ensure that the two neighbourhood policies can use the instruments developed within both EuroMed and the ENP to tackle common problems. Similarly, the Council's approval of the Commission's 'Wider Europe' proposal underscored the principle that it does not replace the Barcelona Process and that the implementation of existing agreements remains a priority.<sup>63</sup> According to the Commission, the instruments available in the ENP can be seen as 'additional bilateral incentives and opportunities, responding to individual countries' reform efforts'.<sup>64</sup> The emphasis on

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<sup>62</sup> Commission (EC), 'Strengthening the European Neighbourhood Policy' (Communication) COM (2006) 726 final, 4 December 2006, 5.

<sup>63</sup> Council of the EU, Conclusions of the 2518st General Affairs and External Relations Council Meeting, 16 June 2003.

<sup>64</sup> Commission (EC), European Neighbourhood Policy website:

bilateralism in the ENP is significant: a multilateral element was not envisaged and the first meeting of all governments in the EU and the ENP states only took place in August 2007, three years after the launch of the policy and in the absence of future comprehensive meetings of this type, cannot be said to constitute an 'institution'. There appears to be little express attempt on the part of the Union to either build a 'region' from these diverse neighbourhood countries or to promote cooperation or integration between them in the way that this has been promoted in EuroMed. Exactly how the relationship between EuroMed and the ENP operates in practice is not yet clear, though the Commission claims that 'the ENP has given a real opportunity to strengthen our relations with our Mediterranean partners'.<sup>65</sup> This sustains the argument here that the ENP can be understood as adding a supplementary dimension or layer to EuroMed, rather than reducing its significance.

The ENP supplements EuroMed by '[reinforcing] existing forms of regional and subregional cooperation and provide a framework for their further development'.<sup>66</sup> The EuroMed Association Agreements signed with each Partner State also form the basis of their bilateral ENP relationship, supplemented by an 'ENP Action Plan' agreeing areas for reform with various sub-committees created to monitor progress. As such, references are made later in this chapter to the Action Plans which have been concluded with the Mediterranean states under the auspices of the ENP, in addition to the EuroMed Association Agreements, as these have strong implications for EuroMed as a system of governance and in particular the bilateral dimension of relations between the EU and each Partner state. As stated above, however, these can be seen as fitting into the system of governance as an additional 'layer' rather than diluting the relationship with each Partner State in the context of EuroMed.

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<[http://ec.europa.eu/world/enp/partners/index\\_en.htm](http://ec.europa.eu/world/enp/partners/index_en.htm)> (accessed 25 July 2008).

<sup>65</sup> Strengthening the European Neighbourhood Policy (n 62).

<sup>66</sup> European Neighbourhood Policy Strategy Paper (n 59) 4.

Whilst the ENP might have been thought of as replacing EuroMed, an important difference remains between the two which justifies continued analysis of the latter. EuroMed was designed at the outset to be a partnership, which means that the participating Partner States agree to the terms of the Barcelona Declaration in order to be involved in the institutional framework outlined below. The ENP, by contrast, suggests that whilst cooperation with neighbours is underlined through the agreement of Action Plans, it primarily remains an external policy through which the EU's relationships with neighbouring states are governed. The 2008 relaunch of EuroMed as 'the Barcelona Process: Union for the Mediterranean', which continues to stress multilateral cooperation in EuroMed, also suggests that the ENP does not render EuroMed obsolete.

The ENP also applies to neighbouring states regardless of whether they participate in the 'sharing of the benefits of enlargement' or not: Libya and Belarus are two states with which the EU does not have a deep relationship, but they are covered by the ENP. A consensual element is not necessary insofar as the ENP applies to neighbouring states. The Commission and Council have been consistent in stating that both states may benefit from incentives provided under the ENP, but there is no mention of an ENP '*acquis*' which needs to be accepted by the partners. This is in contrast to EuroMed where new Mediterranean members (most recently, Croatia, Montenegro and Bosnia-Herzegovina) may take part because, according to the Joint Paris Declaration, they have 'accepted the *acquis* of the Barcelona Process'. Libya (as the only non-participating Mediterranean state) has been told it can participate on the condition that it accepts the *acquis* too. With the emphasis on participation in institutional frameworks and the need to accept certain criteria as a prerequisite, EuroMed can be seen in terms of a system of governance. The institutional framework of EuroMed, explored in the following section, remains largely unchanged by the ENP. Yet, the ENP more closely resembles a more traditional (as far as this is possible within the context



of the EU) instrument of foreign policy. This does not prevent the ENP from being a system of governance in itself, but supplementing EuroMed, the ENP serves to clarify the existence of EuroMed as a frame for the foreign policy of the Union towards the Mediterranean.

### **Institutions and instruments in EuroMed**

The roles of the EU institutions in external relations were examined in the introduction. It is axiomatic that the Council has a key role in EuroMed, even though it was not created pursuant to a CFSP instrument. It should also be noted that the High Representative for Foreign and Security Policy is not the only ‘personification’ of the CFSP in the Mediterranean region, since a Special Representative for the Middle East, Marc Otte (a former Belgian ambassador to Israel) was appointed in 2003.<sup>67</sup> The lack of a formal role in the CFSP for the Commission has not prevented it from having an important role in external relations, and in particular in EuroMed.

The complexity of the EU’s external relations framework, including the personification of the EU’s external relations in the various forms of the Commissioner for External Relations, Commissioner for Development, Commissioner for Trade, with the High Representative for the CFSP (since 1998) and various *ad hoc* Special Representatives of the Council poses particular problems in the Mediterranean and Middle East, where personalised diplomacy is of high importance. The diverse portfolios of the actors have caused some Partner States to question where the centre of decision-making in the EU lies.<sup>68</sup>

Yet, the process of institutionalisation has become a strong feature of the CFSP, as explored in chapter one. In EuroMed, institutionalisation has

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<sup>67</sup> Council Joint Action 2003/965/CFSP appointing the European Union Special Representative for the Middle East peace process and amending Joint Action 2002/965/CFSP [2003] OJ L 184/45.

<sup>68</sup> Interview with Council Official (Brussels, September 2008).

gradually taken place since the Barcelona Declaration and is a particularly appropriate means of understanding the development of the partnership as a process. At the time of the Barcelona Declaration, the institutional features of EuroMed were rather light, but have since developed into a much more elaborate and complex framework. Within the system of governance of EuroMed, multilateral, bilateral and unilateral institutional features are discernible.<sup>69</sup> As noted above in terms of the contrast between EuroMed and the ENP, the multilateral features are what makes EuroMed distinctive in the EU's external relations. It can also be said that the EuroMed institutional arrangements reflects the complexity of the EU's own institutional structure. The danger of so many institutions and individuals with competence to speak for the EU is the perception amongst Partner States of an EU which is lacking in both transparency and predictability.<sup>70</sup>

The Barcelona Declaration did not, at first, establish the complex institutional framework in which EuroMed operates today. Instead, at Barcelona the parties opted for a wide agreement covering possibilities for future institutionalisation of dialogue. The following section evaluates the institutions of EuroMed and their development, before moving on to discuss how these characterise the governance of EuroMed and in particular the emphasis which is placed on the joint ownership of the Barcelona Process.

### **The EuroMed Conference of Ministers**

The EuroMed Conference of Ministers of Foreign Affairs brings together Ministers from EU Member States and Partner States as well as the Council and Commission. The Conference takes place on an annual basis

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<sup>69</sup> The classification of the institutional framework in terms of multilateral, bilateral and unilateral dimensions is taken from: E Philippart, 'The Euro-Mediterranean Partnership: Unique Features and Future Challenges' (2003) Centre for European Policy Studies, CEPS Working Paper No. 10/2003 <[http://aei.pitt.edu/1814/01/MEEM\\_WP10.pdf](http://aei.pitt.edu/1814/01/MEEM_WP10.pdf)> (accessed 25 July 2008).

<sup>70</sup> Dannreuther (n 45) 163.

with sectoral ministers' meetings (including Economic and Finance ministers and those with portfolios for Trade, Migration, Energy and Culture) taking place on a more occasional basis. With the exception of the second meeting in Malta (an applicant EU state at the time) in 1997, all the annual Foreign Ministers' conferences have taken place in the EU. This is significant because after the Barcelona Declaration which launched EuroMed, and the next Ministerial conference in Malta, the outcome of the meetings appear as Presidency conclusions, mirroring the institutional nature of the European Council. Within the key role played by the Council in the EU's external relations, the beginning of EuroMed and its subsequent revitalisation in the early 2000s can often be traced to the Presidencies of Member States with Mediterranean policies of their own especially those of Spain (1995, 2002) and France (2000, 2008). This is similarly often reflected in the EuroMed conclusions.

The Presidency of the EuroMed Conference of Ministers rotates between EU Member States but not the Partner States, who are limited in their steering capacity to participation in the EuroMed Committee as noted below. This has been implicitly recognised as a drawback, since the relaunch of the Barcelona Process: Union for the Mediterranean in Paris as a key policy priority of the French EU Presidency was in fact co-chaired by France and Egypt. There is provision in the Joint Declaration for co-Presidencies of EuroMed Conferences and Summits, Senior Officials meetings and *ad hoc* experts meetings. Co-presiding is open to all participants and is to be undertaken by one EU and one non-EU state concurrently.<sup>71</sup> It appears that the EU co-president will be the Member States holding the Council Presidency (even if these Member States are not Mediterranean: such as the Czech Republic and Sweden in 2009). For the Partner State, it is unclear how the co-president will be chosen. Some Partner States do not wish to be obliged to host meetings where they

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<sup>71</sup> Joint Paris Declaration (2008) 19, 20, 21.

would be forced to invite all EuroMed participants (i.e. including Israel). Whilst the EU Member States are accustomed to the representative role of the Member State holding the Council Presidency in external relations, it is less clear whether the role of the Partner State co-president would be to represent *all* the Partner States in EuroMed: a difficult task given the diversity of the non-EU participants.<sup>72</sup>

The Presidency Conclusions of the conferences reveal the changing nature of the baskets and the progress in cooperation within them, and also the extent to which progress has been affected by factors outside the scope of EuroMed. The most notable of these is the situation in the Middle East: the Fourth EuroMed Conference in Marseille in 2000 was clearly marked by the lack of regional stability and resulted in the postponement, and eventual abandonment of the signing of the Euro-Mediterranean Charter for Peace and Stability, which had previously been envisaged in past Presidency Conclusions as a major breakthrough in EuroMed political relations.<sup>73</sup>

The EuroMed Conference held in October 2001 in Brussels was clearly marked by the events in New York one month previously and the repercussions for Europe and the Mediterranean. The Presidency conclusions are not forthcoming with any major initiatives or developments in advancing the Barcelona Process but were an occasion for EuroMed participants to meet and engage in discussions on the international climate. In the context of post-9/11 tension and the renewed violence in the Middle East which continued during 2002, the Presidency Conclusions of the fifth EuroMed conference in Valencia are notable for the invigoration of the Economic and Financial Partnership basket, and the production of an Action Plan for moving on the proposed Free Trade Area which was far more detailed and concrete in the measures proposed

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<sup>72</sup> Interview with Council Official (Brussels, September 2008).

<sup>73</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Marseille, 2000) 11.

than any previous Conclusions.<sup>74</sup>

More recently, conclusions have begun to lend weight to institutional creation as a means to fulfil EuroMed goals. With the creation and development of the two institutions discussed below, the Parliamentary Assembly and the Anna Lindh Foundation, important aspects of, in particular, the cultural EuroMed basket have been devolved to more appropriate fora, leaving the EuroMed Conference of Foreign Ministers the opportunity to discuss the overarching political and economic aims of the Partnership. The Tampere Conclusions of November 2006 are notable for attaching the widespread and numerous initiatives to be carried out under the auspices of the Barcelona Process in 2007.

What is important in terms of the system of governance in EuroMed is how the focus on the Mediterranean has shifted since 2001. By making more clearly the link between EuroMed and both internal and external security, non-Mediterranean EU members have begun to perceive EuroMed as a more useful framework for action. Migration too has begun to play a much more prominent role, to the extent that some consider migration to now be the main focus of the Barcelona Process.<sup>75</sup> As such, interest in the potential for EuroMed as a framework for cooperation and action is not restricted to the EU members in the South.

### **The EuroMed Committee**

The Barcelona Declaration foresaw the creation of a EuroMed Committee composed of senior officials from an EU Troika of past, present and future Council Presidencies and one representative from each Mediterranean Partner to meet regularly and prepare the meetings of the EuroMed Conference of Ministers. The Committee was also charged with taking stock of the Barcelona Process and updating the work programme. The Commission was named as responsible for the preparation of and follow-

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<sup>74</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Valencia, 2002).

<sup>75</sup> Interview with Council Official (Brussels, September 2008).

up work to the Committee meetings.

Whilst the text of the Barcelona Declaration suggested that the role of the EuroMed Committee would have a more administrative than policy-making role, and that it could draw on the experience of COREPER in the Council's decision-making structure, it has evolved into a much more significant institution in EuroMed. After the renewal of the Barcelona Process in 2000, the Belgian Presidency report of 2001 on implementation of the Common Strategy of the Mediterranean noted that:

... the Euro-Mediterranean Committee, with a view to reinvigorating the Barcelona Process, endeavoured to play a more strategic role as it was regularly called upon to examine the implementation of the various regional programmes or the launch of new programmes, like the framework document for the future JHA regional programme and the follow-up to the Marseille conclusions.<sup>76</sup>

Similarly, the Valencia EuroMed Ministerial Conference Conclusions 2002 acknowledged the more influential role the EuroMed Committee has taken on in the Barcelona Process by noting that greater involvement of the Partner States was needed through the restructuring of the Committee.<sup>77</sup> The Committee has become increasingly important in drafting the Work Programme for the Barcelona Process, which serves as the general plan for the development of EuroMed. An example of this importance is the instrumental role played by the Committee in moving forward the third basket of EuroMed by devising the structure and remit of what eventually became the Anna Lindh Foundation for the Dialogue between Cultures. The EuroMed Committee meets and follows a formal agenda, which helps to focus the minds of the participants on discussion of cooperation and, since the discussions are private, away from reverting

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<sup>76</sup> Council of the EU, Report by the Belgian Presidency on Relations with the Mediterranean Region [2001] 15531/01, 20 December 2001, 3.

<sup>77</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Valencia, 2002) 5.

to grand political debates or reference to ongoing tensions in the Middle East.<sup>78</sup>

The Joint Paris Declaration 2008 reinforces this institutional dimension of EuroMed by providing for a Joint Permanent Committee to be based in Brussels, which will also have the ability to consult EuroMed partners ‘if an exceptional situation arises’, though little direction is given to what kind of situations are envisaged. The Committee will, along with the other institutions, be supported by a permanent secretariat. The mandates of the Joint Permanent Committee and secretariat will be decided by the EuroMed Conference of Ministers in November 2008.

### **The EuroMed Parliamentary Assembly (EMPA)**

A Euro-Mediterranean Parliamentary Dialogue was envisaged by the Barcelona Declaration as a means to exchange ideas and increase channels of dialogue between members of the national Parliaments of the EU, those of the Partner States, and the European Parliament. The Dialogue’s remit was extremely vague and no provision was made for the capacity to make binding resolutions on the Barcelona Process. After convening on an annual basis, the Dialogue participants recommended in 1997 that their dialogue be transformed into a EuroMed Parliamentary Forum. This was a significant step in institutionalising the meeting from an *ad hoc* basis towards becoming a more stable feature of the Barcelona Process. The Forum was convened on five successive occasions between 1996 and 2001. In a similar manner to the EuroMed Ministerial Conference, and recognising the Mediterranean as a potential flashpoint, the Forum met during the immediate aftermath of 9/11, which gave impetus to proposals to institutionalise even further the Forum into an Assembly, with a greater emphasis on the importance of dialogue between cultures. Despite some resistance to the proposal from EU national Parliaments wary about

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<sup>78</sup> Interview with Council Official (Brussels, September 2008).

the creation and cost implications of a new body,<sup>79</sup> the fifth EuroMed Ministerial Conference in Valencia in 2002 approved the upgrading of the Forum to the Euro-Mediterranean Parliamentary Assembly (EMPA).<sup>80</sup> Acquiring the status of an Assembly endowed it with the capacity to make resolutions within an established structure including a presidency, working groups and rules of procedure. There was little of no pressure or encouragement from government ministers in the EuroMed Conference to institutionalise the Parliamentary dimension in EuroMed. Nevertheless, the Assembly has come to be regarded as a permanent, stable feature of the Barcelona Process and as a place where ideas on how to move the Barcelona Process forwards can emerge and take shape. Resolutions of the EMPA have become increasingly influential on the EuroMed Committee and Conference of Ministers.<sup>81</sup>

The first plenary session of the Assembly took place in Athens in March 2004 but was overshadowed by the Madrid bombings several days previously, and renewed tension between Israel and Arab states. Nevertheless, it set itself procedural rules and the primary subjects for discussion.<sup>82</sup> These included, inter alia, security and stability in the region, issues relating to immigration, cultural, social and humanitarian cooperation, and advancing the Free Trade Area. The Assembly has gained the ability to adopt and promulgate proposals and communicate these to the other EuroMed institutions. Further plenary sessions took place under the presidencies of Egypt, the European Parliament, Tunisia and Greece in Cairo (2005), Brussels (2006), Tunis (2007) and Athens (2008) with additional sessions held by the working groups on each of the

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<sup>79</sup> Seimenis and Makriyannis cite the Austrian, Dutch and British Parliaments as those either opposed or reluctant to institutionalise the Forum: I Seimenis and M Makriyannis, 'Reinvigorating the Parliamentary Dimension of the Barcelona Process: The Establishment of the Euro-Mediterranean Parliamentary Assembly' (2005) 16 (5) *Mediterranean Quarterly* 85, 89.

<sup>80</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Valencia, 2002).

<sup>81</sup> Interview with Mr E. McMillan-Scott MEP, Vice-President of the European Parliament (March 2007).

<sup>82</sup> Euro-Mediterranean Parliamentary Assembly, Final Declaration (Vouliagmeni, 2004).



baskets on a continuous basis across the EuroMed region.<sup>83</sup> The EMPA bureau, consisting of four members (usually Presidents of national parliaments), used the Paris Summit in July 2008 as an opportunity to communicate the call by EMPA to the Heads of Government for twice-yearly summits, a joint presidency, a standing joint committee based in Brussels and a secretariat.<sup>84</sup> The Paris Declaration agreed to support the 'strengthening' of EMPA as the 'legitimate' parliamentary expression of the Barcelona Process.<sup>85</sup>

The significance of the EMPA and its institutional development for the purposes of this chapter are three-fold. First, against the background of its institutionalisation and vague remit in the Barcelona Declaration, the Assembly has been particularly active in promoting the 'third' basket of the Barcelona Process, namely that of social, cultural and human affairs. It has already been noted above that this basket has seen the least progress overall in EuroMed, but in the context of almost constant tension in the Mediterranean area between North and South, which came to the fore during the Danish cartoons affair in 2006. Intercultural dialogue was by no means the basket which received the most attention at the start of the Barcelona Process and it is telling that its importance in Euro-Mediterranean relations has now been placed alongside the creation of a Free Trade Area in the Paris Declaration. By orienting discussion towards issues in this basket, such as how to promote intercultural dialogue as a means to bridge the different identities in the EuroMed region,<sup>86</sup> the

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<sup>83</sup> Working groups have been established on Peace and Security in the Middle East, Financing and the Rules of Procedure of EMPA, Problem of Landmines, Civil Protection and the Prevention of Natural and Ecological Disasters, Conditions for the transformation of the FEMIP in the Euro-Mediterranean Development Bank and Ways for the EMPA Assembly to participate in bodies of the Anna Lindh Foundation for the dialogue between cultures: European Parliament, Delegation to the EMPA <[http://www.europarl.europa.eu/intcoop/empa/working\\_groups/default\\_en.htm](http://www.europarl.europa.eu/intcoop/empa/working_groups/default_en.htm)> (accessed 25 July 2008).

<sup>84</sup> Euro-Mediterranean Parliamentary Assembly, 'EMPA as the Parliamentary Wing of the Union for the Mediterranean' Press Release 20080715IPR34273, 12 July 2008.

<sup>85</sup> Joint Paris Declaration 2008, 17

<sup>86</sup> This was theme of the EMPA Plenary Session held in Tunis, 15-17 March 2007.

'reality' of EuroMed as an institutional framework is more visible.

By establishing and developing itself as an institution, the EMPA has built up the informal as well as formal norms that a constructivist approach recognises as important: this in turn has provided the actors with the direction and goals for action. Ideas, which again figure strongly in the institutional constructivist framework of legal analysis used in this thesis, have been translated into concrete initiatives. The clearest example of this is the creation of the Anna Lindh Foundation for the Dialogue of Cultures in Alexandria and the proposal for a EuroMed University.<sup>87</sup> Such developments legitimise the identity of the EMPA and provide an institutionalised forum which has structure and direction. The participants in the EMPA, that is to say the Parliamentarians, have become used to this institutionalised dialogue, and the legitimising effect of the institution provides justification for a strengthening of its role. The Plenary Sessions of the EMPA often appear less as debates in the UK Parliamentary sense but rather as grand speeches where each delegation speaks about the importance of general cooperation in the absence of a defined agenda.<sup>88</sup> As is also the case for the EuroMed Committee, the EMPA committee sessions are where the details of positions and ideas come together against the background of a defined agenda for discussion, which is often more technical in nature, and between only three or four participants.<sup>89</sup> There would be little to gain in committee sessions in making a lengthy speech about the Middle East conflict, which conversely may on occasion occur in the plenary sessions depending on the current developments in the region.

Second, despite occasional tensions between the participants in the early years of the Parliamentary dimension, the continued participation of all Arab Partner States and Israel has been maintained. The very fact

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<sup>87</sup> Proposed by the Slovenian Delegation (n 32).

<sup>88</sup> This observation is drawn from attending the EMPA Plenary Session held in Tunis, 15-17 March 2007.

<sup>89</sup> Interview with European Parliament Official (Brussels, September 2008).

that all Partner States, including Israel and the Palestinian Authority, send delegations and participate in the EMPA committees is an achievement in itself. Avoiding overly-contentious subjects or reference to unresolved issues in the region (such as long-term border disputes) within the EMPA demonstrates that by underlining the cooperative nature of dialogue between the participants, these practices have helped define appropriate behaviour within EuroMed. Furthermore, issues such as intercultural dialogue and women's rights do not often take a central role within the EuroMed ministerial conferences, but have found a central place in the EMPA. The EMPA, significantly, created an hoc committee on women's rights in 2006, which has become a central topic of the committee and plenary debates and which had not been extensively discussed at the governmental level in the EuroMed Ministerial Conferences.<sup>90</sup> This suggests that logics of appropriateness in terms of what subjects can be brought to the table, how progress can be made in these issues and what contribution the EMPA can make to EuroMed may arise.

Third, and a related point, is that the EMPA has an important role in bringing a democratic element to the institutional framework in EuroMed. Although the electorate of the EU or Partner States do not directly decide which of their parliamentarians participate, the Assembly provides an occasion for discussion not only between the EU members to the North and partners to the South, but also between the Mediterranean Partner States, in the absence of any such regional parliamentary body in North Africa or the Middle East. This is significant because of the importance of parliamentarianism in the development of democracy in the Partner States, which is a strong feature of the bilateral association agreements with most of the Partner States.

The parliaments of the countries of the

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<sup>90</sup> Interview with Council Official (Brussels, September 2008).

Mediterranean Basin will be called on to play a significant role in the future, since parliamentarianism is the cornerstone of democracy and an indispensable condition for cooperation and development. ... The various political perspectives (socialist, liberal, and so forth) from both sides of the Mediterranean frequently agree on issues that the governments of their countries are unable to deal with directly because of the persistence of outdated and ineffective diplomatic objectives.<sup>91</sup>

Debates and exchanges of views in the context of the EMPA can therefore operate in a different way, yet adding to the depth of interactions within EuroMed. Political pluralism is lacking in many Partner States, and many delegations from Partner States are either dominated by parliamentarians unwilling or unable to contribute to debates or discussions in a way which might contradict the position of their governments. Whilst it may not be the case that delegations are instructed on what they may or may not say by governments, it is apparent that self-censorship is practiced, which may explain why speeches in the plenary sessions are often generic and lacking in formal proposals.<sup>92</sup> Herein also lies the different role of the EMPA when compared to a national (European) Parliament: the latter holds the government to account but it is unlikely that the EMPA could function in a way which would force the EuroMed Ministerial Conference to justify or explain their decisions. The relationship between government and Parliament is often the reverse in Partner States: for example, when the European Parliament passed a resolution in January 2008 criticising human rights protection in Egypt,<sup>93</sup> the Egyptian government summoned EU Member State ambassadors in Cairo to protest. The response of the Council and the EU

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<sup>91</sup> Seimenis and Makriyannis (n 79) 86.

<sup>92</sup> Interview with European Parliament Official (Brussels, September 2008).

<sup>93</sup> European Parliament Resolution P6\_TA(2008)0023 of 17 January 2008 on the situation in Egypt.

Ambassadors was to state that they have no control over the actions of the European Parliament, which is free to pass resolutions as it sees fit.<sup>94</sup>

Despite the lack of pluralism in many of the Partner States, the EMPA does provide an opportunity for cooperative dialogue along party lines, which plays a much more limited role in the ministerial conferences. The European Parliament's centre-right EPP-ED group has been the most active in seeking like-minded political parties and politicians in Partner States with a view to encouraging a party-political structure in the EMPA instead of the national delegations.<sup>95</sup> The difficulty in doing so, however, lies in the substantial differences between the *raison d'être* of the European Parliament (as a multi-national institution) and the EMPA. The former is part of a European integration process which places together parties which may have very different ideologies in groups so as to form Europe-wide political movements, but no such integration aspect exists in EMPA.<sup>96</sup> Since the Parliamentary delegations from Partner States are often not able to orientate policy discussions, it would appear that linking EuroMed-wide political groupings would be a very difficult task.

### **Independent EuroMed institutions**

The idea of a EuroMed civil or cultural foundation as a means by which policies in the third basket can be put into practice emerged in the early years of EuroMed. However, it was only after 9/11 that the impetus to put the idea into practice gained momentum. What eventually became the Anna Lindh Euro-Mediterranean Foundation for the Dialogue between Cultures was endorsed in 2003,<sup>97</sup> eight years after the beginning of the

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<sup>94</sup> Interview with Council Official (Brussels, September 2008).

<sup>95</sup> A meeting between EPP-ED members and 30 parliamentarians from Partner States in Amman, Jordan was held in December 2006. EPP-ED Group, 'Mediterranean Dialogue: EPP-ED Group meets 30 Parliamentarians from the region to strengthen the process' Press Release, 4 December 2006.

<sup>96</sup> Interview with European Parliament Official (Brussels, September 2008).

<sup>97</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Naples, 2003). The conference approved the proposal made by the Commission: Commission (EC), 'Communication to Prepare the VI Meeting of the Euro-Mediterranean Ministers of

Barcelona Process.<sup>98</sup> As the first institution of EuroMed situated outside the EU (in Alexandria, Egypt) and jointly funded by the Partner States as well as the EU, its broad remit is to ‘promote the dialogue between cultures and contribute to the visibility of the Barcelona Process through intellectual, cultural and civil society exchanges’.<sup>99</sup> The Foundation is independent from the EU institutions and EuroMed states and works on the basis of a ‘network or networks’ of national cultural institutes (such the British Council, Goethe Institute, and University-based study centres across EuroMed countries) but with ‘linkage’ to the aims of the Barcelona Process. The Paris Declaration reaffirmed its status as a ‘EuroMed institution’.<sup>100</sup>

The participation of civil society and NGOs in the EuroMed Partnership has been facilitated by the EuroMed Non-Governmental Platform and Civil Forums. The first Civil Forum took place in Barcelona in 1995 at the outset of the Barcelona Process, and fora have been held on an annual basis since, mirroring the Ministerial Conferences. The participants are NGOs involved in diverse areas relevant to the EuroMed Partnership, including human rights (including the rights of citizens resident in states other than their own), trade unions, environmental and minority groups, from both sides of the Mediterranean. In Valencia in 2003, the civil society networks and actors took the step of institutionalising their presence in EuroMed by establishing a EuroMed Non-Governmental Platform. This was achieved by the adoption of a Charter of Objective and Values in Cyprus in 2004,<sup>101</sup> and statutes at a

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Foreign Affairs’ COM (2003) 610 final.

<sup>98</sup> The Statutes of the Anna Lindh Euro-Mediterranean Foundation for the Dialogue between Cultures were approved by the Euro-Mediterranean Ministerial Conference, Presidency Conclusions (The Hague, 2004).

<sup>99</sup> Statutes of the Anna Lindh Euro-Mediterranean Foundation for the Dialogue between Cultures, Article 2(1).

<sup>100</sup> Paris Declaration 2008, 18.

<sup>101</sup> EuroMed Non-Governmental Platform, Charter of the Non-Governmental Platform (2004) <<http://www.euromedplatform.org/spip/spip.php?article13>> (accessed 25 July 2008).

General Assembly in Luxembourg in April 2005.<sup>102</sup> The Ministerial Conference at Luxembourg identified this as a positive means by which civil society in the EuroMed Partner States could be strengthened.<sup>103</sup> Both reiterate that membership of the Platform is restricted to bodies totally independent of government, commercial or religious control. Headquarters of the Platform were established in Paris, and in its short history, it has been active in calling on the EuroMed institutions to consider the human and civil dimensions of common areas of concern, in particular migration.<sup>104</sup>

Other institutions which have been funded by the EuroMed funding mechanism (MEDA) include the EuroMed Training and Information Seminars for Diplomats (held twice each year in Malta), the EuroMed Study Commission (EuroMesCo, a network of study centres on the Mediterranean), the FEMISE network of foreign policy and economic research institutes, the EuroMed Heritage Programme and EuroMed Youth Programme. The non-governmental dimensions of EuroMed show how the Barcelona Process has emphasised grassroots cooperation between the EU and Partner States, which in turn has helped to solidify and reinforce the network of contacts as the 'glue' holding EuroMed together.<sup>105</sup>

### **Instruments coopted by EuroMed: the Association Agreements**

The bilateral dimension of Barcelona Process consists of the relationship between the EU and each of the Mediterranean Partners through the EuroMed Association Agreements. These have been concluded on the legal

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<sup>102</sup> EuroMed Non-Governmental Platform, Charter of the Non-Governmental Platform (2005) <[http://www.euromedplatform.org/spip/IMG/pdf/Statutes\\_final\\_-\\_18\\_April\\_05-ENG.pdf](http://www.euromedplatform.org/spip/IMG/pdf/Statutes_final_-_18_April_05-ENG.pdf)> (accessed 25 July 2008).

<sup>103</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Luxembourg, 2005).

<sup>104</sup> EuroMed Non-Governmental Platform, Final Declaration of the Marrakech Civil Forum (2006) <<http://www.euromedplatform.org/spip/spip.php?article402>> (accessed 25 July 2008).

<sup>105</sup> Interview with Council Official (Brussels, September 2008).

basis of Article 310 EC which states that ‘the Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures’. It may be noted that this article is not a CFSP provision. However, the vagueness of this provision, which has been used in a variety of contexts and for different purposes, does not prevent it from being used to fulfil goals in the CFSP. The Association Agreements form the ‘fabric’ of the network of relationships and are the principal means by which the Free Trade Area across the EuroMed space is designed to take shape. They do not concern only economic issues as they commit the parties to wide-ranging political and human rights dialogue, and also facilitate bilateral discussions on issues such as migration. Although the Treaty does not provide any explanation of ‘association’ in Article 310 or elsewhere, the consistent terming of the agreements as ‘EuroMed Association Agreements’ by the Commission and Council suggest that they are given a specific meaning in the context of the Barcelona Process.

The process of negotiating, concluding and ratifying the Association Agreements has been, in some cases, extremely lengthy and even at the 10<sup>th</sup> anniversary Barcelona summit in 2005, not all of the Agreements were in force. The EuroMed Association Agreements with Tunisia, Israel, Morocco and Jordan were signed soon after the Barcelona Declaration during the period 1995-1997 and gradually all entered into force before 2000. No EuroMed Association Agreement was made with Malta or Cyprus, since they were already engaged in pre-accession strategies.<sup>106</sup> With Turkey, no specific EuroMed Association Agreement was concluded because of the existing framework and Agreement on the definite phase of

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<sup>106</sup> Malta suspended its application to join the EU between 1996 and 1999. Bilateral relations during this period were conducted according to the EC-Malta Association Agreement 1970.



the customs union signed in 1995.<sup>107</sup> Turkey is now also in a pre-accession strategy and the subject of regular progress reports.<sup>108</sup> An interim agreement was concluded with the Palestinian Liberation Organization (as representing the Palestinian Authority) in 1997 which was due to last for five years whilst a full EuroMed Association Agreement was concluded. A full agreement has, in the context of political instability, not materialised. The Agreements with Lebanon and Syria were the most lengthy, and as former External Relations Commissioner Patten notes, most difficult.<sup>109</sup> For Lebanon, an interim trade agreement was signed in 2002 and entered into force the following year,<sup>110</sup> covering limited trade-related aspects and a human rights clause contained in the full EuroMed Association Agreement, which was also signed in 2002 and finally entered into force in 2006.<sup>111</sup> Syria was the final Partner State with whom the Council concluded negotiations on Association Agreement, in 2004. However, the Agreement has not been signed: a number of EU Member States and the Commission have demanded proof from the Syrian government that it is contributing positively to regional stability and ‘the leadership’s ability to translate some of its words of good will into deeds’.<sup>112</sup> Only when the Association Agreement is signed and ratified will an ENP Action Plan be discussed and Syria will be able to benefit from the financial ENP instruments.<sup>113</sup> In the meantime, relations are governed by the earlier Cooperation Agreement 1977. The more recent EuroMed participants (Croatia, Albania, Montenegro, Bosnia-Herzegovina) will not

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<sup>107</sup> EC-Turkey Association Council, Decision on implementing the final phase of the Customs Union No 1/95 [1995] 96/142/EC.

<sup>108</sup> For example, Commission (EC), ‘Turkey: Progress Report 2006’ COM (2006) 649 final.

<sup>109</sup> C Patten, *Not Quite the Diplomat* (Penguin, London 2005) 193.

<sup>110</sup> Interim Agreement on Trade and Trade-Related Matters between the European Community and the Republic of Lebanon [2002] OJ L 262/2.

<sup>111</sup> Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States and the Republic of Lebanon, COM (2002) 170 final.

<sup>112</sup> Commission (EC), ‘EU-Syria Association Agreement’ Speech by Commission Ferrero-Waldner at the European Parliament Plenary [2006] SPEECH/06/630.

<sup>113</sup> Commission (EC), ‘Country Strategy Paper and National Indicative Programme: Syria’ (2007) <[http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_nip\\_syria\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_nip_syria_en.pdf)> (accessed 25 July 2008).

need EuroMed Association Agreements since their content is already in place within the context of (pre-)enlargement and Stabilisation and Association Agreements. A EuroMed Association Agreement may be proposed in the future with Mauritania: bilateral relations currently operate within the ambit of the ACP framework.<sup>114</sup> In the light of the coup d'état in August 2008 by the Mauritanian military, a further bilateral agreement or deepening of bilateral relations is unlikely to be proposed for some time.

Under the framework of the EuroMed Association Agreements, an Association Council at Ministerial level and Association Committee comprising of senior officials have been created with each Partner state.<sup>115</sup> The Association Council includes members of, on the EU side, the Council of Ministers and Commission, and the government of the Partner State on the other. Meetings are chaired alternatively by the EU Council President and the government of the Partner State.<sup>116</sup>

The Association Agreements are mixed agreements: they are concluded jointly by the Community and the Member States, the latter complementing the powers of the Community, and hence widening the potential scope of the content of the agreements. Much of the content of the Association Agreements is devoted to technical details on economic

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<sup>114</sup> Statement by Council Official (Persona email correspondence 26 September 2008).

<sup>115</sup> The provisions establishing the Association Council and Association Committee do not differ significantly between each partner. EC-Tunisia Association Agreement, Articles 78-86; EC-Morocco Association Agreement, Articles 78-86; EC-Egypt Association Agreement, Articles 74-82; EC-Jordan Association Agreement, Article 89-97; EC-Israel Association Agreement, Articles 67-75; EC-Algeria Association Agreement, Articles 92-100; EC-Lebanon Association Agreement, Articles 74-82. The EC-Palestinian Authority Euro-Mediterranean Interim Association Agreement created a single 'Joint Committee' and denotes the Palestine Liberation Organization (PLO) as representing the Palestinian Authority (Article 72). The provisions on the operation of the Joint Committee (Articles 63-67) do not differ greatly in substance from the other Euromed Association Agreements. With Syria, as the Association Agreement is not yet signed or ratified, bilateral relations remain governed by the EEC-Syrian Arab Republic Cooperation Agreement 1975. A 'Cooperation Council' meets annually (Article 37(2)). The rest of the provisions (Article 35-41) are less extensive than the Euromed Association Agreement the parties have agreed but not yet signed.

<sup>116</sup> For example, EC-Tunisia Association Agreement, Article 79(4). The provisions are identical in the other Euromed Association Agreements.

cooperation in different sectors, conditions of reciprocal market access, and trade in industrial goods. The level of detail in the content and potential economic gains sought or resisted by the parties explains why certain Association Agreements took longer to negotiate and conclude than others. In terms of governance of the EuroMed space, the wide ranging nature of the economic and non-economic content of the agreements allows for a substantial level of differentiation between the EU and each of the Partners. This has an important tool for the EU since each Association Agreement is able to acknowledge the different national interests of each Mediterranean Partner, and the areas which the EU identifies as needing for improvement. This allows for a greater level of specificity in analysing what progress has been made in the bilateral relationship.

The EuroMed Association Agreements demonstrate the extent of the depth of the relationship, both economically and politically, the EU has with each Mediterranean Partner state. Excluding Turkey from this discussion, which has a customs union, the EuroMed agreement with Israel is the briefest, since the abolition of customs duties and related issues were already resolved in previous agreements. This is in contrast with the agreement with, for example, Algeria, where the gradual abolition of customs duties is foreseen in Articles 9-11 of the EC-Algeria EuroMed Association Agreement.<sup>117</sup>

Clauses which are specific to individual Partner states are evident in the Agreements. For example, Article 59 of the Agreement with Lebanon concerns cooperation in reinforcement of institutions and rule of law, as 'an independent and effective judiciary and well-trained legal profession are of particular importance'. This does not appear in other Agreements, and given the wording which emphasises the improvements needed to be made by the Lebanese government, it therefore can be

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<sup>117</sup> Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States and the Republic of Algeria COM (2002) 157 final.

assumed to have been included at the behest of the EU. The consequence of using the Association Agreements is therefore that they can lead to the perception that the EU is using its economic weight to address its concerns in Partner states, but that despite claims that the foundation of EuroMed is that of 'joint ownership', the Partner states are not able to put across their common concerns. Part of this stems from the lack of ability on the part of the Partners to form a coherent lobbying group, and their vast differences in size, political and economic development, which has led to a differentiated approach taken by the EU through the Association Agreements.<sup>118</sup>

### **The unilateral dimension: the MEDA and ENPI programmes**

The unilateral dimensions to EuroMed are the MEDA programme (*'mesures d'accompagnement financiers et techniques à la réforme des structures économiques et sociales dans le cadre du partenariat euro-méditerranéen'*) and European Neighbourhood and Partnership Instruments (ENPI) which relate to the financing of projects undertaken pursuant to the Partnership. Under the original MEDA Council Regulation, 3,435 million euros were committed to providing technical and financial support measures to accompany the reform of economic and social structures in the Mediterranean partners.<sup>119</sup> The Regulation was amended in 2000, and the funding allocation under the MEDA II Regulation was increased to 5,350 million euros.<sup>120</sup> Increasing funding, however, came with a more defined approach of 'express[ing] more clearly

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<sup>118</sup> This theme is returned to in chapter six, where the clauses on migration and readmission are analysed.

<sup>119</sup> Council Regulation (EC) 1488/96 of 23 July 1996 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership [1996] OJ L 189/1, Article 1(3).

<sup>120</sup> Council Regulation (EC) 2698/2000 of 27 November 2000 amending Regulation (EC) No 1488/96 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership [2000] OJ L 311/1, Article 1(2).

the envisaged impact of planned MEDA funded operations in the context of Mediterranean partners' reform processes and the establishment of the Euro-Mediterranean Partnership'.<sup>121</sup> This has resulted in the publication of more strategy plans in the long-term, medium term and annual basis for linking funding to the overall goals of EuroMed, including the establishment of the Free Trade Area. This reform was inspired by the TACIS and PHARE programmes in Eastern Europe and the former USSR. Decisions are made by the MED Committee comprising of the Commission, representatives of the Member States and the European Investment Bank (EIB).<sup>122</sup>

The other source of funding is the possibility of loans granted for projects by the European Investment Bank. Since 2002 this has been known as the Facility for Euro-Mediterranean Investment and Partnership (FEMIP). Loans to Mediterranean Partners have totalled 4,808 million euros during the 1995-1999 period, 6,400 million from 2000 until 2007<sup>123</sup> and 14 billion euros in total since 1974.<sup>124</sup> The MEDA II Regulation amended MEDA I and emphasised the closeness of the relationship between EU and EIB funding.<sup>125</sup>

Since 2007, the MEDA financial instruments have been replaced with the European Neighbourhood and Partnership Instrument (ENPI). The ENPI places the funding mechanisms for EuroMed under the same umbrella programme as for the other ENP countries, although the

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<sup>121</sup> MEDA Regulation II 2698/2000, Preamble point 6; Commission, 'Euro-Mediterranean Partnership MEDA Regional Indicative Programme 2005-2006' [2005] <[http://ec.europa.eu/external\\_relations/euromed/rsp/meda\\_nip05\\_06\\_en.pdf](http://ec.europa.eu/external_relations/euromed/rsp/meda_nip05_06_en.pdf)> (accessed 25 July 2008), 1.

<sup>122</sup> MEDA Regulation 1488/96, Article 11(1), as amended by MEDA Regulation II 2698 and according to the procedure and composition laid down in Council Decision (EC) 1999/468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L 184/23, Articles 4 and 7.

<sup>123</sup> Commission (EC), EuroMed website <[http://ec.europa.eu/external\\_relations/euromed/meda.htm](http://ec.europa.eu/external_relations/euromed/meda.htm)> (accessed 25 July 2008).

<sup>124</sup> Commission (EC), 'Euromed Partnership Regional Strategy Paper 2002-2006' [2002] <[http://europa.eu.int/comm/external\\_relations/euromed/rsp/rsp02\\_06.pdf](http://europa.eu.int/comm/external_relations/euromed/rsp/rsp02_06.pdf)> (accessed 25 July 2008), Article 3.

<sup>125</sup> MEDA Regulation II 2698/2000, Preamble Article 11 and Article 1 amending Article 4 of the MEDA I Regulation 1488/96.

Commission publishes a Regional Strategy Paper and Regional Indicative Programme specifically for the Euro-Mediterranean Partnership as well as for each Partner State.<sup>126</sup> The ENPI are used for financial support according to the aims of the Barcelona Process and the ENP Action Plans agreed with each Partner State. Turkey and Croatia are not subject to this procedure, as funding is provided through the enlargement process and Commission DG Enlargement. Albania and Mauritania are not part of the ENP and they have not been subject to county reports since joining EuroMed.

Funding is provided for bilateral projects or initiatives and also for region-wide cooperation projects. Examples of the latter, such as EuroMesCo and the Heritage Programme, were noted above. Such projects account for 10-15% of the funding,<sup>127</sup> and the rest is devoted to programmes pursuant to the bilateral Association Agreements. These include economic and social programmes designed to foster trade, competitiveness and the establishment of the Free Trade Area. They also include programmes on human rights and democracy and are a means by which EU funding can be channelled directly to civil society and non-governmental actors. Human rights and democracy promotion have become more central in the National Indicative Programmes on each Partner State.<sup>128</sup>

Taking account of the unilateral dimension is of vital importance in understanding the system of governance in EuroMed. Despite the commitment of large-scale financing of MEDA, much of the money allocated to the programme went unspent because of the reluctance of the

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<sup>126</sup> Commission (EC), 'European Neighbourhood and Partnership Instrument (ENPI) Regional Strategy Paper 2007-2013' [2007] and Commission (EC), 'Regional Indicative Programme 2007-2010 for the Euro-Mediterranean Partnership' [2007] <[http://ec.europa.eu/world/enp/pdf/country/enpi\\_euromed\\_rsp\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_euromed_rsp_en.pdf)> (accessed 25 July 2008).

<sup>127</sup> Source: European Commission.

[http://ec.europa.eu/external\\_relations/euromed/multilateral\\_relations.htm](http://ec.europa.eu/external_relations/euromed/multilateral_relations.htm)

<sup>128</sup> This recommendation can be found in the Commission's strategic guidelines for MEDA funding: Commission (EC), 'Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners. Strategic guidelines' (Communication COM (2003) 294 final, 21 May 2003).

Partner States to engage in programmes linked to political reform, and the bureaucratic complications of securing funding.

Since the funding of the partnership relies on the Union institutions and Member States, it is not surprising that the Commission in particular has exercised a leadership role which potentially reinforces the content of the bilateral dimension above. Funding to the Partner States can be suspended in cases of violation of democratic principles and the rule of law.<sup>129</sup> The emphasis on human rights and democracy in the EU's neighbourhood has prompted some commentators to note that the use of MEDA funding for democracy promotion in the Mediterranean represents an 'important testing ground' for the EU's capabilities as an international actor.<sup>130</sup> It is much more difficult, therefore, for the EU to more forcefully engage in democracy promotion by, for example, publicly criticising more strongly their Mediterranean partners and highlighting the direct funding of opposition movements. Doing so would be likely to generate short-term focus on human rights/democracy issues in the media, but would ultimately harm the longer-term processes of dialogue which lie at the core of EuroMed.<sup>131</sup> The preference of the Council and Commission is therefore to pursue a more 'softly softly' approach which avoids outright criticism of the Mediterranean Partners: the latter is an option more regularly pursued by the European Parliament.<sup>132</sup>

At the Barcelona Conference in 1995, the importance of civil society in EuroMed was recognised in the text of the Declaration, and whilst the interest groups envisaged as making up 'civil society' were identified, the mechanisms for their contribution to the Barcelona Process were not defined. Civil society is a fundamental part of the third EuroMed basket

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<sup>129</sup> 'When an essential element for the continuation of support measures to a Mediterranean partner is missing, the Council may, acting by a qualified majority on a proposal from the Commission, decide upon appropriate measures': MEDA Regulation 1488/96, Article 16, as amended by MEDA Regulation II 2698/2000.

<sup>130</sup> Tanner (n 12) 140.

<sup>131</sup> Interview with Council Official (Brussels, September 2008).

<sup>132</sup> Interview with European Parliament Official (Brussels, September 2008).

on social, cultural and human affairs as a contributing factor to the creation of an area of peace, stability and dialogue. This can be seen as based on Europe's own integration experiences and is a key factor in seeing EuroMed as a system of governance. Unfortunately, it is also the basket which has been the most neglected and lacking in progress. The establishment of the Anna Lindh Euro-Mediterranean Foundation will channel the funds to organisations engaged in intercultural dialogue and projects aimed at increasing cooperation across borders in the fields of, *inter alia*, education, the arts, journalism and human rights. The EU has been reluctant to engage directly with major civil society associations in some Mediterranean countries, including certain Islamic associations deemed to be too radical.<sup>133</sup> There have also been instances of governments setting up their own NGOs in order to 'siphon off these EU funds'.<sup>134</sup> If this is true on a wide-scale, it would mean that efforts for democratisation and cultural cooperation are minimal when compared with the economic arrangements in EuroMed.

### **Characterising the EuroMed system of governance in the CFSP context**

The institutional framework and multilateral, bilateral and unilateral features of EuroMed suggest that governance is an appropriate characterisation of the rules and practices defining appropriate behaviour and creating logics of appropriateness. Analysis of the emergence of institutions and their development is possible. To what extent these rules and practices define behaviour is analysed in the following chapters. However, in order for this to be done, it is first necessary to discuss further six observations on the system of governance in EuroMed and its

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<sup>133</sup> F Volpi, 'Regional Community Building and the Transformation of International Relations: the Case of the Euro-Mediterranean Partnership' (2004) 9 *Mediterranean Politics* 145, 159.

<sup>134</sup> Volpi (n 133) 149.



characteristics.

First, the reason why further exploration of the system of governance of EuroMed beyond the institutions and instruments is necessary is due to the language of the Barcelona Declaration and subsequent EuroMed documents. These stress the joint ownership of the Barcelona Process between the EU and the Partner States. EuroMed can be differentiated from the more traditional model of relations with third states in that it has created multilateral, collective institutions bringing all the EU Members and Partner States together. Yet, 'joint ownership' suggests that a partnership of equals exists between the EU (institutions and Member States) and the Partner States as a collective group. In a partnership of equals, each side should be able to influence the development of EuroMed. Considering the Partner States as a collective group in any other way than geographically is impossible. The EuroMed Partnership is one between the EU institutions and Member States on the one hand and each Partner State individually on the other. As such, much of the policy making and operational elements flows from the bilateral and unilateral dimensions of the Barcelona Process. Even on the multilateral front, and despite the repeated claims by the Commission that the Mediterranean Partners bear equal responsibility for the development of EuroMed, the institutional framework and subject-matter have been designed and implemented on the European side. The institutional framework, including the EuroMed Committee, bears resemblance to that of the EU decision-making framework, suggesting that the Barcelona Process has been modelled on a European view of how a system of governance should function.<sup>135</sup> EuroMed does not yet have an independent secretariat and the Commission acts as the administrative centre of both the Barcelona Process and the ENP.<sup>136</sup> The initial choice of

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<sup>135</sup> F Bicchì, 'Our Size Fits All: Normative Power Europe and the Mediterranean' (2006) 13 *Journal of European Public Policy* 286, 294.

<sup>136</sup> A joint secretariat has been proposed in the Joint Paris Declaration, to deal with

the participants to include and exclude in the launch of the Barcelona Process was made by the Council, which has also set the agenda for discussion in the institutional framework. The terms of the Barcelona Declaration were drafted by the Council and Commission, and presented to the Mediterranean partners, rather than as a product of collaboration. The Barcelona Declaration subsequently appeared in similar terms in the CFSP Common Strategy on the Mediterranean, signifying the similarity between the EU's foreign policy goals and the goals of the Barcelona Process. The EuroMed Ministerial Conclusions are given as Presidency (that is, of the EU) Conclusions, reaffirming the role of the Council and making the former appear as merely a veneer for the latter. The Commission administers the MEDA/ENPI programmes and reports on the progress, or lack thereof, of each of the Mediterranean Partners' economic and political reforms. The European Parliament acts as the secretariat for the EMPA and will continue to do so if the proposal for a permanent secretariat at the Parliament in Brussels materialises.

Second, in the absence of the Mediterranean Partners forming a collective and coherent grouping independently of EuroMed, the Council (especially the Member State holding the Presidency) and Commission retain control over the Barcelona Process through its bilateral and unilateral dimensions. Recalling that the goal of creating a EuroMed Free Trade Area by 2010 is through the conclusion of individual Association Agreements with each of the Partner States, this differentiates the process from a multilaterally-based convergence of individual states. Creating a system of governance by concluding bilateral association agreements carries the risk of maintaining a hub-spoke approach, with the economically-powerful EU institutions as the centre defining the economic agenda for integration, and the Partner States at the end of each

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technical matters only but with a separate legal personality: Joint Paris Declaration, 24.

spoke.<sup>137</sup> With the linkage between the economic issues involved in creating the EuroMed Free Trade Area and the other baskets, this hub-spoke analogy could apply across the system of governance in EuroMed more generally, including in the sphere of migration control.<sup>138</sup> This could be reduced if the Partner States advanced the integration process between themselves, yet it could also be said that horizontal integration is rendered more difficult by the governance system the EU institutions have instigated in EuroMed, that is to say by locking in Partner States to the EU's already economically-integrated core.

Third, the advantages for the Commission and Council in promoting EuroMed through the lens of economic integration and free trade are two-fold. From an institutional angle, it is much easier for Commission to act as an international *economic* actor than through the instruments provided for in the CFSP. Further, greater economic development in the Southern Mediterranean would suggest that migration towards the EU would be more limited and that economic prosperity would reduce the risks of economic exclusion. With these reasons as the driving force behind EuroMed, it would seem apparent that the Council and Commission have defined both the membership and the content of EuroMed according to their own interests. The link with migration policy is explored further in the following two chapters.

Fourth, the subject matter of the Association Agreements can also reveal to which they are geared to Union concerns, without giving adequate concessions, notably in terms of market access for agricultural and textile products. The reforms to be undertaken by Partner States, including the approximation of laws in areas such as competition law, product standards and money laundering, appear to be one-sided. EuroMed has been criticised for entrenching existing inequalities between the North and South rather than creating 'an area of shared prosperity

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<sup>137</sup> Dannreuther (n 45) 158.

<sup>138</sup> This point is returned to in chapters 5 and 6.

through sustainable and balanced economic and social development'.<sup>139</sup> The exclusion of the lucrative economic sectors which the Partner States would prefer to have access to in the EU, such as agricultural and textiles, demonstrates that the EU and its Member States are only prepared to allow economic integration in a restrictive sense. Alignment of laws with those of the EU has the potential double advantage of facilitating access to the EU market, which is the main trading partner already for most of the Partner States, and offering a ready-made package of laws (with technical and financial assistance available) for adoption thereby saving expensive information and research costs. Regional integration between the Mediterranean partners could be facilitated if they are individually pursuing legislative programmes relating to the adoption of parts of the *acquis*. However, this harmonisation could be at a cost if Partner States do not perceive that they have anything to gain, such as trade concessions or more liberal visa regimes, from complying with the EU's requests for reform. Beyond the economic sphere, limiting migration to the EU is one area identified by several commentators as being key to the Member States' interest in EuroMed.<sup>140</sup>

Fifth, the proposed Free Trade Area was a means by which the Commission and Council could ensure that the economic reforms of the Partner States were 'anchored' and 'locked-in' through a stronger mechanism than, in particular, the WTO.<sup>141</sup> Whilst it could be said that the Commission and Council have a reasonably clear agenda based on their interests, the Partner States do not have a collective vision towards EuroMed: 'the Southern partners' attitudes towards the relationship are *ad hoc*, disjointed, and at times contradictory'.<sup>142</sup>

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<sup>139</sup> Euromed Regional Strategy Paper 2002-2006 (n 124) 5.

<sup>140</sup> Tanner (n 12) 147; Bicchi (n 13) 14; KD Magliveras, 'Protecting the Rights of Migrant Workers in the Euro-Mediterranean Partnership' (2004) 9 *Mediterranean Politics* 459, 481.

<sup>141</sup> Christiansen, Petito and Tonra (n 7) 406.

<sup>142</sup> H Ebeid, 'The Partnership in Southern Eyes: Reflections on the Discourse in the Egyptian Press' (2004) Euro-Mediterranean Study Commission, EuroMesCo Papers No. 37 <[http://www.euromesco.com.pt/media/euromescopaper37\\_hebeid.pdf](http://www.euromesco.com.pt/media/euromescopaper37_hebeid.pdf)> (accessed 25 July

Sixth, the power imbalance between the two sides is even clearer given the importance of the MEDA funding instruments. Here, the Commission is responsible for distributing funds and can use these decisions to target the areas it considers most in need of reform or which will bring the most perceived benefit to the EU.

In the context of the above six observations, it should not be surprising that the Council and Commission have sought leadership roles in EuroMed. They were responsible for the creation and the drafting of the Barcelona Process and, in the absence of any counterpart organisation grouping together the Mediterranean Partner States, are the only institutions capable of pushing the agenda forward. Given the focus on establishing a EuroMed Free Trade Area (whether this is primarily for the benefit of the EU or not), the Commission evidently has the expertise in this area, and is able to point to links between economic integration and political stability in Europe during the past 50 years. This can be contrasted with the broad theme of security, which has emerged as a key component of EuroMed. The scope which the EU is able to act in the security domain is limited, since it has no security framework of its own to employ.<sup>143</sup> The commitments of the Barcelona Declaration (conflict prevention, human rights, weapons reductions etc.) are more difficult to put into operation in practice. It should also be recalled that the CFSP objectives include the 'strengthening the security of the Union in all ways'.<sup>144</sup> Since 9/11, however, a preoccupation with security issues within the EU Member States and institutions has prompted greater emphasis in EuroMed on security issues. This includes the extensive linking of security to issues of migration, which has the subsequent effect of blurring the distinction between internal and external security and how these differ, if

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2008) 5.

<sup>143</sup> Christiansen, Petito and Tonra (n 7) 407.

<sup>144</sup> Article 11(1) TEU.

at all.<sup>145</sup>

Returning also to the values the Council is attempting to promote through the CFSP and within EuroMed in particular, the nature of how the promotion of democracy and the protection of human rights are to be achieved merits some attention. The Barcelona Declaration contained provisions relating to the need of the signatories to ‘develop the rule of law and democracy in their political systems’ and ‘respect human rights and fundamental freedoms and guarantee the effective legitimate exercise of such rights and freedoms’. The Declaration does not state that these tasks fall only to the Mediterranean Partners, yet the similarity between these provisions and those with Central and Eastern European states in the 1990s support the view that the reason for inclusion of these principles was to enlarge certain aspects of the Union’s system of governance to the Mediterranean Partners. Furthermore, all of the Association Agreements with Partner States contain clauses relating to human rights and more specific areas needing improvement. The Constitutional Treaty and Treaty of Lisbon also contained an identical provision on neighbourhood relations and the aim of developing ‘a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation’.<sup>146</sup> The importance on the EU’s values, rather than common or shared values between the EU and its neighbours, is thus clear.

By emphasising the need for democracy and sustainable economic and social development in the Barcelona Declaration, a clear parallel can be drawn with the values associated with the EU as a ‘civilian’ or ‘normative’ power. Indeed, the Mediterranean was identified as a zone of interest for the CFSP to promote democracy, human rights, stability and

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<sup>145</sup> Tanner (n 12) 145.

<sup>146</sup> Article 57 Treaty establishing a Constitution for Europe; Article 8(1) TEU, as inserted by the Treaty of Lisbon, Article 1(10).

security just prior to the moves towards forming the EuroMed Partnership.<sup>147</sup> The correlation between these two gives an indication to the extent to which the text of the Barcelona Declaration reflects EU interests in promoting its governance system in its Southern neighbours, so-called 'soft power' projection.

There is a conceptual problem in this domain: how does the EU balance the supposed cooperative nature of EuroMed with greater emphasis on democracy promotion? The EU institutions have been consistent in restating the linkage between MEDA funding and the promotion of democracy, but less consistent in a post-9/11 world to criticise Mediterranean partners for failings or shortcomings in democratic development. It is also necessary to distinguish between cosmetic changes and those which go to the heart of real changes within national systems of governance. Part of this stems from fears about Europe's future energy needs, in particular with regard to Algeria, and the desire to ensure cooperation in other areas, such as migration control.<sup>148</sup> Bartels' analysis of the human rights clauses in the Association Agreements with each partner leads him to contend that such clauses are of limited use, since it is unlikely that agreements would be suspended unless there were grave instances of human rights violations.<sup>149</sup> Occasions where this could have happened have passed without sanctions.<sup>150</sup> If grave instances of violations are ignored, then it does not seem that the potential to promote change in the EuroMed region will be realised. Conversely, using the human rights clauses coupled with strengthening civil society and political opposition (which in some Partner States is

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<sup>147</sup> Council of the EU, Lisbon Conclusions 1992, Annex 1, 28-33.

<sup>148</sup> This is returned to in the following chapters where it is noted that cooperation has taken place with Libya, despite the Union's emphasis on the need for improvements in human rights and acceptance of the Barcelona before EU-Libyan cooperation can be deepened.

<sup>149</sup> L Bartels, 'A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements' (2004) 9 *Mediterranean Politics* 368, 386.

<sup>150</sup> Stavridis and Hutchence (n 12). Algeria in the 1997-8 period is the example cited.

Islamist) may create political instability and therefore go against the (EU defined) aims of EuroMed.

Despite viewing the issues on the EuroMed agenda as being of primary interest to the EU side because of the domestic implications for Member States, it is also possible to view EuroMed in a more positive light when compared to policies founded on unilateralism, such as those favoured by the US.<sup>151</sup> Aliboni and Qatarneh make an interesting comparison between EuroMed and the United States' Partnership for Progress and a Common Future for the Mediterranean and Middle East,<sup>152</sup> which was approved by the G8 countries in 2004 but which operates in a much weaker institutional framework and does not emphasise cooperative or joint ownership initiatives.<sup>153</sup> It could also be suggested that the importance of EuroMed is not grounded in strict adherence to terms of the agreements but ensuring the continued participation of all Partner States, given that EuroMed is the only framework in which all Mediterranean non-EU members take part. If the Union institutions began to suspend the agreements which took such a long time to conclude, then it is likely that Partner States would no longer wish to participate and would lead to accusations of 'bullying' by the Union. This could, in turn, harm the long-term development of the Barcelona Process and, in the case of the disintegration of EuroMed, would result in the Union being unable to fulfil the (foreign policy) goals it has promoted in the Partnership.

If EuroMed is to become a system of governance based on joint

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<sup>151</sup> I Schäfer and F Ibrahim, 'Regional Crises and Europe: How the Middle East Conflict and Iraq War Affect the EMP' (2005) Euro-Mediterranean Study Commission, EuroMesCo Papers No. 40 <[http://www.euromesco.com.pt/media/euromescopaper37\\_hebeid.pdf](http://www.euromesco.com.pt/media/euromescopaper37_hebeid.pdf)> (accessed 25 July 2008) 14.

<sup>152</sup> Presidency of the United States, 'Partnership for Progress and a Common Future with the Region of the Broader Middle East and North Africa' (2004) Press Release, 9 June 2004 <<http://www.whitehouse.gov/news/releases/2004/06/20040609-30.html>> (accessed 25 July 2008).

<sup>153</sup> R Aliboni and Y Qatarneh, 'The Future of Euro-Mediterranean Partnership in a Changing Context of Transatlantic and Regional Relations' (2005) Euro-Mediterranean Study Commission, EuroMesCo Papers No. 46 <[http://www.euromesco.net/media/euromesco\\_paper\\_46.pdf](http://www.euromesco.net/media/euromesco_paper_46.pdf)> (accessed 25 July 2008) 10.



ownership, there are several significant steps to be taken. On the institutional front, as well as decentralising from the European side the institutions of EuroMed, such as the case with the Anna Lindh foundation in Alexandria, the Euro-centric characteristics of EuroMed could be reduced by introducing more 'independent bodies' within the institutional framework. The joint chairing of EuroMed Ministerial conferences and independent legal personality of the secretariat were two initiatives contained in the Joint Paris Declaration in July 2008, which may help to realise this. Several ministerial conferences have called for an institutionalised structural dialogue on human rights, this has not materialised and was not proposed in the Joint Paris Declaration. The initiative for a form of dialogue has been supported by the Arab Human Development Report 2003, a UN report written by individuals from Arab states, which recommended democratisation as a means by which the economic situations of the states concerned could be improved.<sup>154</sup> The Commission has in particular used this report as a *raison d'être* to promote good governance and human rights from within the Partner States and stating that these should be central principles of the Barcelona Process.<sup>155</sup> The creation of an Office for Good Governance and Human Rights based on the OSCE's similar body has also been suggested as a EuroMed institution independent of each side.<sup>156</sup> The potential need for an Office on Ethnic Conflicts, again based on the OSCE's High Commission for National Minorities, has also been identified. This could have the function, independently of the governments and EU institutions, of defusing tensions and offering the possibility of avoiding potential ethnic conflicts. Criticism has also been made, however, of the double-edged nature of the EU's engagement with the Mediterranean partners,

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<sup>154</sup> United Nations Development Programme, *Arab Human Development Report* (United Nations, New York 2003).

<sup>155</sup> Commission (EC), 'Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners' COM (2003) 294 final, 21 May 2003.

<sup>156</sup> S Pardo and L Zemer, 'Towards a new Euro-Mediterranean Neighbourhood Space' (2005) 10 *European Foreign Affairs Review* 39, 51.

especially post 9/11: on the one hand, illiberal governments are strengthened in order to secure cooperation on crime and terrorism yet the Barcelona Process commits the EU to encouraging reform.

## **Conclusion**

The complexity of regional affairs in the Mediterranean, the strong economic links between the EU and Partner States and issues of human rights and democratisation provide fertile ground for analysis. Most of the literature on EuroMed concludes that it has been only partially successful in achieving its goals. Whilst it is largely recognised as a (potentially) good confidence-building measure between the North and South Mediterranean, the two biggest criticisms of EuroMed are that it is overly Euro-centric and lacking in formal institutions that would remove or reduce this Euro-centricity.

In the context of the institutional framework developed under the auspices of the Barcelona Process since 1995, the extensive contractual relations under the bilateral agreements, supported by the ENP Action Plans as further 'layers', it is possible to see EuroMed as a system of governance. However, there is a strong note of caution which must be noted. The Council and Commission are both the political and financial driving force behind the Barcelona Process, and both the institutional framework and the issues under discussion within EuroMed bear the hallmarks of the system of governance of EU itself. As such, governance of EuroMed must be understood as a system which is based not on a pooling of sovereignty between participating states, but as one which has an integrated core with a periphery of Partner States. The 'hub-spoke' analogy of economic relations based around a strong centre can be seen to apply more generally to EuroMed. The 'EU' is of course not a single actor in itself in EuroMed because of the various roles of the Member States,

Commission, Parliament and Council in addition to the common EuroMed institutions. This differentiates it from the (internal) governance of the EU, which does not have the same level of strong central actors. The analysis of EuroMed in this chapter reveals, however, that in creating a system of governance through the institutionalisation of cooperation in the Mediterranean, the foreign policy goals of the EU are evident. The aim of the EU in creating EuroMed and the ENP is to ensure that the EU's territory is surrounded by a 'ring of friends'. This makes a 'system of governance' an attractive characterisation of EuroMed, but one which includes an element of control on the part of the EU towards the Partner States, and somewhat dilutes the generally positive associations the language of 'governance' enjoys with regard to the characteristics of openness, transparency and participation identified in chapter one.

Nevertheless, the EuroMed Partnership represents a major step in relations between the EU and the other states bordering the Mediterranean. Unlike the previous policies towards this area, it does appear that the Barcelona process has enjoyed relatively sustained momentum. Given the geopolitical problems and issues in this area, it should not be assumed that this goal can be reached in the near future. It is possible, however, to critically examine the ways and means by which the EU has attempted to pursue this policy in terms of the 'baskets'. Many of the commentators agree that progress on fulfilling the aims of the Barcelona Process has been limited, and the Euro-centric nature of the Process may harm the overall efficiency of EuroMed in the long term. It is also clear that in attempting to promote/apply its internal policies outside its territorial borders, the internal/external element to European integration become ever more blurred. In the following chapter, the issue of migration, which many agree is the key to the EU's interest in the Mediterranean and which has now become the fourth 'basket' in EuroMed is examined in greater detail.



## **Chapter 5: Revisiting the Pillars: EU Migration Law and Policy**

Migration law and policy is one of the clearest examples of where the internal and external spheres of governance are most blurred. This is especially true in the EU's multilevel system of governance. This blurring partly stems from the wide-ranging nature of 'migration' which can be legitimately discussed within any number of contexts. Migration here is used in a wide-sense to include all those who cross borders in a legal or illegal manner and remain in a state for the purpose of work, to seek asylum or as a refugee. As the discussion below demonstrates, these are not hermetically sealed categories. Examining the debate on migration serves to see how the links with the CFSP and the foreign policy goals of the EU can be made and how, in the EU's system of governance, foreign policy goals can be translated into practices in other areas.

Legal measures and political decisions taken within a state to control migration flows to and from the defined territory of the state are close to the core notion of state sovereignty. Legal and policy measures one would expect to find in a national context include border control mechanisms, conditions for entry and residency in the territory and removal of those whose situation is no longer 'regular'. There would likely also be more policy-oriented instruments such as guest worker programmes to fill labour gaps, measures to attract highly-qualified migrants and programmes to facilitate or improve the integration of migrants into society. All these measures may potentially have important effects on 'outsiders', which primarily means individuals but measures may also have strong effects on relations with other states. Exogenous forces, such as economic crises, wars or political instability, can have significant effects on migration flows and, by consequence, internal policy-making as a reaction to these forces.

For the EU Member States, policy-making in migration-related issues

is strongly linked to existing obligations in international law, bilateral arrangements with other states and a growing *acquis* on migration issues at an EU level. The latter is coupled with greater discussion of how the Union should react to migration issues both in its neighbourhood and beyond. Discussion of migration issues is often strongly linked to the search for security in the internal sphere and this necessitates taking into account factors affecting internal security but outside the physical borders of EU territory. Consequently, and alongside the search for an increased global role for the Union, migration issues are pushed towards the domain of foreign policy. Migration therefore merits scrutiny in the context of the CFSP and EuroMed, where in the latter migration has become the fourth 'basket' of cooperation since 2005, and which has therefore come to play a prominent role in the Barcelona Process. The Mediterranean is a focus of EU migration policy-making not only because of the relationships with the Partner States and the movement of their citizens, but also because of the 'frontier' nature of the North African states between sub-Saharan Africa and Europe. EuroMed could, therefore, be seen as an 'interface' between these two geographical regions and reflecting the politicised nature of migration in relations beyond the Mediterranean region.

In contrast to the free movement rights of EU citizens, legal measures at the EU level in relation to migration from third countries remain limited in scope. Competence in the regulation of migration from third states was traditionally understood as being almost wholly within the domain of Member States.<sup>1</sup> Informal and *ad hoc* fora had provided an opportunity for Member States to discuss migration from outside the Community and related issues since the 1970s.<sup>2</sup> Competence to deal with areas of migration law and policy became part of the Union's 'third pillar'

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<sup>1</sup>There were some notable exceptions to this general characterisation, including the provisions on workers in some Association Agreements with third countries.

<sup>2</sup>These included the *ad hoc* Group on Immigration and TREVI, an informal grouping of national interior ministers which first met in 1975.

of Justice and Home Affairs in the Treaty on European Union, and aspects of visa policy for nationals of third states crossing external borders became covered by Article 100(c) EEC.<sup>3</sup> Like the CFSP, the JHA pillar was characterised by intergovernmentalism, reflecting the sensitivity of many Member State governments over such 'core' issues of national sovereignty and resulting, according to de Búrca, in a complex and awkward constitutional structure.<sup>4</sup> The roles of the Commission and Parliament were extremely limited under the TEU provisions. However, the Treaties of Amsterdam and Nice transferred parts of the JHA pillar to the first, Community pillar and the remaining issues in Title VI TEU became known as Police and Judicial Cooperation in Criminal Matters. Issues of JHA are now more widely referred to as Freedom, Security and Justice (FSJ) since the coming into force of the Treaty of Amsterdam in 1999. FSJ is widely seen as one of the most dynamic areas of policy-making at the EU level.

The intersection between national and EU-level migration law and policy coordination forms a large part of FSJ, the continued complexity of which has been rightly characterised by Walker as a 'constitutional odyssey'.<sup>5</sup> Whereas the CFSP was envisaged as the means by which the EU would gain a stronger voice in world (political) affairs to match its economic weight, JHA, by contrast, had no provisions for external cooperation until the Treaty of Amsterdam. This packaging of internal policies and foreign policy in three separate pillars with varied institutional competences and different instruments at their disposal has gradually been eroded. The inherent internal and external dimensions to

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<sup>3</sup> Article 100(c)(1): 'The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States'. This provision eventually became part of the more extensive provisions covering visa policy introduced by the Treaty of Amsterdam.

<sup>4</sup> G de Búrca, 'Institutional Development of the EU' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (OUP, Oxford 1999) 55.

<sup>5</sup> N Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in N Walker (ed) *Europe's Area of Freedom, Security and Justice* (OUP, Oxford 2004)

migration law and policy, especially in the context of the Mediterranean region, make tracking the influences between the systems of governance a revealing exercise. The Union institutions have gradually placed increasing emphasis on the need to transcend the internal and foreign policy boundaries when dealing with migration issues.

The first explicit call by the Commission for the integration of migration issues into external policies was made even before the CFSP came into being.<sup>6</sup> This need was, however, not expressly recognised in Council Conclusions until 1999.<sup>7</sup> Within recent years, Council Conclusions have more consistently recognised the need for the integration of migration goals into foreign policy. The main goal associated with migration policies at national level in the EU is to regulate who may or may not enter and reside in the territory, and to dissuade third country nationals from attempting to enter unlawfully. This can be understood as an ‘arms length’ policy, which allows for some limited migration avenues (for example, for highly skilled workers, temporary/seasonal workers and family members) but attempts to ensure that those who are not wanted are kept far from the territory of the state they may be tempted to enter, whether lawfully or not. That is not to say that EU Member States only pursue measures which are repressive in nature, for example, the return of irregular migrants to their home country, since they may also pursue development policies in third countries which try to remove the reasons potential migrants may have for seeking to come to Europe. Economic development of the Mediterranean Partner States through the creation of the Free Trade Area in EuroMed is one example of this. Preventing irregular migration is often visible as the primary goal of European governments in migration policy and discourse, and this has fed into

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<sup>6</sup> The Commission noted in 1991 the ‘ever swelling number of asylum-seekers’ and the need for a common right of asylum, also recognised by the European Parliament in a Resolution of 13 September 1991. Commission (EC), ‘The Right of Asylum’ (Communication) SEC (1991) 1857 final, 11 October 1991.

<sup>7</sup> European Council, Presidency Conclusions (Tampere, 1999).



migration goals at EU level. This being so, the EU would be seen to be going beyond the type of intergovernmental migration discussions one would expect to find within an international organisation and more towards what one would expect at the level of the nation state.

Whether the migration goals are successfully defined and integrated into foreign policy or not, Council Conclusions demonstrate that the various dimensions of migration law and policy are part of the equation in the CFSP and play a key role in the construction of the EU's identity and definition of its international role. Understanding the synergy between the governance of migration and foreign policy are means by which the EU can be tested on its stated aims, values commitments to the protection of human rights, development and the promotion of 'good governance' elsewhere in the world.

The previous chapter examined the institutions and instruments of the Euro-Mediterranean Partnership and how the emerging system of governance can be characterised. Despite the repeated claims that the Partnership is the subject of joint ownership on the part of the EU and the Mediterranean Partner states, the Council and Commission's interest in seeking a leadership role and enforcing this through the multilateral aspects (agenda-setting in the EuroMed institutions), bilateral aspects (differentiation of the partners through the Association Agreements) and unilateral aspects (control of MEDA/ENPI funding) was shown to be in evidence. The governance of migration in its differing forms and contexts is a good example of where cooperation takes place between the EU and its Mediterranean partners but where different interests can be perceived. Migration has become an increasing focal point in the institutional development of EuroMed since the original Barcelona Declaration and the economic, political and cultural dimension to migration means that it cuts across all three original 'baskets'. 'Migration, Social Integration, Justice and Security' was added to the five-year work programme agreed at the 2005 Barcelona EuroMed Ministerial Conference and can be treated as

a separate basket within the Partnership, which continues to have implications for the other three baskets. Since the baskets serve to structure the institutional development within EuroMed, the emphasis on legal means to control migration within the Mediterranean context show how the synergy between EuroMed and migration has developed since the greater attention the EU institutions and Member States have placed on the latter in recent years.

The purpose this chapter is to identify and explore the complex framework of migration law and policy at an EU level, distinguishing its different aspects and critically examining the legal instruments the governance of migration. Weight is attached to analysis of the measures which have particular consequences for the Mediterranean Partner States, which allows for an analysis of the links and interaction between the governance of migration and EuroMed in the following chapter.

### **Migration Law and Policy at the EU Level**

Within the context of the cross-pillar nature of migration policy-making at EU level, tracking the respective competences of the EU institutions and the Member States is complex. 'Migration' here is understood as a broad term, encompassing the governance of legal/regular and illegal/irregular forms of migration to the EU in terms legislative and policy measures.<sup>8</sup> As noted above, many aspects of this area of policy-making go to the heart of state sovereignty and identity. However, because of the importance of migration issues within national debates (particularly in evidence during domestic elections), rhetoric from Member State governments and media-led assumptions often blur the reality in which the EU acts in this area. Despite rhetoric from some Member States concerning sovereignty which suggests that progress in forging a common EU approach to migration

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<sup>8</sup> It is noted, however, that references may be made to 'immigration policy', 'asylum policy' and 'integration policy' where appropriate.

matched with a legal framework would be impossible, this area has seen greater cross-pillar transfers of competences to the EU institutions, than, for example, for the CFSP. The nature of these transfers has, however, been uneven. The existence of an ‘intergovernmental brake’ within FSJ has prevented more comprehensive transfers of competence to the EU.<sup>9</sup>

The recurrent theme in both the transfer of competence and the ability of the institutions to create coherent legislation and policy is the resistance of (some of) the Member States in going beyond minimum levels of standard setting in migration policy. The need for Member States to demonstrate to domestic political audiences that they are ‘in control’ is more evident in terms of irregular migration, which complicates the forging of comprehensive migration policies at EU level, despite the tone of the Treaty dispositions and successive Council Conclusions.

### **The Treaty of Amsterdam, the Tampere Conclusions and the Hague Programme**

A starting point in exploring migration governance in the EU is the different relationship between citizenship of the Union for nationals and the status of non-nationals of the Member States. The Treaty on European Union granted citizenship of the Union to nationals of Member States<sup>10</sup> but third-country nationals resident in the EU were not covered by these provisions. In spite of the traditionally limited competences for the EU institutions regarding the status of third-country nationals, the latter were affected by the abolition of border controls in the Schengen Area and the completion of the Single Market. With national borders effectively rendered invisible in the Schengen Area, it would be impossible to check the movement across internal frontiers by those not holding citizenship of the Union.

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<sup>9</sup> Walker (n 5) 20.

<sup>10</sup> Articles 17-22 EC.

With the creation of Justice and Home Affairs dispositions in the TEU, various aspects of migration to the EU were the subject of third pillar instruments. These included family reunion and unaccompanied minors, and a Joint Action on uniform residence permits.<sup>11</sup> The most significant advance in this area was, however, the Treaty of Amsterdam. The Treaty invigorated the domain of Justice and Home Affairs by transferring competences to the Community pillar and thus allowing the Commission a stronger role. The insertion of the new Article 63 EC was equally significant. This article laid down the obligation for the Council to adopt measures in asylum, refugee, entry and residence and immigration policy within five years of the entry into force of the Treaty.<sup>12</sup> These dispositions cover the main forms of migration to EU and can in many ways be seen as a ‘catch-up’ to the mobility rights enjoyed by EU citizens internally. By working under the assumption that the lack of *internal* border controls necessitates the coordination or harmonisation of dispositions regarding the *external* border and the conditions of third-country nationals in the EU, the Treaty of Amsterdam set a relatively ambitious programme for action.

The conclusions of the special meeting of the European Council in Tampere in October 1999 served as a guide to the ‘milestones’<sup>13</sup> to be created towards a Union of Freedom, Security and Justice.<sup>14</sup> These included a Common EU Asylum and Migration System,<sup>15</sup> elevating the legal status of third-country nationals to those of EU citizens through non-discrimination and allowing for a uniform set of rights ‘as near as possible to those enjoyed by EU citizens’.<sup>16</sup> The document also stressed the

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<sup>11</sup> S Peers, *EU Justice and Home Affairs Law* (OUP, Oxford 2006) 183.

<sup>12</sup> Article 63(1) – (4). It should be noted that during this five year period, Article 67 EC stated that the provisions proposed by the Commission or a Member State were to be adopted on the basis of unanimity. The five year period expired on 1 May 2004.

<sup>13</sup> This is the term employed in the Council conclusions.

<sup>14</sup> European Council, Presidency Conclusions (Tampere, 1999).

<sup>15</sup> European Council, Presidency Conclusions (Tampere, 1999), A (2).

<sup>16</sup> European Council, Presidency Conclusions (Tampere, 1999).

importance of readmission agreements and technical cooperation at the EU's borders, foreseeing the eventual adhesion of the (then) candidate states in Central and Eastern Europe and the Mediterranean who would constitute large parts of the enlarged Union's external border. The initial 'milestones' which appeared as legislative proposals soon after the Tampere Council were adopted in some cases, and dropped or watered-down in others.<sup>17</sup> The legal instruments which have come into being since Tampere are treated below according to their subject matter.

The Tampere Programme was followed in 2004 by the Hague Programme on strengthening FSJ in the EU and accompanied by an Action Plan.<sup>18</sup> Despite the suggestive implications of an 'Action Plan' for further concrete measures, the Hague Programme merely listed priorities for action and further discussion. The Hague Programme was therefore notable for launching the second phase of a forging a common policy in the asylum, migration and borders<sup>19</sup> but not for outlining a future legislative programme in the field of migration as had been the case at Tampere. It also did not call for a shift to qualified majority voting (QMV) in the Council for legal migration, meaning that is still subject to unanimity voting in the Council with only consultation of the European Parliament.<sup>20</sup> Taken as a whole, the Hague Programme reflects the Member States' preferences for maintaining national asylum systems and their respective legal migration channels rather than create a fully European system.<sup>21</sup> This perhaps explains why the general progress of implementation of the Hague Programme and the legal instruments was described by the Commission in July 2008 as 'mixed' at best.<sup>22</sup> Under the

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<sup>17</sup> Peers (n 11) 185-186.

<sup>18</sup> Commission (EC), 'The Hague Programme: Ten Priorities for the Next Five Years' COM (2005) 184 final, 10 May 2005.

<sup>19</sup> Hague Programme (2005) III 1(1.2).

<sup>20</sup> Peers (n 11) 186-187.

<sup>21</sup> M Garlick, 'The EU Discussion on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 *International Journal of Refugee Law* 601, 610.

<sup>22</sup> Commission (EC), 'Report on Implementation of the Hague Programme for 2007' COM (2008) 373 final, 2 July 2008.

Treaty of Lisbon, all provisions pertaining to JHA would be brought together under Title IV 'Area of Freedom, Security and Justice' and the reformed Article 63(a) would require the Union to develop 'a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'.<sup>23</sup> The co-decision procedure would be extended to legal migration, and harmonisation measures could go beyond minimum standards.<sup>24</sup>

With a basic legislative framework in place as guided by the Tampere Conclusions, and in spite of the absence of a fully Europeanised system of governance of migration, the EU has begun to view the different aspects of migration beyond the technical and to outline a more coherent programme for migration at an EU level. This is in evidence in the increasing use of the term 'policy' rather than 'measures' in proposals and documentation since the Treaty of Amsterdam and Tampere Conclusions.<sup>25</sup> An integral part of this process has been the linkage between migration and economic development (of both the EU and sending countries) and security. There has also been a more explicit linkage between EU and Member State level policies on migration: the JHA Council Conclusions in July 2008 noted, for example, that the European Pact on Immigration and Asylum contains 'common principles that are to guide migration policies at national and EU level'.<sup>26</sup> The Mediterranean region and the EU's relationships with the Partner States form a key component in the institutional policy-making process.

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<sup>23</sup> Article 79(1) TFEU, as inserted by the Treaty of Lisbon, Article 2(66).

<sup>24</sup> Article 79(2) TFEU, as inserted by the Treaty of Lisbon, Article 2(65).

<sup>25</sup> A Niemann, 'Explaining Visa, Asylum and Immigration Policy Treaty Revision: Insights from a Revised Neofunctionalist Framework' (2006) University of Bath, Constitutionalism Webpapers ConWEB No. 1/2006  
<<http://www.bath.ac.uk/esml/conWEB/Conweb%20papers-filestore/conweb5-2006.pdf>> (accessed 25 July 2008) 16.

<sup>26</sup> Council of the EU, '2887th Council Justice and Home Affairs Meeting Conclusions', 19-24-25 July 2007, 8.

## Borders, the Schengen Area and third-country nationals

Most Member States of the EU are part of the Schengen Area.<sup>27</sup> This has important consequences for their own national borders and immigration systems.<sup>28</sup> Within this space, internal frontiers effectively disappear by becoming 'weightless'.<sup>29</sup> Third-country nationals who need visas for short-term visits to a Schengen Member State are granted visas which are valid across the Schengen Area.<sup>30</sup> Measures do not yet extend, for example, to allowing third-country nationals similar rights in terms of employment through the limited means described below.

The Schengen Borders Code,<sup>31</sup> a Regulation which entered into force in October 2006, lays down the principle of the absence of border controls between EU Member States and the rules governing the EU's external borders.<sup>32</sup> The Schengen Information System (SIS) is used for surveillance cooperation between the Member States and a more extensive SIS is

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<sup>27</sup> The exceptions are the UK and Ireland, who have not adopted the Schengen *acquis* and opted-out when Schengen was incorporated in the Treaty arrangements by Treaty of Amsterdam. Cyprus, Bulgaria and Romania have not yet fully implemented the Schengen *acquis* but are expected to do so in the future. The *acquis* includes provisions on police cooperation, the Schengen Information System and technical frameworks at air, land and sea borders. The Council concluded in November 2007 that all of the 2004 enlargement states (except Cyprus) could become part of the Schengen area in December 2007. Council of the EU, '2827<sup>th</sup> Council Justice and Home Affairs Meeting Conclusions', 8-9 November 2007.

<sup>28</sup> These challenges have been discussed in relation to Slovenia and Poland in: B Zalar, 'The Experiences and Challenges for Adjudication on Refugee Law in Slovenia' (2006) 18 *International Journal of Refugee Law* 118; I Piorko and M Sie Dhian Ho, 'Integrating Poland in the Area of Freedom, Security and Justice' (2003) 5 *European Journal of Migration and Law* 175.

<sup>29</sup> D Kostakopoulou and R Thomas, 'Unweaving the threads: Territoriality, National Ownership of Land and Asylum Policy' (2004) 6 *European Journal of Migration and Law* 5, 6.

<sup>30</sup> This was first introduced in the Schengen Convention 1990, Articles 10-11.

<sup>31</sup> Council Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/1.

<sup>32</sup> Article 21 on internal border controls prevents Member States from carrying out checks on persons at border crossings irrespective of nationality. Member States may, however, require third-country nationals to 'report their presence on the territory of any Member State pursuant to the provisions of Article 22 of the Schengen Convention': Schengen Borders Code 562/2005, Article 21(d).

currently in the planning stages.<sup>33</sup> Coordination of the strengthening of the EU's external borders is the task of Frontex, an EU agency based in Warsaw which began work in 2005.<sup>34</sup> Its task is to coordinate operational cooperation between Member States with respect to the training of officials, joint operations and technical assistance.<sup>35</sup> Evaluating the work and role of Frontex is premature; however, its creation as an external border agency suggests that the Member States find agreement and cooperation through delegation to an EU agency easier when there is a perceived 'external' threat. The emphasis on border control reveals a prioritising of the strengthening of frontiers because of perceived 'risks' to the EU's territory. A similar point is in evidence with the establishment of the Rapid Border Intervention Teams (RABITs) by a Regulation.<sup>36</sup> Given the proximity of the Mediterranean, these measures are bound to have a strong impact on EuroMed and the relationships and identities of the EU and its Partner States. The nature of 'thicker' external borders is returned to below with specific consideration of the Mediterranean.

### **Migrant workers and economic migration**

Despite popular perceptions to the contrary, membership of the EU does not allow third-country nationals the right to work in any Member State of the EU. In fact, there are only limited means by which third-country nationals may seek employment in the EU. Many Member State governments have found themselves stressing the positive benefits of immigration (whether this is from the new Member States or outside the

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<sup>33</sup> Council Regulation (EC) 2424/2001 of 6 December 2001 on the development of the second generation Schengen Information System (SIS II) [2001] OJ L 328/L.

<sup>34</sup> Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the management of operation cooperation at the external borders of the Member States of the European Union (Frontex Regulation) [2004] OJ L 349/L. The Regulation does not apply to the UK or Ireland.

<sup>35</sup> Frontex Regulation 2007/2004 Article 2(1) (a) to (f).

<sup>36</sup> Commission (EC), 'Proposal for a Regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) no 2007/2004 as regards that mechanism' (Regulation Proposal) COM (2006) 401 final, 19 July 2006.



EU) whilst simultaneously attaching importance to measures designed to keep people 'out' and protect both welfare systems and national identities which are often claimed to be threatened. Member States seem to prefer this course of action rather than that of recognising that the decisions of their neighbours already have an impact on internal migration flows of third-country nationals within the EU.<sup>37</sup> Whilst the EU as a whole is facing long-term problems relating to an ageing population, common and comprehensive solutions at the EU level have not been forthcoming.

A directive covering admission to the EU for the purposes for employment and self-employment was proposed in 2001 as a consequence of the launch of the Tampere agenda. The proposal was not fully discussed in the Council as it attracted little support amongst the Member States.<sup>38</sup> The draft directive was accompanied by a communication on a QMV disposition for economic immigration policy.<sup>39</sup> Specific directives were successfully created in relation to researchers<sup>40</sup> (justified by reference to the Lisbon Agenda of making the EU a competitive knowledge-based economy)<sup>41</sup> and for the admission of students, pupils, trainees and volunteers.<sup>42</sup> Aside from family reunification, as examined below, the most significant directive in this area in terms of the number of individuals potentially covered has concerned migrants already resident in the EU, rather than those seeking entry. The Long-Term Residents Directive allows a third-country national who has been legally and continuously resident and working in a Member State the right to reside

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<sup>37</sup> Federal Trust, 'An Area of Freedom, Security and Justice in Europe?' (2007) Federal Trust Report <<http://www.fedtrust.co.uk>> (accessed 25 July 2008) 13.

<sup>38</sup> Commission (EC), 'Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities' COM (2001) 386 final, 11 July 2001.

<sup>39</sup> Peers (n 11) 185-186.

<sup>40</sup> Council Directive (EC) 2005/71 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289/15.

<sup>41</sup> European Council, Lisbon Presidency Conclusion, 23-24 March 2000.

<sup>42</sup> Council Directive (EC) 2004/114 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12.

in the same Member State or any other Member State.<sup>43</sup> A number of exceptions are provided for in the Directive, which suggests that if used, they would constitute limitations and a 'significant departure from the goal, as formulated in Tampere, of giving third-country nationals a comparable legal status to EU citizens'.<sup>44</sup> This is especially the case for employment and the right to social benefits, and as such the Directive has attracted criticism for maintaining long-term residents in a status of 'second class citizens'.<sup>45</sup>

The Constitutional Treaty proposed some majority voting in legal migration issues, but maintained the right of the Member States 'to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'.<sup>46</sup> This provision was retained by the Treaty of Lisbon and would improve the facilitation of legislation in this area.<sup>47</sup> The constant difficulty appears to be in agreeing what migration should be allowed, in what quantities and how.<sup>48</sup> A proposal for a directive establishing a 'blue card' system for non-EU nationals who would be able to work in highly skilled jobs was proposed by the Commission in October 2007,<sup>49</sup> but as with previous proposals of this type, faces lengthy discussions in the Council.<sup>50</sup> Without dispositions on legal and regular

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<sup>43</sup> Council Directive (EC) 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Long Term Residents Directive) [2003] OJ L 16/44.

<sup>44</sup> Y Schibel, 'Transposing EU Law on Legal Migration' (2005) 6 *European Journal of Migration and Law* 395, 401.

<sup>45</sup> L Halleskov, 'The Long-term Residents Directive: a Fulfilment of the Tampere Objective of Near-Equality?' (2005) 7 *European Journal of Migration and Law* 181, 200.

<sup>46</sup> Article III 267(5) Treaty Establishing a Constitution for Europe.

<sup>47</sup> Article 79(5) TFEU, as inserted by the Treaty of Lisbon, Article 2(68).

<sup>48</sup> In a 2005 Green Paper on an EU approach to managing economic migration, the Commission recognised that the Union had not yet been able to produce a common concept of admission for economic purposes: Commission (EC), 'An EU approach to managing economic migration' (Green Paper) COM (2004) 811 final, 11 January 2005.

<sup>49</sup> Commission (EC), 'Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment' COM (2007) 637 final, 23 October 2007.

<sup>50</sup> E Guild, 'EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative' (2007) Centre for European Policy Studies, CEPS Policy Brief No. 145/2007

migration to the EU the 'central plank' of an EU migration policy is absent.<sup>51</sup> An immediate point of comparison can be made with asylum law and policy.

The absence of general competences of the part of the EU to deal with migration suggests that there is no scope for the EU to employ means to manage migration flows. However, the main sources of provisions for third-country nationals at an EU level to exercise an economic activity in the EU are found in the bilateral agreements with third states. Here, the Commission has succeeded in gaining influence on migration policy. Such agreements with third states include those in the EU's neighbourhood such as those in the European Economic Area, pre-accession states and Russia. Turkey and the Maghreb Mediterranean Partner States have clauses in their Association Agreements which also allow for limited migration rights. There are a number of agreements with Turkey and their dispositions have frequently come under the scrutiny of the ECJ. The main status of Turkish workers in the EU is the Association Agreement 1963, the 1970 Protocol to the Association Agreement, and Decisions 2/76 and 1/80 of the Association Council concerning access to employment. For Morocco, Algeria and Tunisia, the bilateral agreements provide for equal treatment in social security for workers and family members and equality in working conditions. These rights were provided for in the original treaties in the 1970s and remained largely unchanged in the new agreements.<sup>52</sup>

## **Family reunification**

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<[http://www.libertysecurity.org/IMG/pdf\\_blueCard.pdf](http://www.libertysecurity.org/IMG/pdf_blueCard.pdf)> (accessed 25 July 2008).

<sup>51</sup> R Cholewinski, 'The Need for Effective Individual Legal Protection in Immigration Matters' (2005) 7 *European Journal of Migration and Law* 237, 261.

<sup>52</sup> The new agreements are: Euro-Mediterranean Agreement between the European Communities and their Member States and the Republic of Tunisia [1998] OJ L 97/2; for Euro-Mediterranean Agreement between the European Communities and their Member States and the Kingdom of Morocco [2000] OJ L 70/2 and Euro-Mediterranean Agreement between the European Communities and their Member States and the Republic of Algeria [2005] OJ L 265/2.

The reunification of third-country family members has become the most significant form of migration to the EU Member States in numerical terms.<sup>53</sup> This form of migration accounts for more than 50% of the total migration to some EU Member States.<sup>54</sup> Some of the Mediterranean Partner States have been amongst the major sending countries of migrant workers to the EU and, as a consequence of reunification, their family members.

Two situations for third-country family members coming to and residing in the EU require outlining here as each is treated under distinct legal frameworks. The two situations are for the family members of EU citizens, and family members of third-country nationals resident in a Member State of the EU. Family reunification can also be affected by the law on asylum and refugees, depending on the status of the applicants. The legal situation of third-country family members of a national of a Member State has been covered by Community law as far back as 1961.<sup>55</sup> As a general rule, however, EU law has only been relevant as to their situation once rights to free movement within the EU have been exercised. Currently, third-country nationals who are family members of an EU citizen exercising his or her free movement rights 'may provide more favourable immigration rights, especially for members of a migrant workers' family, when the free movement principle has been triggered legally'.<sup>56</sup>

The current legal framework for the non-EU citizen family members of a Union citizen resident in another Member State is provided for by

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<sup>53</sup> It should be noted that statistics currently take into account only the pre-2004 and 2007 enlargement Member States: GP Freeman, 'National Models, Policy Types, and the Politics of Immigration in Liberal Democracies' (2006) 29 *West European Politics* 227, 234-235.

<sup>54</sup> K Hailbronner, 'Asylum Law in the Context of a European Migration Policy' in N Walker (ed) *Europe's Area of Freedom, Security and Justice* (OUP, Oxford 2004) 42.

<sup>55</sup> Council Regulation (EEC) 15/1961 of 12 June 1961 [1961] JO 1073.

<sup>56</sup> Case C-370/90 *R v IAT and Surinder Singh ex parte Secretary of State for the Home Department* [1992] ECR 4265.

Directive 2004/38/EC, which came into force in 2006.<sup>57</sup> Family members are defined as spouses or registered partners (if such partnerships are recognised in the host Member State), direct descendants under the age of 21 and dependant direct relatives.<sup>58</sup> They are granted the right of entry to the Member State with only an entry visa (if one is required),<sup>59</sup> and benefit from residency rights so long as the Union citizen is working, studying or has sufficient resources so as not to be a burden on the host Member State's social assistance system. Citizens of all the Mediterranean Partner States except Israel require visas when crossing external borders of Member States.<sup>60</sup>

For the reunification of third-country nationals and their family members, the legal regime is covered by the Directive on Family Reunification adopted on the basis of Article 63(3)(a) EC.<sup>61</sup> This directive does not apply to the UK, Ireland or Denmark,<sup>62</sup> or to the family members of EU citizens.<sup>63</sup> The directive allows a right to family reunification of third-country nationals legally resident in a Member State. 'Family' is given a restricted definition and includes spouses and unmarried minors, though Member States are free to be less restrictive in their transposition of the Directive if they wish. Family members must be granted the same access to employment and education as the sponsor,<sup>64</sup> though Member States may invoke a delay before authorising family members to gain

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<sup>57</sup> K Groenendijk, 'Family Reunification as a Right under Community law' (2006) 8 *European Journal of Migration and Law* 215, 216.

<sup>58</sup> Council Directive (EC) 2004/58 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Free Movement Directive) [2004] OJ L 229/35, Article 2(2).

<sup>59</sup> Free Movement Directive 2004/58, Article 5(2).

<sup>60</sup> Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 81/1.

<sup>61</sup> Council Directive (EC) 2003/86 of 22 September 2003 on the right to family reunification (Family Reunification Directive) [2003] OJ L 251/12.

<sup>62</sup> Family Reunification Directive 2003/86, Preamble, Articles 17 and 18.

<sup>63</sup> Family Reunification Directive 2003/86, Article 3(3).

<sup>64</sup> Family Reunification Directive 2003/86, Article 14.

employment (Article 14(2), a potential further barrier to integration.<sup>65</sup> Family relationships may have also commenced after the sponsor entered the Member State,<sup>66</sup> and after five years the family members gain long-term autonomous residence rights,<sup>67</sup> mirroring those in the Long Term Residents Directive examined above.<sup>68</sup> Restrictions and limitations on the rights established by the directive are possible (Article 16) and a wide discretion is left to the Member States as to whether they use them or not. One example is the Dutch government's requirement that incoming family members pass an 'integration' test at a Dutch Embassy prior to arrival.<sup>69</sup> This directive also covers family members of refugees, the legal situation of which is examined below.

Returning to the issue of the intersection between EU law and human rights provisions, the European Parliament challenged certain aspects of the Family Reunification Directive,<sup>70</sup> specifically, that there may be additional conditions for integration for unaccompanied children over the age of 12 where there is national legislation to such effect, and applications for reunification must be submitted before a child reaches 15.<sup>71</sup> The ECJ dismissed the action as no absolute right for a third-country national to reside in a state could be found in the ECHR or other international treaties (including the Geneva Convention in the case of refugees)<sup>72</sup> and nothing in the Directive prevents Member States from authorising family reunification on grounds other than the Directive.

## **Asylum seekers and refugees**

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<sup>65</sup> Schibel (n 44) 401.

<sup>66</sup> Family Reunification Directive 2003/86, Article 2(d).

<sup>67</sup> Family Reunification Directive 2003/86, Article 15.

<sup>68</sup> Long Term Residents Directive 2003/109.

<sup>69</sup> Groenendijk (n 57) 223-224.

<sup>70</sup> Case C-540/03 *European Parliament v Council of the EU* [2006] ECR 5769.

<sup>71</sup> Family Reunification Directive 2003/86, Article 4(1)(d) and 4(6).

<sup>72</sup> A Edwards, 'Human Rights, Refugees, and the Right "to Enjoy" Asylum' (2005) 17 *International Journal of Refugee Law* 293, 309.

The issue of asylum has been pushed up the national political agendas in many Member States, and mainstream asylum policies in recent years have reflected a hardening of attitudes.<sup>73</sup> In fact, asylum figures in Member States in the mid-2000s are higher than in the mid-1980s, but contrary to public perceptions have continued to decline steadily each year since the peak during the early 1990s.<sup>74</sup>

Despite the argument that those seeking asylum and refugee status through forced displacement are fundamentally different from 'economic' migrants,<sup>75</sup> Article 63 EC also provided for measures to be taken. This is explained by the need for comprehensive measures due to the crossovers in legal status which can often occur for those seeking migration options to the EU.

All Member States of the EU are parties to the Geneva Refugee Convention.<sup>76</sup> The principle, according to Article 33 of the Convention, is that no state shall expel or return (*refouler*) a refugee to a territory where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. ECHR Article 3 on the prohibition of 'inhuman and degrading treatment' could apply in cases where refugees are refused entry or expelled.<sup>77</sup> The Charter of Fundamental Rights of the EU also recognises the right to

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<sup>73</sup> Kostakopoulou and Thomas (n 29) 6.

<sup>74</sup> E Thielemann, 'Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing' (2004) 6 *International Journal of Refugee Law* 47, 64; Garlick (n 21) 614.

<sup>75</sup> E Feller, 'Asylum, Migration and refugee Protection: Realities, Myths and the Promise of Things to Come' (2006) 18 *International Journal of Refugee Law* 509, 515; and more generally; E Feller, 'Refugees are not Migrants' (2005) 24 *Refugee Survey Quarterly* 27.

<sup>76</sup> Geneva Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention). The Convention covers basic principle for the protection of refugees. A refugee is defined in the Convention Article 1(A)(2) as someone who: 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

<sup>77</sup> *Chahal v United Kingdom* (1996) 23 EHRR 413. For further commentary on the limits of Article 3 ECHR; H Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' (2005) 24 *Refugee Survey Quarterly* 39

asylum.<sup>78</sup>

Unlike third-country nationals in the EU, no legislative measures were taken at the EU level which specifically addressed their legal situation before the coming into force of the Treaty of Amsterdam.<sup>79</sup> Greater coordination was discussed in the Council at the end of the 1980s to prevent multiple applications for asylum in the Member States, or 'asylum shopping'.<sup>80</sup> Unlike for economic migration, Member States have recognised and acted on the need for common action on asylum policy. The Dublin Convention 1990 created a framework to designate which Member State was responsible for dealing with individual asylum applications. The measures on asylum to be adopted within five years after the entry into force of the Treaty of Amsterdam covered the responsibility of the Member States for considering an application for asylum, minimum standards on the reception of asylum seekers, minimum standards with respect to the qualification of nationals of third countries as refugees, and minimum standards of procedures in Member States from granting or withdrawing refugee status.<sup>81</sup> Article 63(2) EC also stated that measures on refugees and displaced persons must be concluded vis-à-vis temporary protection to displaced persons from third countries as well as measure to promote a 'balance of effort' between Member States in bearing consequences of receiving displaced persons.<sup>82</sup> Key to this Article is the emphasis on minimum standards rather than full harmonisation. Member States may therefore continue to adopt 'national provisions which are compatible with this Treaty and with international

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<sup>78</sup> Charter of Fundamental Rights of the European Union (2000/C 364/01), Article 18.

<sup>79</sup> Guild notes that the only reference pre-1999 to refugees was found in Council Regulation (EEC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (Social Security Regulation) [1971] OJ L 149/2, Article 1(d): E Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *International Journal of Refugee Law* 630, 631.

<sup>80</sup> E Denza, *The Intergovernmental Pillars of the European Union* (OUP, Oxford 2002) 196.

<sup>81</sup> Article 63(1) and (2) EC, as amended by the Treaty of Amsterdam.

<sup>82</sup> Article 63(2) (a) – (b) EC, as amended by the Treaty of Amsterdam.



agreements'.<sup>83</sup>

The Tampere European Council Conclusions stated the aim of creating a Common European Asylum System (CEAS) to include clear and uniform rules and standards on procedures, and recognition and reception of asylum seekers.<sup>84</sup> Coupled with the CEAS, the Tampere Conclusions identified partnerships with sending countries,<sup>85</sup> the fair treatment of third-country nationals<sup>86</sup> and the management of migration flows<sup>87</sup> as the constituent parts of a common EU Asylum and Migration Policy. Commission proposals were made in 2000 and the first phase measures were adopted by 2005. The Dublin Convention 1990 was placed within the Union's legal framework by a Regulation, thereby reinforcing the hierarchy of criteria used to establish the Member State responsible for an asylum application.<sup>88</sup> The Regulation stressed the 'continuity' of the new Regulation (labelled 'Dublin II') with the original Dublin Convention.<sup>89</sup> In the Mediterranean context, some Southern EU Member States have objected to the 'gate-keeping' function of Dublin II, as they are most likely to be the first state of arrival.<sup>90</sup>

Article 67(1)(b) EC was the legal basis for the Minimum Reception Conditions Directive.<sup>91</sup> The Directive applies to persons claiming Geneva Convention refugee status in a Member State and lays down minimum standards only. Such provisions include, for example, informing asylum seekers as to 'at least any established benefits and of the obligations with

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<sup>83</sup> Article 63 EC, as amended by the Treaty of Amsterdam.

<sup>84</sup> European Council, Presidency Conclusions (Tampere, 1999) 13.

<sup>85</sup> European Council, Presidency Conclusions (Tampere, 1999) 11-12.

<sup>86</sup> European Council, Presidency Conclusions (Tampere, 1999) 18-21.

<sup>87</sup> European Council, Presidency Conclusions (Tampere, 1999) 22-27.

<sup>88</sup> Council Regulation (EC) 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II Regulation) [2003] OJ L 50/1.

<sup>89</sup> Dublin II Regulation, Preamble, 10.

<sup>90</sup> S Kneebone, C McDowell and G Morrell, 'A Mediterranean Solution? Chances of Success' (2006) 18 *International Journal of Refugee Law* 492, 493.

<sup>91</sup> Council Directive (EC) 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Minimum Reception Conditions Directive) [2003] OJ L 31/18.

which they must comply relating to reception conditions' within a maximum 15 day period,<sup>92</sup> access to the education system for minors,<sup>93</sup> and 'material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence'.<sup>94</sup> As is the case with other Directives below, Member States are free to offer more favourable conditions,<sup>95</sup> but it appears that many states only offer the minimum and may take advantage of the vague terms of the Directive (for example, the special duties with respect to persons with special needs)<sup>96</sup> to avoid making substantially more beneficial reception conditions.

The Qualifications Directive agrees the minimum standards for the qualification of a third-country national as a refugee or someone in need of international protection, and the content of the protection.<sup>97</sup> Many in need of protection fall outside the category of 'refugee' and may benefit from 'subsidiary protection'. This would seem to suggest that subsidiary protection is an inferior form of protection to that of the Geneva Convention, and NGOs including the Refugee Council in the UK have called for the use of 'complementary protection' as a preferred term.<sup>98</sup> Yet, fixing narrowly-defined categories of protection runs the risk of creating new groups of unprotected persons.<sup>99</sup>

In elaborating the definition of refugee for the purposes of EU asylum law, Articles 9 and 10 of the Directive refer to the forms of persecution which can give rise to protection. These include acts of

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<sup>92</sup> Minimum Reception Conditions Directive 2003/9, Article 5(1).

<sup>93</sup> Minimum Reception Conditions Directive 2003/9, Article 10.

<sup>94</sup> Minimum Reception Conditions Directive 2003/9, Article 13(2).

<sup>95</sup> Minimum Reception Conditions Directive 2003/9, Article 4.

<sup>96</sup> Minimum Reception Conditions Directive 2003/9, Articles 15(2)-(17-20).

<sup>97</sup> Council Directive (EC) 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive) [2004] OJ L 304/12.

<sup>98</sup> Refugee Council, 'Policy Response to the Home Office Consultation on the Qualification Directive' (2006) <<http://www.refugeecouncil.org.uk>> (accessed 25 July 2008) 2.

<sup>99</sup> J McAdam, 'The European Qualification Directive: the Creation of a Subsidiary Protection Regime' (2005) 17 *International Journal of Refugee Law* 461, 461-463.

physical, mental or sexual violence or denial of judicial redress, prosecution or punishment which is 'disproportionate or discriminatory'.<sup>100</sup> The reasons for persecution also cover religious beliefs, sexual orientation and gender-related aspects, as these may constitute 'membership of a particular social group'.<sup>101</sup> Persecution or fear of persecution must be sufficiently serious<sup>102</sup> and well-founded.<sup>103</sup> Whilst this definition of status is relatively broad, the exclusion clauses allow for a revocation of status, meaning that the rights of individuals to move, work or receive benefits would be restricted.<sup>104</sup>

The most contentious legislative instrument which has come out of the Tampere programme is the Asylum Procedures Directive.<sup>105</sup> First proposed in 2000, the Directive aims to 'establish minimum standards on procedures in Member States for granting and withdrawing refugee status'.<sup>106</sup> The Directive applies to individuals seeking refugee status under the Geneva Refugee Convention, and it may also apply to other asylum seekers if the Member State so wishes.<sup>107</sup> The procedural rights include being informed of decisions in writing, and in the case of a negative decision, to be informed of the factual and legal reasons for denial of asylum.<sup>108</sup> Despite criticism that the measures will protect asylum seekers insufficiently, minimum standards should (if properly enforced) raise the

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<sup>100</sup> Qualification Directive 2004/83, Article 9(2) (a) - (d).

<sup>101</sup> This category is particularly open to different interpretations: H Lambert, 'The EU Asylum Qualification Directive: its Impact on the Jurisprudence of the United Kingdom and International Law' (2006) 55 *International and Comparative Law Quarterly* 161, 169.

<sup>102</sup> Qualification Directive 2004/83, Article 9(1).

<sup>103</sup> Qualification Directive 2004/83, Article 10(2).

<sup>104</sup> Peers (n 11) 334. In *Chahal v United Kingdom* (n 77) it was stated that the protection of non-nationals from expulsion from the territory of States includes the real risk that they will be subject to inhuman or degrading treatment within the meaning of Article 3 ECHR or if they are the victims of a disproportionate interference with their right to respect for family life under Article 8 ECHR.

<sup>105</sup> Council Directive (EC) 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive) [2005] OJ L 326/13.

<sup>106</sup> Asylum Procedures Directive 2005/85, Article 1.

<sup>107</sup> Asylum Procedures Directive 2005/85, Article 3(3) and (4).

<sup>108</sup> Asylum Procedures Directive 2005/85, Article 9(1) and (2).

standards in operation in some Member States. For example, the Directive limits the grounds for rejecting claims as inadmissible only where the asylum seeker should seek protection elsewhere or repetitive/multiple applications have been made. Some Member States, including Spain and Portugal, operate much wider categories which has resulted in three-quarters of all applications being rejected as inadmissible.<sup>109</sup> The Directive has also been subject to criticism for the limited safeguards regarding appeals against decisions and the lack of a right to the suspensive effect of appeals.<sup>110</sup>

A related point, and of particular interest here in the context of the Mediterranean, are the dispositions on the nature and definition of 'safe countries of origin' to which individuals may be returned without a substantial examination of their application. Article 29 obliges the Council to produce a 'minimum common list of third countries which shall be regarded by Member States as safe countries of origin'. Inclusion of a country on this list would give Member States the option, as per Article 36, of not examining (at all or only in part) the asylum application of a person who has entered or is seeking to enter the territory from a country on the 'safe' list. The UNHCR has voiced serious concerns about the compatibility of these provisions with the Geneva Convention.<sup>111</sup> In any event, a common minimum list has not been agreed and following an action by the European Parliament, the ECJ annulled the provisions relating to the 'safe country list' due to the exclusion of the Parliament

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<sup>109</sup> M Fullerton, 'Inadmissible in Iberia: the Fate of Asylum Seekers in Spain and Portugal' (2005) 17 *International Journal of Refugee Law* 659, 661.

<sup>110</sup> J Vested-Hansen, 'Common EU Standards on Asylum: Optional Harmonisation and Exclusive Procedures?' (2006) 7 *European Journal of Migration and Law* 369; Peers (n 11) 342.

<sup>111</sup> United Nations High Commissioner for Refugees (UNHCR), 'The European Union, Asylum and the International Refugee Protection Regime: UNHCR's Recommendation for the New Multi-Annual Programme in the Area of Freedom, Security and Justice' (2004) <<http://www.unhcr.org/protect/PROTECTION/43661f532.pdf>> (accessed 25 July 2008)

from the process.<sup>112</sup>

The above four pieces of legislation form the backbone of the post-Tampere framework of asylum and refugee law at the EU level. The dates of adoption of the legislative measures demonstrate the extremely slow-moving process in the passing of FSJ legislation, even when only minimum standards are at stake. This was foreseen by some commentators at the time of the signing of the Treaty of Amsterdam,<sup>113</sup> and demonstrates both the nature of the agreement by wary Member States and the exclusion of major roles for the European Parliament and ECJ. To this section a further directive must be added. The Mass Influx of Persons Directive was the first legislative instrument passed following the Tampere programme, and it covers the scenario for temporary protection for a mass influx of displaced persons, enhancing and promoting burden-sharing between the Member States.<sup>114</sup> The temporary protection measures may last only for one year, though provisions are made for

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<sup>112</sup> Case C-133/06 *European Parliament v Council of the EU* [2008] OJ C 158/04. The Parliament also passed a resolution on before the decision of the ECJ on the case: European Parliament Resolution P6\_TA(2007)0286 of 21 June 2007 on Asylum: Practical Cooperation, Quality of Decision-Making in the Common European Asylum System [2006] T6-0286/2007, which included the following:

‘whereas Article 29 of Directive 2005/85/EC provides for the drawing-up of a minimum common list of third countries regarded as safe countries of origin, and noting that on the one hand this list has still not been drawn up and on the other hand that the Council did not take into account Parliament's opinion when adopting that Directive, for which reason an action for annulment of Directive 2005/85/CE is now pending before the Court of Justice of the European Communities (the Court of Justice); whereas such a list should be adopted under the co-decision procedure; whereas the inclusion of a country on that list does not mean automatically that asylum seekers from that country will be basically refused asylum, but rather that, according to the Geneva Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967 (Geneva Convention), there is an individual assessment of every single application’.

<sup>113</sup> P Boeles, 'Parliamentary and Judicial Control in Matters of Asylum and Immigration under the Treaty of Amsterdam' in T Heukels, N Blokker and M Brus (eds) *The European Union after Amsterdam* (Kluwer Law International, Dordrecht 1998) 220-221

<sup>114</sup> Council Directive (EC) 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Mass Influx of Persons Directive) [2001] OJ L 212/12. The preamble points to the events in the former Yugoslavia as the primary motivation for this legislation

extensions by QMV if the Council so wishes.<sup>115</sup> 'Mass' and 'large' are not given a definition, which mirrors the situation in UNHCR instruments.<sup>116</sup> However, the Directive states that the influx must come from a specific country or geographical area.<sup>117</sup> The Directive details the levels of protection to be afforded, including family reunification, employment and welfare provision, which are less extensive than those in the legislation examined above.<sup>118</sup> Although this chapter returns to the question of burden-sharing, within the Mediterranean context, it must be noted that this Directive has not been used. Neither are the burden-sharing mechanisms particularly extensive, even in the event that this Directive was used, since there no obligation to share the *financial* burden of a mass influx of persons.<sup>119</sup>

### **Irregular migration, returns, expulsions and readmission agreements**

Article 63(3)(a) and (b) covers measures on immigration policy relative to conditions of entry and residence, standards on procedures for the issue by Member States of long-term visas and residence permits (including those for the purpose of family reunion) and illegal immigration and illegal residence, including repatriation. 'Illegal' immigration is a problematic term, since it does not have a common definition and carries connotations of criminality rather than irregularity.<sup>120</sup> 'Illegal' immigrants are not only those who enter the EU by clandestine means but also individuals who enter and stay legally, for example as a tourist or under a work scheme, but do not leave when they should, and those whose asylum application fails. As such, although the Commission and Member States

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<sup>115</sup> Mass Influx of Persons Directive 2001/55, Articles 4-7.

<sup>116</sup> JF Durieux and J McAdam, '*Non-refoulement* through Time: the Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 *International Journal of Refugee Law* 4, 5.

<sup>117</sup> Mass Influx of Persons Directive 2001/55, Article 2(d).

<sup>118</sup> Mass Influx of Persons Directive 2001/55, Articles 8-16.

<sup>119</sup> Hailbronner (n 54) 69.

tend to speak of illegal (im)migration, here the term ‘irregular’ is preferred. Given the nature of irregular migration to the EU, exact statistics on numbers are not available. However, it is estimated that 90% of asylum seekers are forced to enter the EU via irregular means.<sup>121</sup> Figures on those who enter the EU and do not claim asylum are highly contested.

The ‘fight against illegal immigration’ is manifested in both ‘hard’ and ‘soft’ legal instruments and in operational elements used to strengthen borders, to the increasing involvement of third countries through readmission agreements and policy initiatives such as extra-territorialisation. Human trafficking has been the focus of a number of legislative instruments, using preventive, dissuasive and punitive measures.<sup>122</sup> These include creating rules for deciding which Member State is responsible for prosecution,<sup>123</sup> and granting limited rights to a residence permit to victims of trafficking.<sup>124</sup>

For the Commission, a returns policy is, ‘an integral part of a comprehensive Community immigration and asylum policy’.<sup>125</sup> Of the legislative instruments passed specifically with regard to returns, a Directive passed in 2001 provides for the mutual recognition of decisions on the expulsion of third-country nationals.<sup>126</sup> The Directive defines expulsion as third-countries who no longer fulfilling legal conditions for residence and for those whose expulsion is based on a ‘serious and present

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<sup>120</sup> T Balzacq and S Carrera, *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy* (Centre for European Policy Studies, Brussels 2005) 26.

<sup>121</sup> Oxfam, *Foreign Territory: the Internationalisation of EU Asylum Policy* (Oxfam GB, Oxford 2005) 3.

<sup>122</sup> Balzacq and Carrera (n 120) 28.

<sup>123</sup> Council Framework Decision (JHA) 2002/629 of 19 July 2002 on combating trafficking in human beings [2002] OJ L 203/1.

<sup>124</sup> Council Directive (EC) 2004/81 of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19.

<sup>125</sup> Commission (EC), ‘On a Community return policy on illegal residents’ (Communication) COM (2002) 564 final, 14 October 2002.

<sup>126</sup> Council Directive (EC) 2001/40 of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (Mutual Recognition of Expulsion Decision Directive) [2001] OJ L 149/34.

threat to public order or to national security and safety'.<sup>127</sup> A Directive on common standards and procedures in Member States for returns was proposed by the Commission in 2005, which would repeal Directive 2001/40 and replace it with a harmonisation of common rules, rather than mutual recognition only.<sup>128</sup> Frontex has a role to play in providing 'necessary assistance' to the Member States and collating best practices.<sup>129</sup>

The legal basis for Member States to cooperate in organising joint flights for returning third-country nationals to non-Member States is provided by a Council Decision.<sup>130</sup> With its appendix outlining guidelines for 'security provisions' before, during and after the flight, the Directive covers the operational means by which Member States open to other Member States participation in a joint removal of third-country nationals. This procedure has been criticised as creating charter flights full of returnees, which appear to be collective returns and therefore against the principle of *non-refoulement*.

Readmission agreements between the EU Member States and third countries are not new phenomena,<sup>131</sup> but they have become more widespread at Union level since 2000. Member States maintain their own 'safe country' lists, which may involve people being sent back on a bilateral basis and therefore without engaging the Dublin II Regulation. These lists differ from Member State to Member State. The Treaty of Amsterdam granted Community competence to conclude readmissions

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<sup>127</sup> Mutual Recognition of Expulsion Decision Directive 2001/40, Article 3(1)(a) and (b).

<sup>128</sup> Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals' COM (2005) 391 final, 1 September 2005.

<sup>129</sup> Frontex Regulation 2007/2004, Article 9.

<sup>130</sup> Council Decision (EC) 2004/573 of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [2004] OJ L 261/5.

<sup>131</sup> The Schengen countries concluded a readmission agreement with Poland in 1991, the first of its kind at the European level: C Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 European Journal of Migration and Law 35



agreements,<sup>132</sup> which was endorsed as a way forward by the Tampere Conclusions.<sup>133</sup> A bilateral readmission agreement requires parties to readmit, upon application and without any further formality, their nationals if they do not (or no longer) fulfil the conditions for entry to, presence or residence in the territory of the requesting state.<sup>134</sup> Readmission agreements are beginning to constitute a core instrument in the EU's policy on irregular migration.

The Council authorises the Commission to negotiate a readmission agreement. So far, agreements have been concluded with a number of non-EU jurisdictions, including Russia, Albania, Sri Lanka, Macao, and Hong Kong. For the EuroMed partners, readmission agreements are clearly envisaged and negotiations have begun with Morocco, Algeria and Tunisia.<sup>135</sup> Libya, not yet a EuroMed partner, is also an intended candidate for a readmission agreement.<sup>136</sup> The criteria for the authorisation to seek a readmission agreement were agreed at the Seville European Council 2002.<sup>137</sup> The criteria include: the extent of (relative) migratory pressure on the EU, states which have already signed an association or cooperation agreement, states adjacent to the EU, states where a readmission

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<sup>132</sup> Article 63(3)(b), as amended by the Treaty of Amsterdam.

<sup>133</sup> European Council, Presidency Conclusions (Tampere, 1999) 27.

<sup>134</sup> Balzacq and Carrera (n 120) 31.

<sup>135</sup> These were adopted on the basis of a Council Decision to which the respective agreements were attached: Council Decision (EC) 2007/341 of 19 April 2007 on the conclusion of the Agreement between the European Community and the Russian Federation on readmission [2007] OJ L 129/40; Council Decision (EC) 2005/371 of 3 March 2005 on the signing of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation [2005] OJ L 124/22; Council Decision (EC) 2005/372 of 3 March 2005 concerning the conclusion of the Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation. [2005] OJ L 124/43; Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing without Authorisation [2004] OJ L 143/97; Agreement between the European Community and the Hong Kong Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing without Authorisation [2004] OJ L 64/38.

<sup>136</sup> Commission (EC), 'The monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration' COM (2005) 352 final, 28 July 2005, 5.

<sup>137</sup> European Council, Presidency Conclusions (Seville, 2002).

agreement would 'add value' to Member States' bilateral agreement, and 'geographical balance'. There is no explanation of how the criteria were applied to the individual cases, but it appears from the extent to which the readmission agreements have been concluded that not all of the criteria need to apply in every case. The emphasis on neighbouring countries is clear since all, except Libya, have signed EuroMed Associated Agreements as the basis of their deepened 'partnership' relationship.

The tone of the readmission agreements seems also to be indicative of the way in which they are used by the EU in the pursuit of 'thicker borders'. Although readmission agreements are in theory to work on a two-way basis, in practice it is the EU which seeks to ensure that third countries accept the return of their nationals (and also non-nationals who have passed through the state in question) with a minimum of procedural formalities. Given that the perceived advantages of a bilateral readmission agreement are weighted towards the EU, incentives for third states to enter into a readmission agreement are an integral part of the negotiation process. For the Mediterranean partners a more accessible visa regime for lawful entrance to the Union's territory is often a key request.<sup>138</sup> In the context of the difficulties of reaching a common approach to lawful migration at the EU level, however, this request is strongly resisted by Member States in the Council.<sup>139</sup> Part of this resistance stems from the fear that it would be used not only by the citizens of Partner States but serve as an inducement for those from further South in Africa to attempt to enter the EU.<sup>140</sup>

The nature of the countries with which readmission agreements have been concluded or foreseen also raised important questions about the respect for human rights that the EU proclaims as one of its core values.

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<sup>138</sup> Interview with Council Official (Brussels, September 2008).

<sup>139</sup> M Schieffer, 'Community Readmission Agreements with Third countries: Objectives, Substance and Current State of Negotiations' (2003) 5 *European Journal of Migration and Law* 343, 356.

<sup>140</sup> Interview with Council Official (Brussels, September 2008).

Many of the third states have been the accused of serious human rights failings (including by the EU institutions and Member States), which suggests that those seeking asylum may have a valid case to present and returning them to a 'safe' country would undermine the whole platform of the EU's stated values.<sup>141</sup> Whilst it is probable that the political situation in the destination state may be more closely monitored, this is by no means automatically the case. Furthermore, readmission agreements raise legal and practical issues with regard to the administrative infrastructure and training of officials in human rights protection. This is particularly true where individuals are removed to a third state which they are not a national of, as this situation does not fall within the existing parameters of international law and the destination state may be ill-equipped to deal with subsequent asylum requests by those individuals.<sup>142</sup> This point is made by Kruse in relation to the readmission agreement with Albania, which entered into force in May 2006. Albania is now a EuroMed Partner State since late 2007, and its readmission agreement is now likely to hold important lessons for future agreements with states in North Africa and elsewhere in the Mediterranean.

## **Externalisation**

One of themes of this thesis thus far is to demonstrate that the pillar structure is longer an adequate means by which the competences of the EU institutions can be fully understood. To this must be added a further consideration which draws together the legislative provisions introduced under the auspices of the Tampere and Hague Programmes in the migration domain, that of the increasing externalisation of JHA and migration law and policy in particular.

It has already been stated above that any migration policy, by its

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<sup>141</sup> Balzacq and Carrera (n 120) 31-32.

<sup>142</sup> I Kruse, 'EU Readmission Policy and its Effects on Transit Countries: the Case of Albania' (2006) 8 *European Journal of Migration and Law* 115

very nature, incorporates an external dimension. However, it is evident that in an EU sense, law and policy output on migration with a specific externalised focus has increased dramatically since the Tampere Conclusions in 1999. This express desire on the part of the European Council to integrate migration policy measures taken in the internal sphere with the external sphere has helped to overcome the institutional divisions caused by the pillar structure.<sup>143</sup> After Amsterdam, the Commission gained a more significant role in negotiating agreements with third states on migration issues. Externalisation was given an even more explicit focus in the Hague Programme 2004 by emphasis on cooperation with third countries in the 'fight against irregular migration'. More recently, the European Pact on Immigration was proposed by the French EU Presidency and informally discussed by Member States on 7 July 2008. The Pact does not have legal force but may signal the way in which immigration (and border) policies may develop: Member States have agreed to refrain from large-scale regularisations (such as that which occurred in Spain in 2005) and to explore 'blue card' initiatives to encourage highly skilled (and discourage low-skilled) third-country workers to the EU.<sup>144</sup>

There are three dimensions to the externalisation of migration measures. All three contribute to a vision of the EU as ring-fenced by 'thicker borders' and can be said to concern regular and irregular migration. The first is in the literal sense of strengthening the borders by stepping up surveillance efforts and promoting cooperation between the Member States in land and maritime operations. Frontex is one example of this capacity-building on the part of the EU to control migration. As a strong feature of the enlargement process in Central and Eastern Europe, the Commission has used the accession process as a means of requiring

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<sup>143</sup> C Boswell, 'The "External Dimension" of EU Immigration and Asylum Policy' (2003) 79 *International Affairs* 619, 626.

<sup>144</sup> Council of the EU, '2887th Council Justice and Home Affairs Meeting Conclusions', 19-24-25 July 2007, 8.

new Member States to ameliorate their border controls in preparation for entry into the Schengen Area. Seeking the cooperation of non-accession third states in the EU's vicinity is vital: for example, in the maritime operations carried out since 2006 along the Southern Mediterranean coastline.<sup>145</sup>

Second, externalisation of JHA and migration policy can be characterised by more express cooperation with third states. The negotiation of readmission agreements with third states, so that migrants who do enter the EU irregularly will be returned to their home or transit state with fewer procedures hurdles, are a current (and growing) example of this. Similarly, regular migrants are also affected by the 'thicker borders' notion within the context of a gradual tightening of opportunities for economic migration from outside the EU. The 'thicker borders' concept points to the criminal dimension of irregular migration and attempts to prevent irregular migrants from reaching the EU by pursuing initiatives such as the extra-territorialisation of immigration controls in third states, including in processing centres. Measures, including penalising employers in the EU who employ irregular migrants,<sup>146</sup> also form part of this vision.

The third dimension to the externalisation of migration measures also stems from a thickening of the EU's border, but in a less physical sense. Various initiatives have arisen during the lifespan of the Tampere and Hague Programmes which attempt to tackle the motivations for both regular and irregular migration. Examples of these include the revisiting of the guest worker programmes which were phased out in Member States such as Germany in the late 1970s. An EU 'blue card' has also been proposed based on the perceived success of the US green card system, but for highly skilled workers only. Other ideas include the creation of job centres in certain African countries which are the major sources of

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<sup>145</sup> This is covered in more detail in the following chapter.

<sup>146</sup> Commission (EC), 'Proposal for a Directive of the European Parliament and the Council providing for sanctions against employers of illegally-staying third country nationals' COM (2007) 249 final, 16 May 2007.

irregular migrants: these would advise potential migrants as to the (limited) means of lawfully entering the EU and seeking employment.<sup>147</sup> The running theme in these initiatives is, however, to select only those the Member States desire to enter their territory and to ensure that they return home afterwards. This renewed emphasis on ‘circular migration’ has appeared as a priority in the relationship between migration and development policy in the Council, and therefore in the relationship between the EU and third states, including EuroMed Partner States and developing countries elsewhere.<sup>148</sup>

The extent to which migration control and its externalisation is now discussed at EU level serves as an example of the changing nature of policy areas. In spite of the characterisation of JHA as an ‘intergovernmental’ pillar, and the perceived sensitivity of Member State governments over the area of immigration, control measures have since 1992 moved from individual Member State level, to the intergovernmental sphere and eventually towards the supranational.<sup>149</sup> This is remarkable given the time period for these shifts in migration governance. Herein, however, is revealed a gap in whether these shifts can be viewed as a success. The Commission lauds the development of JHA as one of the most dynamic in European integration after the completion of the Single Market. Yet Member State governments have not been forthcoming in praising the achievements as seen by the Commission, and many remain attached in their discourse to ideas of national control as protecting the state from external threats linked to migration, hence ignoring the moves at European level. Furthermore, the externalisation of migration control via the means identified above demonstrates that decision and policy-making has moved not only upwards, but also outwards into the realm of

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<sup>147</sup> The first centre opened in Bamako, Mali in September 2008.

<sup>148</sup> Council of the EU, ‘2831<sup>st</sup> Council General Affairs and External Relations Meeting Conclusions’, 19-20 November 2007, 51.

<sup>149</sup> S Lavenex, ‘Shifting Up and Out: the Foreign Policy of European Immigration Control’ (2006) 29 *West European Politics* 329.

foreign policy. Hence, an interface between the CFSP and JHA policy-making spheres becomes visible. For example, as 'Justice and Home Affairs' has given way to the creation of an area of 'Freedom, Security and Justice', analysis of the documentation from EU institutions and Member States emphasises that the FSJ is of the Union territorial space only. The significance of this is that in order to ensure that the EU becomes and remains an area of FSJ, greater weight is to be attached to asylum and immigration policy, and effective protection of the Union's external borders. One example is the 18-month Presidency plan for the German, Portuguese and Slovenia Presidencies for 2007-2008, which foresaw the strengthening of FSJ via protection of the external borders and placed the Barcelona Process with the framework for cooperation in the 'external role' of the EU in security.<sup>150</sup> This attachment to the EU as an area of FSJ, rather than promoting Freedom, Security and Justice more generally (including, for example, in the Mediterranean space) creates a distinction between the EU and its Partner States.

Identifying how and why this move has occurred is important in framing the discussion in the next chapter of the interaction between EuroMed and migration policy. How can the externalisation of migration policy and measures to control migration at the EU level be explained? According to Lavenex, the 'shifting up and out' of migration policy (from state sovereignty to intergovernmental cooperation, towards supranational governance and finally foreign policy) can be explained by two factors. First, the move is a consequence of deepening European cooperation on migration control and the growing perception of migration as a threat to security through terrorism, fundamentalism and organised crime. This pre-dates the Treaties of Amsterdam and Maastricht as interior ministries in Member States began informal discussions on migration control in the 1970s, although it is only much more recently

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<sup>150</sup> Council of the EU, '18-month Programme of the German, Portuguese and Slovenian Presidencies' [2006] DOC 17079/06.

that institutionalisation through the Treaties has taken place.<sup>151</sup> The focus therefore shifts to the external in order to combat these issues, and especially since the ‘threats’ are strongly associated with the EU’s neighbourhood.<sup>152</sup>

Second, the dominant actors in migration decision-making are national government representatives in the Justice and Home Affairs Council, working in an institutional format which allows them to ‘increase their autonomy vis-à-vis other actors in the domestic and European policy arenas’.<sup>153</sup> What this means is that national government representatives avoid domestic constraints to reform, such as other political (opposition) parties or the courts, and hence increase their autonomy by gaining information advantages over domestic counterparts and acting as gatekeepers.<sup>154</sup> More recently, the increasing power of the supranational institutions via the communitarisation of JHA has meant that these domestic constraints are now visible at the EU level too, primarily due to the increased role of the Parliament. Thus, seeking a limited but growing *European* approach to migration can be perceived and this is largely due to the supranational actors such as the Commission and Parliament (who are not faced with the same electoral pressure as national government representatives) than the Council, where national representatives are more concerned with gaining possibilities that would be difficult to achieve at the national level. In a more concrete fashion, this means that repressive measures could be pursued at the Union level by JHA officials outside of the ‘humanitarian policy frames’ at the domestic level.<sup>155</sup> The shift towards migration policy in the external arena has the further advantage for the national governments of maintaining the intergovernmental characteristics associated with foreign policy and

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<sup>151</sup> V Guiraudon, ‘European Integration and Migration Policy: Vertical Policy-making as Venue Shopping’ (2000) 38 *Journal of Common Market Studies* 251, 260.

<sup>152</sup> Lavenex (n 149) 330.

<sup>153</sup> Lavenex (n 149) 330.

<sup>154</sup> Lavenex (n 149) 331; Guiraudon (n 151) 262.

<sup>155</sup> Lavenex (n 149) 332.



away from the stronger roles for the Commission and Parliament in the Community Method, which has now taken away from much of the initially intergovernmental third pillar. Hence, the transition of migration control and policy from the internal to the external becomes clearer.

The externalisation of migration control and the emergence of these issues in foreign policy depend much on the different interests of the institutions involved. Measures which can be seen as preventing or controlling migration, particularly irregular migration, to the EU are closely linked to the national interests of the Member States in the JHA Council. The synergy between migration control in the external sphere and foreign policy as intergovernmental frameworks is evident, and Member States are able to prevent, or rather bypass, the different interests of the Commission and Parliament. By contrast, holistic or comprehensive approaches to both regular and irregular migration (such as addressing root causes of migration in third countries) are more associated with the supranational institutions such as the Commission and Parliament. Discussion of the preservation of Member State interests, or even sovereignty, brings back in the potential role of the new modes of governance since here too the Member States are not bound by legally-enforceable pieces of legislation but 'softer' forms of governance including the Open Method of Coordination. With an emphasis on 'control', new modes of governance would gain an overall 'goal' that was identified as problematic when considering the application of new modes of governance to foreign policy more broadly defined.

With these competing institutional interests in mind, the externalisation of measures on migration further blurs not only the internal and external spheres of governance and policy-making, but also the frames for external action of the EU. The focus of the EU's foreign policy-making sphere is the CFSP, but the measures taken in relation to migration are not concluded under specific the CFSP articles in the TEU (11-28). However, Article 24 TEU states that, 'When it is necessary to

conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect'. Agreements, whilst not implying a formal transfer of sovereignty from the Member States,<sup>156</sup> can be concluded in pursuit of matters covered by JHA.<sup>157</sup>

In this light, the CFSP is neither irrelevant nor meaningless, but rather the Council, in adopting measures under the CFSP, becomes able to link migration more explicitly to the CFSP goals. The stated goal of the EU in the Mediterranean, according to the Common Strategy of 2000 is to 'help secure peace, stability and prosperity in the region'<sup>158</sup> and it goes on to list migration as an area for action.<sup>159</sup> This is reflected in linking migration discourse with security; for example, the European Security Strategy is 'a further indication of the Union's move towards the integration of JHA objectives and instruments in its foreign and security policy agenda'.<sup>160</sup> High Representative Solana's speech to the EuroMed Ministerial Conference in November 2007 noted that migration is 'very important for security' and as such deserves greater cooperative measures.<sup>161</sup> The link between security and controlling migration (which was present even before 9/11)<sup>162</sup> further reinforces the place of migration policy within foreign policy, and again highlights the place of this with Mediterranean relations via EuroMed.

#### The Barcelona Process and the European Neighbourhood Policy

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<sup>156</sup> Declaration no.4 of the Final Act of the Treaty of Amsterdam.

<sup>157</sup> Article 38 TEU.

<sup>158</sup> Common Strategy of the European Union 2000/458/CFSP on the Mediterranean Region [2000] OJ L183, 3.

<sup>159</sup> Common Strategy on the Mediterranean Region, 11.

<sup>160</sup> J Monar, 'The EU as an International Actor in the Domain of Justice and Home Affairs' (2004) 9 *European Foreign Affairs Review* 395, 413.

<sup>161</sup> J Solana, Summary of Remarks at the 9th Euro-Mediterranean Meeting of Foreign Ministers, Lisbon, 5-6 November 2007, SPEECH S319/97 <[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressdata/EN/discours/97017.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/discours/97017.pdf)> accessed 25 July 2008.

<sup>162</sup> Guiraudon (n 151) 260.

have begun to feature discussion of cooperation in migration (particularly irregular migration) and security strongly in the institutional framework, to the extent that it has become the most dynamic issue for discussion in EuroMed.<sup>163</sup> This has been supplemented by the European Neighbourhood Policy, expressed through the bilateral Action Plans, as an additional 'layer' to the system of governance in EuroMed. Indeed, although the Barcelona Process was not initially created with migration as an express area for discussion and cooperation, by the time of the launch of the ENP in 2004, this dimension of the EU's relations with its neighbours had begun to be more explicitly recognised, and migration issues have fed back into EuroMed. Migration and security were together placed at the heart of the Barcelona Process in 2005 when cooperation in these areas became a separate area for action in the partnership. Insofar as EuroMed is a partnership between the EU and its Mediterranean Partners, this provides an opportunity for the EU institutions to pursue migration goals within a cooperative framework of governance, albeit a system of governance in which the EU institutions and Member States play a more dominant role. The 'partnership' aspect of EuroMed fits with the emphasis on partnership with third countries which are 'sending' or 'transit' points for migrants, particularly irregular migrants. 'Partnerships' with such countries were stressed in both the Tampere and the Hague Programmes. The institutionalised forms of cooperation which have begun to appear in the Barcelona Process demonstrate the extent to which externalisation of internal policies in the EU has occurred. Whilst the foreign policy of the EU could be said to serve a purpose of pursuing external goals for internal purposes, the reverse could also be said to be true, that is by using internal measures to satisfy foreign policy goals.

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<sup>163</sup> Interview with Council Official (Brussels, September 2008).

## Conclusion

There is little doubt that migration has begun to feature more prominently in the CFSP, EuroMed and the external relations of the EU more generally. Migration and foreign policy are two prominent areas which Member States are extremely reluctant to pool sovereignty, even if common challenges which could be confronted together at the EU level are recognised. The analysis of migration measures which have been put into place reveal that even with the length of time involved, measures to prevent *irregular* migration have been more successfully put into place than policies on *regular* migration control. This involves both internal measures concluded via the Community method, and increasingly external elements, including the involvement of third countries. The latter contributes to the externalisation of migration control in both the physical sense (such as extra-territorialisation and control methods) and also in an EU policy-making sense as the moves to control migration shift from the internal policy-making sphere to the external, foreign-policy making sphere, where the Council (and hence the Member States) remain largely in control.

Externalisation and all of the above measures and practices concluded at EU level have strong effects on EuroMed. Due to the location of the Mediterranean Partners as both sending and transit countries for both regular and irregular migrants, measures concluded in the area of migration have often been the result of issues in the Mediterranean. Migration has become a highly politicised issue, and third countries are increasingly sensitive to efforts by the EU to create 'thicker borders' and shift migration problems further afield. Operational elements, identified in earlier chapters as being crucial to the understanding of the system of governance, are observable in the Mediterranean space. Since cooperation between the EU and Partner States is vital in carrying out the operational elements, there is a tension between the migration goals pursued by the

EU and the 'partnership' approaches underlying EuroMed. The following chapter identifies the specific nature of migration law and policy in EuroMed and the interaction between the CFSP, JHA and EuroMed in order to understand the relative importance of the latter and to ascertain how the practice elements of migration foreign policy reveal the existence and preference for preventative or repressive measures.



## Chapter 6: Interaction between EuroMed and Migration Governance

The discussion in chapter five on Justice and Home Affairs and its external dimension demonstrates that the foreign policy of the European Union is not hermetically sealed within the CFSP. Decision and policy-making in migration has moved upwards in recent years from the national level, through an intergovernmental frame towards supranational governance. The EU's competence in migration law and policy-making has become impossible to ignore, and with this competence has come a clear tendency to point to the foreign policy dimension of migration policy and control.

The two facets to this externalisation of migration policy and control, namely the strengthening of borders through physical means and the pursuing of policies designed to reduce migratory pressures on the EU, require to varying extents the cooperation of third states. EuroMed, within its institutional framework exhibiting multilateral, bilateral and unilateral features, would seem to be an ideal forum for cooperation, since it involves most state actors around the Mediterranean within its system of governance. The practical expressions and operational elements of migration management and control at the EU level can be analysed to see to what extent policies and practices are motivated by the management of migration through *repressive* or *cooperative* measures.

The identification of the most pertinent issues in the EU's migration policy towards the Mediterranean reveals that external border security and methods by which irregular migrants can be expelled from Europe, or prevented from arriving in the first place, are the current themes. This has been termed the EU's 'logic of exclusion'<sup>1</sup> and can be identified by the prioritisation of the language and instruments more commonly found in

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<sup>1</sup> E Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 International Journal of Refugee Law 630, 641.

police work, prosecution and penal policy than in the rights and freedoms of migrants.<sup>2</sup> The different interests and identities of the EU institutions, Member States, Partner States and actors in the other EuroMed institutions, such as the EMPA and Civil Forum, can be discerned from the language used in EuroMed documentation.

The Mediterranean Partner States are affected to varying extents by any migration measures taken by or within the EU (including those examined in chapter five), whether this involves their cooperation or not. The theoretical approach set out in chapter three placed the emphasis on how, in an institutional framework, logics of appropriateness arise which (can) influence behaviour. As such, attention is not only paid to the strategies and discourse of the EU institutions and Member States within EuroMed, but also in their approaches to how to deal with migration in this context.

It is essential in this chapter to look at three dimensions of the relationship between the governance of migration and EuroMed. First, the place of migration in the Barcelona Process will be analysed. This covers how the place of migration in EuroMed has evolved during the lifetime of the Barcelona Process, including through the addition of the ENP as a further layer to the EuroMed system of governance. Second, how and to what extent the documentation on migration governance emerging from EU actors (including the Member State holding the Presidency) reveals an emphasis on partnership/cooperation approaches across the Mediterranean with Partner States and whether this language stresses prevention and repression as responses to challenges. In other words, does the stated aim of a EuroMed 'partnership' figure strongly in migration law and policy at the EU level, or is consideration of it absent? This necessitates consideration of general policy and programmes such as the Global Approach to Migration, the Tampere and Hague Programmes

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<sup>2</sup> B Tholen, 'The Europeanisation of Migration Policy: the Normative Issues' (2005) 6 *European Journal of Migration and Law* 323, 329.



and Council Presidency Programmes as well as more specific bilateral agreements, such as readmission agreements. Wider consideration in the context of the general moves towards migration policy-making at EU level can reveal whether anything emerging from the institutional framework of EuroMed could be seen as ‘spillover’, given that migration is a policy area which operates across the institutional logics of the EU. Third, the increasing number of practical expressions of migration policy through the creation of Frontex and Rapid Border Intervention Teams (RABITs), the conclusion of readmission agreements with the Partner States and the discussion of extra-territorial processing centres reveal how, in practice, the weight of the measures taken rely on principles of prevention, partnership/cooperation or repression.

### **Migration and the Barcelona Process**

Migration of peoples has always been a hallmark of the Mediterranean region. Indeed, Braudel’s classic characterisation of the Mediterranean was as an ‘*espace de mouvement*’.<sup>3</sup> The Mediterranean Partner States, particularly those in the Maghreb, are a major source and transit point for migrants entering to the EU. With only limited means to enter through regular channels for the purposes of finding employment, the context of many measures taken with the Mediterranean in mind is that of irregular migration.

Migration issues in the Mediterranean are not only the concern of the Member States in the Southern part of the EU: Northern EU Member States have growing communities of peoples from the Mediterranean Partner States, and these Member States have demonstrated a keen interest in the future governance of Mediterranean migration. Once again, although reference is made to the Partner States as a group, not all are

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<sup>3</sup> F Braudel, *La Méditerranée et le monde méditerranéen à l’époque de Philippe II* (9th edn, Armand Colin, Paris 1990).

seen as sending or transit countries of migration. North African states are often the focus of the EU's discussion of migration issues. Israel is a particular exception amongst the Partner States as a destination country for migrants, regular and irregular.<sup>4</sup> To this picture of migration in the Mediterranean are added the large numbers of Palestinian refugees found in a number of Partner states in an uncertain legal situation,<sup>5</sup> and non-Palestinian refugees from elsewhere in the Middle East in Mediterranean Partner states.<sup>6</sup> Sub-Saharan Africa is the primary location of states suffering from 'protracted' refugee situations which contributes to migrants seeking asylum and/or using illegal and often dangerous migration routes to reach the EU. Migration in the Mediterranean is therefore not a simple picture of EU Member States 'receiving' nationals of the Mediterranean Partner States.

EU states in the Mediterranean have been in the media spotlight with regard to the situation of irregular migrants attempting to reach the EU in recent years. Malta, Spain and Italy have been the most vocal in pressing for EU help on dealing with the numbers of migrants entering, or attempting to enter, their territories. Irregular migration has also become a humanitarian issue as an increasing number of people risk their lives in crossing the Mediterranean to reach Europe by sea, and, once in the EU live beneath official radars and (especially in the case of trafficked individuals) potentially deprived of basic rights. The legislative instruments examined in the previous chapter have strong implications

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<sup>4</sup> L Copans, 'Israel vows entry ban on Darfur refugees' *Guardian* (London 20 August 2007) <<http://www.guardian.co.uk/sudan/story/0,,2152321,00.html>> accessed 25 July 2008.

<sup>5</sup> The largest numbers of Palestinian refugees are found in Lebanon, which does not accept legal responsibility for them and labels them 'stateless foreigners'. There are approximately 350,000 Palestinian refugees in the country, and about half live in the twelve United Nations Relief and Works Agency for Palestine Refugees (UNRWA) camps: UNRWA, 'UNRWA in Figures' (2007) <<http://www.un.org/unrwa/publications/pdf/uif-june07.pdf>> accessed 25 July 2008.

<sup>6</sup> For background to the Palestinian issue in Lebanon and other Partner States: S Haddad, 'The Origins of Popular Opposition to Palestinian Resettlement in Lebanon' (2004) 38 *International Migration Review* 470; R Zaiotti, 'Dealing with non-Palestinian Refugees in the Middle East: Policies and Practices in an Uncertain Environment' (2006) 18 *International Journal of Refugee Law* 333.

for the states in the Southern part of the EU as transit points for people heading elsewhere in the Union.

With migration issues high on the political agendas of the Member States, it would be logical to suggest that the Barcelona Process would be an appropriate framework for discussion of the issues. The lifespan of the Barcelona Process is interesting because it straddles important developments in the context of EU competence in migration and important changes in the nature of Mediterranean migration patterns. The first ten years of EuroMed were punctuated by the events of 9/11, the aftermath of which has had important effects on the discourse and practice of EU migration policy towards the Mediterranean, often emphasising the 'security' aspects of migration.

The first EuroMed Ministerial Conference in 1995 produced the Barcelona Declaration, and contained only one express mention of the migration issue in the text:

In the area of illegal immigration they [the EuroMed participants] decide to establish closer cooperation. In this context, the partners, aware of their responsibility for readmission, agree to adopt the relevant provisions and measures, by means of bilateral agreements or arrangements, in order to readmit their nationals who are in an illegal situation.<sup>7</sup>

This was supplemented in the Work Programme attached to the Declaration with the following provisions:

Given the importance of the issue of migration for Euro-Mediterranean relations, meetings will be encouraged in order to make proposals concerning migration flows and pressures. These meetings will take account of experience acquired, inter alia, under the MED-Migration

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<sup>7</sup> Barcelona Declaration 1995.

programme, particularly as regards improving the living conditions of migrants legally established in the Union.<sup>8</sup>

and

Officials will meet periodically to discuss practical measures which can be taken to improve cooperation among police, judicial, customs, administrative and other authorities in order to combat illegal immigration. These meetings will be organised with due regard for the need for a differentiated approach that takes into account the diversity of the situation in each country.<sup>9</sup>

The limited references to migration in the Barcelona Declaration were nevertheless indicative in their content of a both a multilateral and bilateral framework based on partnership and cooperation, and potentially covering both regular and irregular migration. The cross-cutting nature of migration issues meant that it would be within any or all of the three 'baskets'. The passage from the Barcelona Declaration cited above is interesting because of the emphasis it places on the obligation on the partners' awareness 'of their responsibility for readmission'. This suggests from the outset that the EU, primarily the Council in this context, envisaged the conclusion of readmission agreements from the outset. It has already been noted in chapter four that the Barcelona Declaration reflected the far greater input the EU had into its content than the Partner States. Readmission of nationals who are in an irregular situation between the EU and the Partner States is in practice not a two-way process: the return of citizens of Partner States and other third states to the partners is the main purpose of such agreements. Readmission agreements are a means by which the EU and its Member States can seek

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<sup>8</sup> Barcelona Declaration 1995.

<sup>9</sup> Barcelona Declaration 1995.

to control migration flows. This provision in the Barcelona Declaration reveals that the basis of cooperation from the outset in EuroMed can be seen to be based on likely demands by the EU on the Partner States, of which readmission agreements was one. At the time of the Barcelona Declaration, Partner States (particularly those in North Africa) were the source of a higher proportion of migrants to the EU than ten years later.<sup>10</sup> The placing of migration at the heart of EuroMed in 2005 is also indicative of how these patterns have changed: Partner States have become increasingly used as transit points to Europe but they have also become destinations for migrants. The place of migration in EuroMed has shifted in order to reflect a growing perception of a shared problem between both the EU and the Partner States.<sup>11</sup> The original discussions on migration centred on economic development of the Partner States as a means to remove the need for Partner State citizens to try to enter Europe. Now, this dimension of migration has given way to linkage of migration to security, which is also presented as a common concern to both sides of the Mediterranean.

Following the events of 9/11 and subsequent terror attacks in Europe and in the Partner States, cooperation on migration at the EU level found a new impetus. Cooperation became grounded in measures taken to combat terrorism, which similarly was not given a prevailing presence in the original Barcelona Declaration. Whereas migration was, at the time of the Barcelona Declaration, seen as a 'soft security' issue, the redefinition of security and the subsequent acts of terrorism in Madrid and London demonstrate that migration can have 'hard security' issues, although not in a traditionally defined way (i.e. threats from individuals motivated by a particular ideology, rather than from external states). This has evolved during the lifetime of the Barcelona Process to such an extent that some claim that security, rather than development, has become the core

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<sup>10</sup> Interview with Council Official (Brussels, September 2008).

<sup>11</sup> Interview with Council Official (Brussels, September 2008).

concern of the EU institutions and Member States.<sup>12</sup>

The European Neighbourhood Policy places much more weight on counter-terrorism issues that had been the case in EuroMed.<sup>13</sup> Through the reinforcement of the system of governance in EuroMed by the ENP, references to migration in EuroMed often stress the link between the fight against terrorism on both sides of the Mediterranean. Council Conclusions, such as those at Laeken immediately following the attacks in the United States in 2001, emphasised the strengthening of external border controls in order to 'help in the fight against terrorism'. An Action Plan was adopted in Valencia in 2002 that gave further impetus to reinforced cooperation in the Mediterranean for migration.<sup>14</sup>

The linking between migration and security by the EU has been made not only in relation to security within its own borders, but of the internal security of the Partner States. By pointing to the occurrence of terror attacks in Morocco, Tunisia and Jordan, the Commission and Council have attempted to link security with migration issues and therefore convince the Partner States that there are benefits for all in increased security cooperation. However, there is an important difference identified by Collyer:

... migration is not universally considered as a security risk, but most frequently associated with terrorism in wealthier parts of the world. Migration did not figure in explanations of the attacks outside Europe or North America, such as those in Morocco, Algeria, Jordan, Indonesia, Saudi Arabia and Turkey, or the regular attacks in Iraq. Associations with

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<sup>12</sup> G Aubarell and X Aragall, 'Immigration and the Euro-Mediterranean Area: Keys to Policy and Trends' (2005) Euro-Mediterranean Study Commission, EuroMesCo Papers No. 47 <[http://www.euromesco.net/media/euromesco\\_paper\\_47.pdf](http://www.euromesco.net/media/euromesco_paper_47.pdf)> (accessed 25 July 2008) 11.

<sup>13</sup> Commission (EC), 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Communication) COM (2003) 104 final, 11 March 2003, 1.

<sup>14</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Valencia, 2002).

migration were not significant, and responses have not focused on border control, even when the perpetrators were actually identified as international migrants. In Europe the reverse has been true. Bombs in Madrid and London were immediately associated with migrants in the press even when this was shown not to be true in London.<sup>15</sup>

The subsequent effects of terror attacks and the fear of attacks has been a linkage of security discourse with migration policy and, in the operational field, border control measures. Collyer notes that during the British Presidency of the European Council in 2005 border control measures were the usual solutions proposed as responses to terrorism.<sup>16</sup> Despite the emphasis on strategic approaches to tackling migratory pressures which would seem to indicate a preventative approach with the full involvement of the Mediterranean Partners, the linking of security and migration within the Work Programme and insistence that this is for the benefit of all is problematic. By linking migration and security together under the justification that it would benefit all the EuroMed participants, the agreement actually attempts to ensure that Partner States' cooperation can be engaged in the pursuit by EU actors for a 'thicker border', ensuring that would-be terrorists are prevented from entering the EU.

The implications for EuroMed and the foreign policy of the EU in the Mediterranean in the context of the legislative instruments adopted is a growing link with security and the thickening of borders. The Barcelona Process is therefore faced with an apparent paradox: as a means by which the two sides of the Mediterranean can cooperate across the baskets, there is both a decline in the importance of borders (which the conclusion of a Free Trade Area in particular implies) and a thickening of borders, driven

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<sup>15</sup> M Collyer, 'Migrants, Migration and the Security Paradigm: Constraints and Opportunities' (2006) 11 *Mediterranean Politics* 255, 265.

<sup>16</sup> Collyer (n 15) 265.

by the desire both to limit (irregular) migration and fight terrorism. The legal measures and operational elements under discussion and in practice between the EU and its Mediterranean partners demonstrate this paradox. In the preliminary years of the Barcelona Process, the emphasis on economic development and a Free Trade Area as a means to promote prosperity on both sides of the Mediterranean, seems to have given way to a desire to seek cooperation based on security concerns. Calls for reinforcing or 'better managing' the EU's external border implies that whilst cooperation is needed from third states, this will be undertaken by a 'give and take' approach on a bilateral basis, rather than through a partnership of equals.

By the time of the tenth anniversary of EuroMed, the competences of the EU institutions in migration had become more developed, as explored in the previous chapter, and a gradual European approach to different aspects of migration had begun to tentatively take shape. Employing again Lavenex's paradigm of 'shifting up and out', migration had begun to move towards the realm of foreign policy. The linkage between migration policies and the EU's foreign policy was made in the conclusions of the Feira European Council 2000.<sup>17</sup> This represented a shift from the Council's view that the establishment of an area of Freedom, Security and Justice did not bring with it the aim to have a specific 'JHA' foreign policy.<sup>18</sup> It also demonstrated that despite reluctance of the part of Member States to communitarise migration policy, an external impetus for cooperation existed without 'compromising national asylum and immigration systems'.<sup>19</sup> 'Justice and Home Affairs' has become 'Freedom, Security and Justice' in the internal sphere of governance, but in linking security

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<sup>17</sup> S Lavenex, 'EU External Governance in "Wider Europe"' (2004) 11 *Journal of European Public Policy* 680, 689.

<sup>18</sup> J Rijppma and M Cremona, 'The Extra-Territorialisation of EU Migration Policies and the Rule of Law' (2007) European University Institute, EUI Working Papers No. 2007/01 <<http://www.iue.it/PUB/LawWPs/law2007-01.pdf>> (accessed 25 July 2008) 2.

<sup>19</sup> S Lavenex, 'Shifting Up and Out: the Foreign Policy of European Immigration Control' (2006) 29 *West European Politics* 329, 330.



discourse with measures designed to thicken the external border of the EU, it appears that the FSJ applies primarily to the territory of the EU, and not the Mediterranean space as a whole.

The EuroMed Work Programme 2005 elevated migration to the fourth major area for cooperation in addition to the three existing baskets. The objectives in migration cooperation are, in an identical way to cooperation in the other three baskets, divided into objectives and followed by the means by which these objectives are to be met. It is interesting to note that the promotion of 'legal migration opportunities' is the first objective identified in the programme, but the means by which this objective is to be met in practice contains no further details.<sup>20</sup> By contrast, combating illegal migration is accompanied by specific actions to be undertaken involving 'all aspects' of this form of migration including readmission agreements and capacity building. It is also interesting to note that in the Commission's proposal for the content of the Work Programme, migration issues do not feature strongly in its express 'short to medium term challenges' of human rights and democracy, sustainable economic growth and reform and education. Initiatives on discussion of migration issues and 'programmes and actions aiming at encouraging ... a joint approach to the management of migratory flows should now be realised' are mentioned along with noting the 'sensitive' nature of migration and the social integration of migrants.<sup>21</sup> The Programme links legal and illegal migration in the same part of the programme:

#### Rather than focussing on reducing migratory

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<sup>20</sup> [the Euro-Mediterranean Partnership will enhance cooperation in these fields to] promote legal migration opportunities, work towards the facilitation of the legal movement of individuals, recognising that these constitute an opportunity for economic growth and a means of improving links between countries, fair treatment and integration policies for legal migrants, and facilitate the flow of remittance transfers and address 'brain drain'. The objective, at point 12(e) reads simply as to: 'Promote legal migration opportunities and integration of migrants': EuroMed Work Programme 2005, 11(a).

<sup>21</sup> Commission (EC) 'Tenth Anniversary of the Euro-Mediterranean Partnership: A Work programme to meet the challenges of the next five years' (Communication) COM (2005) 139 final, 12 April 2005, 2(4).

pressures partners should agree on a more strategic approach that aims to optimise the benefits of migration for all Partners. Such an approach would include intensified cooperation aimed at preventing human tragedies that take place in the Mediterranean as a result of attempts to enter the EU illegally. Preventing further loss of life needs to be a clear priority in the framework of the partnership.<sup>22</sup>

It appears, therefore, that the Commission's approach to migration is more strategic and long-term, yet this does not appear to have translated strongly into the final work programme. As it is unlikely to be the Partner States that point to the need for readmission agreements, it can be surmised that the Council has been more active in promoting solutions to the challenges of irregular migration than longer term solutions which focus on shared benefits and an overall reduction in migratory pressures through economic development. This point is supported by the proposal by the French Presidency to the Council for a European Pact on Immigration, which overlapped with existing Commission strategies for immigration and asylum, but which used much stronger terms including 'zero tolerance' (for trafficking in human beings) and a 'visa policy which serves the interests of Europe and its partners' under the heading of 'security'.<sup>23</sup>

Drawing out the EU's approach to migration in the Mediterranean can be discerned by the language contained in the multilateral and bilateral dimensions of the Barcelona Process, where the institutions of the EU and the Member States through the Presidency and Council have pursued policies which have the characteristics of partnership, but which are often pursued in order to 'thicken' the EU's external border. It is also useful to examine the language of the documentation outside the scope of

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<sup>22</sup> Commission (n 21) 2(4).

<sup>23</sup> Council of the EU, '2887th Council Justice and Home Affairs Meeting Conclusions', 19-24-25 July 2007, 8.

the Euro-Mediterranean Partnership, in order to evaluate to what extent the policies pursued through the frame of JHA set the context for the pursuit of the CFSP goals, and the place of EuroMed as part of a more holistic approach to migration issues within the EU. As such, the following scope of analysis is wider than the practices arising from the EuroMed institutions.

### **EuroMed Ministerial Conferences**

The annual EuroMed Ministerial Conferences between the foreign ministers of the EuroMed participants, the Commission and Council have gradually attached more weight to discussion of migration issues. However, it was only in late 2007 that a specific ministerial meeting was held on migration following the provision in the 2005 five year work programme agreed in Barcelona for Ministerial level dialogue.<sup>24</sup> This stands in contrast to the more extensive contacts between ministers holding portfolios dealing with economic, science and technology, fishing and cultural issues which have occurred since the early days of the Barcelona Process.<sup>25</sup> The preparation of the first meeting on migration took much longer and was more complex than all other ministerial conferences in EuroMed: preparation began during the German Presidency in early 2007, but the meeting did not eventually occur until during the Portuguese Presidency later in the year.<sup>26</sup>

Migration did not feature strongly in the early Ministerial Conference Conclusions and was generally only found within the third basket of social, cultural and human affairs. The weight of the discussions on migration was thus grounded within the integration of migrants and cultural dialogue, rather than as a political or security issue. Experts and

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<sup>24</sup> EuroMed Work Programme 2005, 12(a).

<sup>25</sup> These all figured in the evaluation of the first full year of the operation of Euromed: Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Malta, 1997).

<sup>26</sup> Interview of Council Official (Brussels, September 2008).

officials held sporadic meetings on migration during the early years of the Barcelona Process, which were recognised in the Ministerial Conclusions.<sup>27</sup>

A shift in the focus language of the Ministerial Conference conclusions can be perceived from 2000 onwards. By this time, the Council's the CFSP Common Strategy of 19 June 2000 had defined the CFSP objectives of the EU in the Mediterranean, which included greater emphasis on tackling irregular migration, in particular 'through the establishment of readmission arrangements relating to own and third country national as well as persons without nationality'.<sup>28</sup> The Tampere Conclusions in 1999 heralded the beginning of the legislative measures described in chapter five and the development of the external dimension of JHA. As such, the EuroMed Ministerial Conclusions gradually moved from emphasis on migration issues within the context of the 'integration of third-country nationals residing legally in the territory of the Member States' as part of the social, cultural and human affairs basket towards placing migration within the political and security basket. Although not referring to migration, but rather 'illicit trafficking of all kinds', the EuroMed Marseille Conclusions 2000 pointed to the need for measures for the common security of all in the Mediterranean.<sup>29</sup>

The Commission's Communication in preparation for the fifth EuroMed Conference 2002 noted that 'migration and human exchange are of vital importance to the Partnership ... the migration issues need to be addressed in a comprehensive way in which partners have an open eye for the causes of migration and the need to respond in a global manner that will include an active policy in the area of socio-economic cooperation, legal migration and illegal migration'.<sup>30</sup> The Ministerial Conclusions

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<sup>27</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Stuttgart, 1999).

<sup>28</sup> Council Common Strategy (CFSP) 2000/458 on the Mediterranean Region [2000] OJ L183, 22.

<sup>29</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Marseille, 2000).

<sup>30</sup> Commission (EC) 'Communication to Prepare the Meeting of Euro-Mediterranean

permitted the Commission to take forward the implementation of a regional cooperation programme including concrete measures on JHA issues, including migration, as part of the Valencia Action Plan. The JHA Commissioner considered the JHA mandate to cover ‘the entire field of Justice and Home Affairs’<sup>31</sup> and as an endorsement for multilateral and bilateral cooperation with Mediterranean partners, through the Association Agreements.<sup>32</sup>

Whilst migration remained formally within the third basket in the Valencia Action Plan, it appears that this was as the result of the Commission’s attempt to ‘import’ JHA goals within the EuroMed framework, since it would be the Commission’s role to take forward the cooperation measures with the Mediterranean Partner States. The language of the Framework Document endorsed by the Ministerial Conference in 2002 is of a ‘comprehensive and balanced approach’.<sup>33</sup> Yet, the presence of measures in the form of readmission agreements (to be promoted ‘as far as possible’ between the EU and Partner States and between Partner States themselves),<sup>34</sup> and assistance measures designed to build up institutional capacities dealing with asylum applications in Partner States, are indicative of more repressive aims.<sup>35</sup> It appears the initial focus in the Ministerial Conclusions in the early years of the Barcelona Process on migrant’s rights, where there could exist genuine partnership efforts, had given way to the insistence on the part of the Commission, Council and Member States to include ‘concrete measures’ more linked to security and the fight against terrorism within the social, cultural and human affairs basket. The Commission recognised the

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Foreign Ministers’ (Communication) SEC (2002) 159 final, 13 February 2002, 6.

<sup>31</sup> A Vitorino, ‘The European Dimension of Immigration, Policing and Crime’ [2006] SPEECH/01/297.

<sup>32</sup> Commission (n 21) 31.

<sup>33</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Valencia, 2002).

<sup>34</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Valencia, 2002) II (3) (b).

<sup>35</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Valencia, 2002) II (2) (c).

concerns from Partner States over the rights of their citizens resident (regularly or irregularly) in the EU,<sup>36</sup> but the prioritising of certain aims linked with security reinforces the view advanced in this thesis of a system of governance in EuroMed with the EU institutions as stronger central actors.

The Naples and Dublin EuroMed Ministerial Conferences in 2003 and 2004 substantially increased the time devoted to discussion of migration issues. Again, the Conclusions demonstrate a mixture of cooperative and partnership approaches within a desired 'global approach', but with an increasing linkage to the consideration of 'security concerns' and 'the management of migratory flows'.<sup>37</sup> Although this was balanced with consideration for the facilitation of the legal movement of persons and social integration, it is telling that the only concrete measure referred to at Naples was the combating of illegal migration through readmission agreements.<sup>38</sup> The Conclusions of the Mid-term meeting at Dublin in 2004 were even more explicit in that, 'Ministers renewed their commitment to the conclusion of readmission agreements'.<sup>39</sup> This approach is justified within the Conclusions by reference to the need of all partners to prevent loss of life in the Mediterranean by migrants attempting to reach Europe by irregular means.<sup>40</sup> Demonstrating the synergy between the EuroMed Ministerial Conclusions and the Council Conclusions, readmission agreements and technical assistance for management of migration through border controls were listed as priorities in the Mediterranean for the EU in its Strategic Partnership

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<sup>36</sup> Commission (EC) 'Governance and Development' (Communication) COM (2003) 615 final, 20 October 2003, 28. This point is also made by R Gillespie, 'Reshaping the Agenda? The Internal Politics of the Barcelona Process in the Aftermath of September 11' in A Jünemann (ed) *Euro-Mediterranean Relations after September 11: International, Regional and Domestic Dynamics* (Frank Cass, London 2004) 29.

<sup>37</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Naples, 2003) 60.

<sup>38</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Naples, 2003) 60.

<sup>39</sup> Euro-Mediterranean Mid-term Ministerial Conference, Presidency Conclusions (Dublin, 2004) 71.

<sup>40</sup> Euro-Mediterranean Mid-term Ministerial Conference, Presidency Conclusions (Dublin, 2004) 71.

with the Mediterranean and the Middle East, prepared by the CFSP High Representative and approved by the Council in June 2004.<sup>41</sup>

Migration issues in the EuroMed Ministerial Conference conclusions post-2004 reflect the bilateral approaches favoured by the European Neighbourhood Policy Action Plans in putting into practice cooperation on JHA matters. The initial neighbourhood policy initiative 'Wider Europe' (which eventually became the ENP) also made explicit references to the impact of migration on the Union's neighbourly relations.<sup>42</sup> The externalisation of border controls towards the Partner States, by emphasising the need for border management and capacity building particularly in the Maghreb states, has begun to be more prominent and couched in terms of addressing the root causes of migration in African sub-Saharan states.<sup>43</sup> The origin of these points in the Conclusions is evident when one looks at the input of the EU Member State holding the Presidency, and the Commission. The joint programmes of the Luxembourg-UK (2005), Austria-Finland (2006) and Germany-Portugal-Slovenia (2007-8) Presidencies all point to the increased need to 'focus on practical measures to improve cross-border cooperation, strengthening the security and management of the external border and increasing cooperation'.<sup>44</sup> For its part, the Commission's submission to the EuroMed Conference on the 10<sup>th</sup> anniversary of the Barcelona Process linked cooperation in JHA, including migration, between the Mediterranean Partner States with the drive to bring them 'closer to the

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<sup>41</sup> Council, EU Strategic Partnership with the Mediterranean and the Middle East (2004) <<http://consilium.europa.eu/uedocs/cmsUpload/Partnership%20Mediterranean%20and%20Middle%20East.pdf>> accessed 25 July 2008, 4.

<sup>42</sup> Commission (n 13) 6.

<sup>43</sup> Euro-Mediterranean Ministerial Conference, Presidency Conclusions (The Hague, 2004) 30-31; Euro-Mediterranean Ministerial Conference, Presidency Conclusions (Luxembourg, 2005) 49.

<sup>44</sup> Council, 'Operational Programme of the Council for 2005 submitted by the incoming Luxembourg and United Kingdom Presidencies' (2005) 15503/04, 2 December 2004, 82. The Joint Austria-Finland programme placed 'particular emphasis' on border control: Council, Operational Programme of the Council for 2005 submitted by the incoming Austrian and Finnish Presidencies (2005) 16065/05, 22 December 2005, 41.

EU'. This aim formed part of the five-year work programme for the Barcelona Process and was adopted by the Ministerial Conference at Barcelona in November 2005.<sup>45</sup> The language here reveals that the strategy of the EU Member States, Council and Commission in promoting both migration and foreign policy goals through Euromed's multilateral institutions results in Conclusions which the Mediterranean Partner States have only limited input. The 10<sup>th</sup> anniversary of EuroMed coincided with two important developments: the establishment of Frontex, the EU's External Border Management Agency, and the publication of the EU's Global Approach to Migration, adopted by the Council in December 2005. In confronting migration issues, the latter envisaged a role for EuroMed within the following terms:

Use all available frameworks for cooperation with Mediterranean partners ... to prevent and combat illegal migration and trafficking in human beings, build capacity to better manage migration, and explore how best to share information on legal migration and labour market opportunities, for example through the development of migration profiles and through strengthening sub-regional fora.<sup>46</sup>

A specific Ministerial-level meeting on migration in EuroMed took place during the Portuguese EU Presidency in November 2007.<sup>47</sup> As discussed above, issues were not restricted to irregular migration, but also indicated future projects for cooperation in legal migration (such as pre-departure training courses for migrant workers and job centres in Partner States on legal opportunities for work in EU Member States). Nevertheless, the most concrete proposals were again found in the section on illegal

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<sup>45</sup> Euro-Mediterranean Ministerial Conference, 'Five Year Work Programme' (Barcelona, 27-28 November 2005).

<sup>46</sup> Council of the EU, '2701<sup>st</sup> Council General Affairs and External Relations Meeting Conclusions', 12 December 2005, 9.

<sup>47</sup> Euro-Mediterranean Ministerial Conference, 'First Euro-Mediterranean Meeting on Migration: Agreed Conclusions' (Algarve, 18-19 November 2007).



migration, where Partner States were offered assistance in improving technical standards in national travel documents, the supporting of any EuroMed initiatives by Frontex, and, once again, readmission agreements with both EuroMed partners and source countries.

### **Euro-Mediterranean Parliamentary Assembly (EMPA) and EuroMed Non-Governmental Platform**

The EMPA, the development of which was analysed in chapter four, has also discussed migration issues within its multilateral setting. Unlike the Ministerial Conferences, the EMPA plenary sessions have been held at the end of an annual presidency held alternately by an EU Member State parliament (or the European Parliament) and the national Parliament of a Partner State.<sup>48</sup> As a result, the language of the official documents of the EMPA sessions is markedly different from those of the Ministerial Conferences. Parliamentarians have consistently opted in their Declarations for emphasis on the rights of migrants including the promotion of integration and especially as regards women.<sup>49</sup> The Parliamentary Forum<sup>50</sup> at Bari in 2002 passed a resolution on migration,<sup>51</sup> which placed far more emphasis on the rights of non-EU citizens in the EU Charter of Fundamental Rights and the development-related aspects of migration, such as combating poverty and the 'brain drain' from countries in the South. Whilst externalisation measures such as readmission agreements were noted as to their importance in fulfilling obligations of partners, the place of this within the context of solidarity and respect for rights was stressed. Given the inherently political and sensitive nature of

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<sup>48</sup> The EMPA bureau's proposal to hold two annual sessions was presented to the Ministerial Conference which launched the Barcelona Process: Union for the Mediterranean in July 2008.

<sup>49</sup> Euro-Mediterranean Parliamentary Assembly, Final Declaration of the Presidency, (Tunis, 16-17 March 2007) 5-6.

<sup>50</sup> The Euromed Parliamentary Forum became the Euromed Parliamentary Assembly in 2004.

<sup>51</sup> Euro-Mediterranean Parliamentary Forum, Final Declaration of the Presidency, (Bari, 17-18 June 2002).

discussions on migration, it is likely that some Parliamentarians from Partner States are unwilling to give strong views on migration policy in order to avoid contradiction with national governments.<sup>52</sup> Nevertheless, further evidence of parliamentary opinion was provided by the clear opposition to extra-territorial processing centres in the conclusions of the EMPA plenary session in Cairo in 2005:

[The Euro-Mediterranean Parliamentary Assembly] expresses concern over the establishment in the Mediterranean countries, at the request of some Member States of the Union, of 'initial reception centres' for immigrants targeting the Union's territory, which fail to provide minimal guarantees for the fundamental rights of the persons concerned; recalls that management of migration flows should be based not exclusively on security considerations, but also on the management of sustainable and social development of the Mediterranean countries<sup>53</sup>

The institutionalised forum for NGOs and civil society within EuroMed, which in 2005 became the EuroMed Non-Governmental Platform, has unsurprisingly been critical of the measures pursued to control/manage migration in the Mediterranean. The Platform's Malaga Meetings in 2005 evaluated the 10 year existence of the Barcelona Process and was critical of the lack of emphasis placed within the social, cultural and human basket on migration. In particular, the contributing NGOs from both sides of the Mediterranean lamented the 'current treatment of migration issues – exclusively security based – and of cultural exchanges – marginalized'.<sup>54</sup> This was reiterated at the Civil Forum in Marrakech in

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<sup>52</sup> Interview with European Parliament Official (Brussels, September 2008).

<sup>53</sup> Euro-Mediterranean Parliamentary Assembly, Final Declaration of the Presidency, (Cairo, 12-15 March 2005)

<sup>54</sup> EuroMed Non-Governmental Platform, 'Malaga Meetings: General Conclusions' (2005) <[http://www.euromedplatform.org/spip/IMG/pdf/Malagua\\_meetings.pdf](http://www.euromedplatform.org/spip/IMG/pdf/Malagua_meetings.pdf)> accessed 25 July 2008, 5.

2006, which expressed strong opposition to the use of the multilateral, bilateral and unilateral dimensions of EuroMed and the ENP to transform the Mediterranean Partner States into 'frontier zones'.<sup>55</sup>

### **Bilateral EuroMed relations**

The importance of the bilateral relationships and the 'grid' of Association Agreements and Action Plans between the EU and each of the Mediterranean Partners as constituent parts of the system of governance in EuroMed was explored in chapter four. By concluding agreements with each of the partners, diverse and specific goals in migration can be pursued, depending on 'which are most salient for the partner in question and for the EU'.<sup>56</sup> Algeria, for example, has more provisions on justice, freedom and security, as the Commission recognised in its Tenth Anniversary review of EuroMed.<sup>57</sup> This reflects both its size and population (and hence more potential migrants coming from and transiting through its territory) and generally weaker relationship with the EU than its neighbours Morocco and Tunisia.

Similar provisions apply in the area of migration, where provisions for readmission agreements for nationals illegally resident in the territory of either party are included in some of the Agreements. These are found in the agreements with Algeria (Article 84), Egypt (Article 68), Lebanon (Article 68), but not with Jordan or Israel. The clauses are the launch pad for further, more detailed agreements on readmission and combating irregular migration.<sup>58</sup> Legal migrant workers in the EU from Tunisia and Morocco benefit from non-discrimination clauses. Article 64 of both the

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<sup>55</sup> EuroMed Non-Governmental Platform, 'Marrakech Civil Forum: Final Declaration' (2006) <[http://www.euromedplatform.org/spip/IMG/pdf/Final\\_Declaration\\_-\\_2006\\_Civil\\_Forum.pdf](http://www.euromedplatform.org/spip/IMG/pdf/Final_Declaration_-_2006_Civil_Forum.pdf)> accessed 25 July 2008.

<sup>56</sup> Commission (EC), 'European Neighbourhood Policy Strategy Paper' COM (2004) 373 final, 16.

<sup>57</sup> Commission (n 21) 31.

<sup>58</sup> For example, EC-Algeria Euromed Association Agreement, Article 84(2).

EC-Tunisia and EC-Morocco Association Agreements reads as follows: ‘The treatment accorded by each Member State to workers of Tunisian/Moroccan nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals’. These provisions have been held to have direct effect by the ECJ.<sup>59</sup>

The specific legal basis for the conclusion of readmission agreements, Article 63(3)(b) EC, was examined in chapter five. Agreements have begun with several states in North Africa and it is likely that further agreements will be sought with the other EuroMed sending and transit states. As readmission agreements first appeared during the 1990s with prospective EU Member States, this practice has continued with more recent agreements concluded with neighbouring states of Albania, Moldova and Ukraine. The neighbourhood is very much the priority focus of this tool, which can be explained by the scope of the readmission agreements which include not only nationals of the neighbouring states but also nationals of other states who have transited through state(s) in the Union’s neighbourhood. Given the numbers of citizens of EuroMed Partner States in the European Union, the readmission agreements, once concluded, may potentially affect more than any of the current agreements the EU has concluded which are in force. However, readmission agreements have not yet been successfully concluded with any of the Partner States, except Albania. Albania is however an unusual case in the EuroMed context since EU membership is potentially open to it in the future, and the readmission agreement was concluded before it was invited to join EuroMed. It should be seen more as a pre-cursor to eventual enlargement negotiations. More telling are the lengthy discussions with the Maghreb states on readmission agreements which have either failed or resulted in

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<sup>59</sup> The case concerned a Tunisian national resident in Germany: Case C097/05 *Gattoussi v Stat Rüsselsheim* [2006] ECR I-11917. A similar worded clause is found in the EC-Algeria Euromed Association Agreement, Article 67, though this Agreement has yet to be fully ratified.

numerous difficulties and points of contention.<sup>60</sup> In particular, the situation of non-nationals of the EuroMed Partner States being returned to the Partner State they transited through would, in sufficient numbers, cause a strain of the resources and capacity of institutions to deal with them.<sup>61</sup> A Commission document appraising the progress of the Global Approach to Migration notes that since obtaining mandates to negotiate readmission agreements with Morocco and Algeria in 2000 and 2002 respectively, the Commission has not yet succeeded in concluding negotiations. The Commission cites the main problem with Algeria being the latter's refusal to consider readmission at EU level.

As discussed above, the inducements that the EU offers in order to conclude readmission agreements have occasionally included visa facilitation for (regular) third-country nationals to enter the EU. However, the instances where this has occurred is with jurisdictions not envisaged as future EU members, such as Hong Kong and Macao. These are also not jurisdictions which are a major source of migration flows to the EU. It would be logical to assume that a more liberal visa regime would not an inducement likely to be offered to EuroMed Partner States, especially states such as Algeria and Egypt which are both populous and, in the context of the security measures taken in a number of Member States in recent years, seen as likely to facilitate entrance to the EU's territory of individuals seen as 'security risks'. The Council is also wary of putting in place visa facilitation measures for students and business representatives which could be exploited.<sup>62</sup> The Austrian Presidency of the Council in 2005 proposed that visa facilitation for all EuroMed, ENP and Western Balkan states should be undertaken as a means to conclude readmission agreements, but this was not included in the final Council Conclusions

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<sup>60</sup> Commission (EC) 'Interim Progress Report on the Global Approach to Migration' (Staff Working Document) SEC (2007) 1632, 5 December 2007, 6.

<sup>61</sup> M T Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: the Safe Country Concept Revisited' (2006) 18 *International Journal of Refugee Law* 571, 589.

<sup>62</sup> Interview with Council Official (Brussels, September 2008).

text.<sup>63</sup>

The Commission has presented the need for readmission agreements as a means to stem the flow of irregular migration across the Mediterranean and thus avoid the humanitarian costs.<sup>64</sup> In this light, it seems that readmission agreements are presented as a confidence-building measure and contributing towards the governance of migration in the Mediterranean as a whole. Whilst it might be conceived that the EU has enough trust in its Mediterranean partners to regard them as 'safe' enough to send back migrants without detailed examination of their asylum claims, the reality of a readmission agreement is likely to be different. Since the bilateral agreement will only be useful for readmission of nationals in one direction (that is from the EU to the Partner State) then it appears that it may be, according to one Moroccan commentator, 'perceived as another tool for imposing European will on a small and weak country'.<sup>65</sup> Furthermore, the nature of sending irregular migrants back to states in North African states where only a relatively weak administrative framework exists for dealing with them is a concern voiced by UNHCR. As part of a bilateral agreement, Italy has already been undertaking removals from the Italian island of Lampedusa to Libya, often without giving individuals the opportunity to apply for asylum, and for which it has been criticised by UNHCR as being essentially *refoulement* in all but name.<sup>66</sup>

Further evidence of the importance the Council places on readmission agreements is provided by its more general migration strategy. The Global Approach to Migration adopted during the UK Council Presidency in December 2005 focused priority action on Africa

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<sup>63</sup> European Council, Presidency Conclusions (Brussels, 17 July 2006) 10633/1/06.

<sup>64</sup> Commission (EC) 'Tenth Anniversary of the Euro-Mediterranean Partnership: A Work programme to meet the challenges of the next five years' (Communication) COM (2005) 139 final, 12 April 2005, 2(4).

<sup>65</sup> E A Mrabet, 'Readmission Agreements: the Case of Morocco' (2003) 5 *European Journal of Migration and Law* 379, 385.

<sup>66</sup> UNHCR, 'UNHCR deeply concerned over Lampedusa deportations' (2005) Press Release, 18 March 2005 <<http://www.unhcr.org/news/NEWS/423b00a54.html>> accessed 25 July 2008.

and the Mediterranean and referred to the significance of readmission agreements.<sup>67</sup> It may be very difficult to perceive how, in a partnership of 'joint ownership', they will benefit the Partner States unless tied to very specific inducements in other, perhaps economic, areas. In addition, one reason why the Partner States may be reluctant to conclude such agreement is their weak institutional capacity to deal with a potentially large number of returnees. Partner states would be likely to prefer greater emphasis on the economic dimensions to EuroMed to address the imbalance in development between North and South, and are minded to the risk of diversion of funds through an emphasis on border security rather than the establishment of the Free Trade Area and associated economic benefits.<sup>68</sup> The question of the significant sums of money created by remittances by regular and irregular to the Partner States is not an insignificant consideration too.

In terms of the externalisation of migration policy, the enthusiasm of Member States for readmission agreements as expressed through the Council can be explained by the 'shifting up and out' logic explored at the end of chapter four. By more readily returning individuals in an irregular situation, Member State governments bypass domestic constraints, including potentially lengthy legal proceedings, as well as holding centres. Member States' readiness to allow the EU institutions the competence to conclude readmission agreements within the context of their reluctance to pool sovereignty in the field of legal migration demonstrates that EuroMed serves as a means by which preventative and repressive policies can be pursued. As mixed agreements, they allow for a strong role for the Commission to take forward, but nevertheless resemble 'traditional' foreign policy tools in restricting the democratic oversight by other institutions.

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<sup>67</sup> Gil-Bazo (n 61) 584-585.

<sup>68</sup> J P Cassarino, 'The EU Returns Policy: Premises and Implications' (2006) European University Institute MIREM Research Project Paper  
<<http://www.mirem.eu/research/reports/rep1>> (accessed 25 July 2008).

## Unilateral mechanisms: MEDA and ENPI funding

As examined in chapter four, the funding of the EuroMed Partnership has evolved from a funding instrument into a means of pursuing a strategic plan in the Mediterranean. The two MEDA Regulations which originally envisaged the completion of the Free Trade Area are the primary means by which funding would be granted for projects under the auspices of the Barcelona Process. The annexes to MEDA I and MEDA II Regulations did not mention migration or security.

Since 2007, MEDA has been replaced by the European Neighbourhood Partnership Instrument (ENPI). Beyond the significance of bringing the funding mechanism with the ENP, which operates on a firmly bilateral basis with the Partner States, the funding has become subject to much more stringent strategy goals the EU wishes to pursue in the Mediterranean. This is clear from the ENPI Regional Strategy Paper 2007-2013,<sup>69</sup> where migration is listed as one of the five policy priorities of the EU and indeed channels the work programme for the 2007-2013 period into three objectives, of which 'a common Euro-Mediterranean area of justice, security and migration cooperation' is the first, and a sustainable economic area only second. Stating the importance of migration in the Mediterranean as a result of the EuroMed Ministerial Conference in Barcelona on 2005, followed by an express channelling of projects around this as a primary objective, reveals the extent to which the funding of EuroMed has transformed from facilitating the initial aim of creating a Free Trade Area to using it as a means to secure the EU's area of Freedom, Security and Justice. This point is underlined later in the same document, where it is stated that, 'issues related to Justice and Home Affairs, border control, the fight against terrorism and crime have come to the forefront

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<sup>69</sup> Commission (EC), 'European Neighbourhood and Partnership Instrument (ENPI) Regional Strategy Paper 2007-2013' [2007] <[http://ec.europa.eu/world/enp/pdf/country/enpi\\_euromed\\_rsp\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_euromed_rsp_en.pdf)> (accessed 25 July 2008), 3.



in the Euro-Mediterranean Partnership'.<sup>70</sup> The unilateral dimension to EuroMed has clearly been transformed and reflects an agenda based around the search for security and thicker borders, rather than the *economic* goals of the Barcelona Process which appeared to be dominant in 1995.

### **Operational dimensions to migration control in the Mediterranean: Frontex, RABITs and Extra-territorial Processing**

The twin factors of the evolution of the Freedom, Security and Justice policy area within the EU and dismantling of national borders in the Schengen Area has led to the establishment of a specialised agency charged with coordinating the management of the EU's external borders. Frontex, which has been operational since 2005, has undertaken several short-term operations in the Mediterranean since its inception: Poseidon in the Eastern Mediterranean Sea and on the Greek-Turkish land border (June-July 2006), Nautilus in the area around Malta and Southern Italy (August and October 2006) and Hera operations I, II and III in the Canary Islands (July and August-December 2006, February and March 2007).

These operations were triggered by requests from Malta (Nautilus) and Spain (Hera) for assistance from Frontex pursuant to Article 8 of the Frontex Regulation.<sup>71</sup> Experts and personnel were seconded to Frontex from at least five other Member States in each case. Nautilus involved the surveillance of international waters around Malta, as well as the territorial waters of third countries from the coasts of which potential

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<sup>70</sup> Commission (n 69) 7.

<sup>71</sup> 'one or more Member States confronted with circumstances requiring increased technical and operational assistance when implementing their obligations with regard to control and surveillance of external borders may request the Agency for assistance. The Agency can organise the appropriate technical and operational assistance for the requesting Member State(s)'. Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the management of operation cooperation at the external borders of the Member States of the European Union (Frontex Regulation) [2004] OJ L 349/1, Article 8.

immigrants depart.<sup>72</sup> According to Frontex's figures on Hera II, almost 4000 irregular migrants en route from Africa to the Canary Islands were intercepted and prevented from making the journey.<sup>73</sup> Although most of the African countries from where the migrants were departing, or attempting to depart, are not EuroMed Partner States, there are nevertheless important considerations for EuroMed. First, with the extension of the Hera programmes through 2006 and 2007 due in part to their effectiveness, irregular migrants may use alternative land routes to reach the Northern African coast and attempt to enter the EU by this means. Secondly, by preventing would-be migrants from leaving, a bilateral agreement is needed between the state concerned (i.e. Spain for the case of Hera) and the departing states (mainly Mauritania and Senegal). In doing so, the EU border is effectively 'exported', putting the Frontex measures into a similar category as those explored below.

Frontex does not have competence to conclude binding agreements with third states. It may, however, seek to conclude 'working arrangements' with third states. The process of doing so involves the granting of a mandate by the Management Board (composed of representatives of the border authorities of the Member States and two representatives of the Commission).<sup>74</sup> The working arrangements are of a technical nature and are an initial step in the development of 'sustainable partnerships'.<sup>75</sup> According to the Frontex Regulation they are, however, to be concluded 'in the framework of the European Union external relations policy'. Working arrangements have been concluded with Russia, Ukraine and Switzerland and mandates to agree working arrangements have been granted in relation to 11 other states, including four EuroMed Partner

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<sup>72</sup> Rijpma and Cremona (n 18) 21-22.

<sup>73</sup> Frontex, 'HERA Statistics' (2008) <<http://www.frontex.europa.eu/gfx/frontex/files/hera-statistics.pdf>> accessed 25 July 2008.

<sup>74</sup> Frontex Regulation 2007/2004, Article 21(1).

<sup>75</sup> Interview with Frontex Officer (Warsaw, March 2008).

States: Turkey, Morocco, Egypt and Mauritania.<sup>76</sup> A mandate to conclude a working arrangement with Libya has also been granted but it is not clear how this fits into the Frontex Regulation Article 14 requirement of being with the framework of the EU's external relations policy, since the EU has only a limited relationship with Libya. It is possible, however, that the working arrangement will serve as a confidence-building measure and, if agreed, will come into force if and when Libya joins EuroMed by accepting the Barcelona '*acquis*' of which migration cooperation, as the fourth basket, is now an integral part. In return for cooperation on preventing irregular migration in the Mediterranean, Partner States have requested equipment and/or funding to invest in border management. As Frontex is not equipped with funding mechanism, it is limited to offering cooperation in research and training only.<sup>77</sup>

In addition to the Frontex operations, multilateral cooperation agreements have also been effectuated since 2004 at a sub-EU level based on common initiatives by groups of states. The UK, France, Italy and Portugal carried out 'Operation Ulysses' in 2005 with the goal of deflecting migration by sea in the Northern Mediterranean; the UK has led a project on interception in the Turkish seas known as 'Project Deniz', and Greece, Spain, France, Italy, the UK, Cyprus and Malta have established 'Operation Triton' for the South-Eastern Mediterranean. These agreements are primarily intended to improve border surveillance and interdiction capacity.

Rapid Border Intervention Teams (RABITs) were introduced by a Regulation, amending the previous Frontex Regulation.<sup>78</sup> The purpose of RABITs is to provide logistical help to any Member State facing a sudden influx of migrants, with an emphasis on providing expertise, for example,

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<sup>76</sup> Interview with Frontex Officer (Warsaw, March 2008).

<sup>77</sup> Interview with Frontex Officer (Warsaw, March 2008).

<sup>78</sup> Council Regulation (EC) 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers [2007] OJ L 199/30.

if large numbers of individuals are using forged documents. Frontex has the task of collating a pool of experts from across the EU to be used in 'exceptional and unusual' situations. The first simulated RABIT exercise to test the capabilities of the mechanism took place in November 2007 at Porto Airport in Portugal as was not, therefore, designed to test the ability to respond to migrants arrived by sea.<sup>79</sup>

As already stated above, these operations are conducted under different Regulations and were not the product of cooperation within the EuroMed framework, at least not in its multilateral dimensions. In order for the operations to be successful, however, the cooperation of EuroMed Partner States is necessary. The Annual Reports 2005 and 2006 and the 2007 Work Programme of Frontex<sup>80</sup> have, as one might expect, placed considerable stress on border control elements. However, Frontex has defined its role according to a 'four tier model' in which the classic border control mechanisms, which in this case concern the coordination and sharing of information between Member States, are only the first two levels.<sup>81</sup> The third and fourth tiers involve cooperation with competent authorities and third states. In pursuit of these goals, Frontex has attempted to make itself, its role and its competences known to all the Mediterranean Partner States, Libya and the other states in Africa.<sup>82</sup>

EuroMed is therefore a system of governance in which border and migration control cooperative projects can arise. There is however a disparity between what is envisaged through EuroMed's multilateral fora and what is concluded bilaterally with the Partner States. The conclusions on the First EuroMed Ministerial Meeting on Migration in November 2007 highlighted the possibility of a number of projects such as training

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<sup>79</sup> Frontex, 'Rapid Border Intervention Teams first time in action' (2007) Press Release, 6 November 2007 <[http://www.frontex.europa.eu/newsroom/news\\_releases/art29.html](http://www.frontex.europa.eu/newsroom/news_releases/art29.html)> accessed 25 July 2008.

<sup>80</sup> Frontex, Decision of the Management Board 1/2008 of 29 January 2008 on the Programme of Work 2008.

<sup>81</sup> Frontex, 2006 Annual Report (Warsaw 2007), 5.

<sup>82</sup> Frontex, 2006 Annual Report (Warsaw 2007), 18-19.

courses on methods for the detection of false travel documents, search and rescue at sea and workshops on information campaigns, but did not mention under what conditions 'hard' cooperation between Partner States within Frontex could arise.<sup>83</sup> This leaves open the important questions of the legal status of those picked up at sea, and what happens to them when they are returned to a Partner States which may not be their country of residence. The other multilateral elements of EuroMed, in particular the EMPA, do not have the opportunity to discuss or have oversight of these operations.

A further dimension to practical cooperation in migration control in EuroMed is not one which has materialised, but which has appeared on the agenda and may yet evolve into actual practices. The idea of extra-territorial processing centres, whereby would be asylum seekers/immigrants have their applications processed before even reaching the territory to the EU, have been mooted since the launch of the Tampere programme. The UK government advocated the creation of centre for processing refugees outside the EU in 2003 in a leaked document entitled, 'New international approaches to asylum processing and protection'.<sup>84</sup> The idea seemed to gain support from the Netherlands and Denmark. The German government raised the issue again in 2004 (where it was rejected) and 2005,<sup>85</sup> though the language gradually changed from that of 'transit processing centre' to 'safe zones' in North Africa.<sup>86</sup>

The rationale for such centres appears to be two-fold: by not being situated on the EU's territory, there is less of a chance that people will

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<sup>83</sup> Euro-Mediterranean Ministerial Conference, 'First Euro-Mediterranean Meeting on Migration: Agreed Conclusions' (Algarve, 18-19 November 2007).

<sup>84</sup> M Garlick, 'The EU Discussion on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 *International Journal of Refugee Law* 601, 616.

<sup>85</sup> Amnesty International, 'EU Regional Protection Programs: Enhancing Protection in the Region or Barring Access to the EU Territory?' (2005) Amnesty International <<http://refugeelaw.qeh.ox.ac.uk/pdfs/ai-eu-on-rpps-october-2005.pdf>> (accessed 25 July 2008).

<sup>86</sup> S Kneebone, C McDowell and G Morrell, 'A Mediterranean Solution? Chances of Success' (2006) 18 *International Journal of Refugee Law* 492, 497.

leave the centre and fall below the official radar in the Member States, perhaps resurfacing during a regularisation programme. Second, given the emphasis from a human rights perspective on better reception conditions for asylum seekers within the EU (where monitoring by NGOs is facilitated), extra-territorial processing in a third state would be more cost effective for Member State governments.<sup>87</sup> Australia was a noted advocate of such a system, processing applications extra-territorially in the poor Pacific neighbouring states of Nauru, Kiribati and Papua New Guinea, until this was suspended in 2007.<sup>88</sup> The Australian case illustrates that extra-territorial processing centres are already in existence, though there are two important differences. First, the EU is a supranational polity which raises complex legal issues in terms of competence beyond a bilateral agreement with a third state. Second, Australia uses the centres as a basis for *resettlement* for refugees, which is not the case for the EU. The implications for this are significant but beyond the scope of this study. The Government of Australia's 'Pacific Solution' was suspended following a change of government in 2007.

Although extra-territorial 'centres', or 'reception in the region'<sup>89</sup> schemes have not yet materialised at the EU level and concrete proposals have not *formally* appeared on the institutional agenda, the idea merits discussion because of their specific Mediterranean focus. The common denominator of ideas for extra-territorial means to deal with migrants is that they are thought to be a 'Mediterranean solution' to the problem identified as the irregular flows of migrants across the high seas of the Mediterranean where no state wishes to accept responsibility.<sup>90</sup> The legal

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<sup>87</sup> Guild (n 1) 641.

<sup>88</sup> K Marks, 'Australia Scraps "Pacific Solution" for Refugees' Independent (London 11 December 2007) <<http://www.independent.co.uk/news/world/australasia/australia-scraps-pacific-solution-for-refugees-764355.html>> accessed 25 July 2008.

<sup>89</sup> This was the term favoured by the Danish government when it introduced the idea for discussion during its Council Presidency in 2002: G Noll, 'Visions of the Exception: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 *European Journal of Migration and Law* 303, 304.

<sup>90</sup> Garlick (n 84) 602.

position of extra-territorial centres with regard to their compatibility with Geneva Convention is, at best, unclear. NGOs have voiced strong doubts that people seeking asylum cannot be subject to procedures in their home state, or state in which they are in transit, because of the potential risk of whatever harm or threat they are attempting to escape from.<sup>91</sup> Some states (including the UK) have pointed to the lack of an express obligation in the Geneva Convention to process claims in the country of application and therefore claim that extra-territorial centres are a potentially legitimate avenue to pursue.<sup>92</sup>

In a sense, Member States of the EU are already operating a system of extra-territoriality, since one of the functions of the Dublin II Regulation is to transfer those seeking asylum to another Member State which, according to the criteria, is responsible for the application as the first EU Member State the asylum seeker reached. In the Mediterranean context of migrants arriving from North Africa, this would often mean Malta, Spain or Italy. Extra-territoriality of processing outside the EU would appear to be an extension of this by pushing asylum-seekers further from the states they had intended to reach. Yet, holding asylum seekers in a third country where applications are filed would not make any Member State ultimately responsible for them, and the EU system is currently insufficiently centralised to make this possible.<sup>93</sup> It would also need Member States to sign up to agreements on how many processed applicants to accept, but this may not correlate to the actual destinations requested by the asylum seekers and exacerbate the problem of multiple applications being filed in different Member States.

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<sup>91</sup> For example; Amnesty International, 'Unlawful and unworkable: Amnesty International's views on proposals for extraterritorial processing of asylum claims' (2003) <<http://www.amnesty.org/en/library/asset/IOR61/004/2003/en/dom-IOR610042003en.html>> accessed 25 July 2008.

<sup>92</sup> T Blair, 'Letter to the Greek Presidency of the EU: New International Approaches to Asylum Processing and Protection', (10 March 2003). Reproduced by Statewatch: <<http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>> accessed 25 July 2008.

<sup>93</sup> B Junker, 'Burden Sharing or Burden Shifting? Asylum and Expansion in the European Union' (2006) 20 *Georgetown Immigration Law Journal* 293, 316.

There is also the key issue of how the agreement between the EU and the 'host state' will cover the operational measures involved in running the centre and the treatment of claimants. It is unlikely, despite any agreement to host extra-territorial processing centres, that Partner States will accept processing facilities for would-be migrants on their territory without detaining the claimants. For those whose claims are not accepted, the practical dimension to resettlement or repatriation in the country of origin (if this can be identified) leads to further questions as to the powers and responsibilities to be exercised by an extra-territorial centre run by the EU. This is what the UNHCR terms the 'barbed wire conundrum' and may have the consequent effect of driving asylum seekers further into the arms of people-smugglers<sup>94</sup> or relying on the asylum systems of the third state, which may be extremely weak. Potential asylum seekers would be held in a 'vision of the exceptional'.<sup>95</sup> It would be possible for claimants to be transferred to a centre in a state where they have never been in order for their claim to be assessed. Moving and channelling people across potentially large distances to a centre where their movements would be restricted whilst their claim is processed, with no guarantee of success, would not appear to be an ideal means to convince potential migrants to avoid entering the EU irregularly.<sup>96</sup> For those whose applications fail, they may finish outside of the extra-territorial centres in the host state, and many of the states in North Africa lack even basic legislation on asylum and refugee status, or there have been serious doubts expressed by UNHCR and NGOs about the enforcement of the legislation. Continued strong emphasis by the EU institutions on readmission agreements and border controls may not encourage Partner States to enforce the rights of those who are 'returned'.

Other Partner States do not have refugee legislation, and in many

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<sup>94</sup> Kneebone, McDowell and Morrell (n 90) 497.

<sup>95</sup> Noll (n 89) 339.

<sup>96</sup> E Feller, 'Asylum, Migration and refugee Protection: Realities, Myths and the Promise of Things to Come' (2006) 18 *International Journal of Refugee Law* 509, 530.



cases UNHCR has been responsible for the determination of refugee status and subsequent humanitarian care. Egypt and Lebanon, for example, have no such legislation and granted no refuge for asylum seekers on either a temporary basis (Lebanon) or permanent basis (Egypt). With the demands on the UNCHR and its resources, it seems unlikely that it would be able to take on a major role in extra-territorial processing centres in the Mediterranean.<sup>97</sup> An even more troubling example for NGOs is that Libya, which is not yet a EuroMed participant but which has a bilateral readmission agreement with Italy and has been discussed as a potential host of a transit processing centre alongside a host of other initiatives in controlling migration.<sup>98</sup> UNHCR has no official presence in the country and is adamant that Libya ‘cannot be considered a safe country of asylum’.<sup>99</sup>

Whilst no formal proposals have yet come forward for an EU extra-territorial processing centre in the Mediterranean or elsewhere, the ‘institutional scoreboard’ on the Hague Programme requires a study to be undertaken in ‘close collaboration with UNHCR’.<sup>100</sup> Any proposal is likely to face strong opposition from human rights and refugees NGOs, many of whom take part in the EuroMed Non-Governmental Platform. For example, Oxfam termed the UK government idea for transit processing centres ‘dangerous’ and condemned its ‘legality, morality and

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<sup>97</sup> M Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 *International Journal of Refugee Law* 1, 4-6.

<sup>98</sup> Following a series of meetings between Commission and Libyan officials, the Justice and Home Affairs Council in 2005 approved a list of short to medium term opportunities for cooperation in migration: Council of the EU, ‘Justice and Home Affairs Council Conclusions: Cooperation with Libya in matters of Migration’ (2005) Press Release 8845/06, 3 June 2005.

<sup>99</sup> This comment was in response to the deportation from Italy to Libya of 180 individuals: UNHCR, ‘UN Refugee Agency deeply concerned over actions by Italy’ (2005) Press Release, 18 March 2005  
<<http://www.un.org/apps/news/story.asp?NewsID=13702&Cr=asylum&Cr1=>> accessed 25 July 2008.

<sup>100</sup> Commission (EC), ‘Report on the Implementation of the Hague Programme for 2006 – Institutional Scoreboard – Table 1’ (Staff Working Document) SEC (2007) 896, 8.

practicality'.<sup>101</sup> Part of their fear would be that practicing an asylum policy outside the EU would prevent effective supervision of the respect for human rights by UNHCR or the NGOs themselves.<sup>102</sup> Other commentators have suggested that providing the tools to the Mediterranean Partner States to improve their institutional capabilities in dealing with those in transit would be a more appropriate solution, and closer to the spirit of the Geneva Convention.<sup>103</sup> Furthermore, there have been no signs that Mediterranean Partner States would be willing to host the kind of centres mooted by Germany.<sup>104</sup> Betts reports that during an informal meeting with UNHCR on 29 September 2004, the North African states suggested that they would refuse to cooperate in the development of 'offshore processing'. They seem to have been concerned by two main issues: firstly, the international image of a state seen as a 'dumping ground' for those not deemed worthy of entry to the EU and secondly, the unresolved legal and practical issues of those whose claims are rejected by the European authorities.<sup>105</sup>

Against the background of these strong critiques, the process of deliberating and eventually creating extra-territorial reception centres will undoubtedly be closely monitored and contested. There are two general important considerations in the context of the Mediterranean Partner States. The first is that even if 'camps' or 'processing centres' are created, they are unlikely to directly concern as many individuals as the readmission agreements which are under negotiation or envisaged for the Partner States. Second, attention on extra-territorial centres leaves aside the connected issue of the increasingly restrictive migration policies being

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<sup>101</sup> Oxfam, *Foreign Territory: the Internationalisation of EU Asylum Policy* (Oxfam GB, Oxford 2005) 4.

<sup>102</sup> M Samers, 'An Emerging Geopolitics of "illegal" Immigration in the European Union' (2004) 6 *European Journal of Migration and Law* 27, 34.

<sup>103</sup> Guild (n 1) 645.

<sup>104</sup> Garlick (n 84) 621.

<sup>105</sup> A Betts, 'Towards a Mediterranean Solution? Implications for the Region of Origin' (2006) 18 *International Journal of Refugee Law* 652, 661.

adopted by Mediterranean Partner States.<sup>106</sup> This could be seen as a natural consequence of the more stringent legal and policy frameworks being developed in the EU Member States, which keep those trying to enter the EU in the periphery of the EU's neighbourhood. Yet, in the absence of humanitarian capabilities in place in many Partner States, adoption and enforcement of increasingly restrictive policies by Partner States may have an extremely repressive effect on migrants in transit through the Partner States. This may again have the effect of diverting migration routes to neighbouring states even further afield.

In this respect, it seems likely that the EU will have a difficult task in lauding the importance of fundamental rights and freedoms and the respect that the Partner States should show for international human rights protection in this context. EuroMed could be used a forum for discussion of processing centres, but given the likely opposition from some Member States and, in particular, civil society, this is likely to continue to be outside the scope of the multilateral dimensions. As a means of pushing the external frontier of the EU outwards, extra-territorial centres would appear to be the appropriate solution, but the lack of official documentation or concrete proposals would seem to demonstrate that the EU institutions or Member States would find it difficult to reconcile both a partnership approach across the Mediterranean with the promotion of the fundamental values the EU claims to base its system of governance on.

## **Conclusion**

Migration is a policy area which operates across the institutional logics of the EU, but which has in recent years become much more prominent in the EU's foreign policy objectives. Migration issues were more present in EuroMed than at first would appear from the text of the Barcelona

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<sup>106</sup> Gil-Bazo cites Morocco as an example of a state having recently adopted EU-style migration policies: Gil-Bazo (n 61) 587.

Declaration and early official documents in EuroMed, but migration is now recognised as one of the most important issues in the Partnership. The Mediterranean serves as both the impetus for action on migration at the EU level, and also the region where the impact on internal measures on migration (whether regulating legal or irregular migration) is likely to be felt the strongest. Despite the reservations of the Member States in granting competence to the EU to deal with migration issues, or following up on the promises contained in Council conclusions at Tampere and the Hague with strongly coordinated legislative measures, the EU institutions have gradually gained competence in this area. As is the case with EuroMed itself, the ‘pillar’ structure is of limited assistance when understanding where the ‘internal’ dimensions of policy-making end and the ‘external’ dimensions begin.

Closer examination of the approaches to migration issues at the EU level insofar as they affect or involve Mediterranean Partner States reveal contradictions in the language used. It is not necessarily the case that *repressive* or *preventative* measures taken by the EU institutions or Member States sit in direct opposition to *partnership* approaches. For example, in attempting to prevent migrants reaching Europe by clandestine and irregular means, extra-territorial centres situated in North Africa would be a repressive and preventative solution in that they contribute to a thicker border of the EU in creating a protective ‘layer’ around the EU’s territory. But, it is also possible to employ the language of partnership with the Mediterranean Partner States by framing measures within the context of dealing with phenomena which is a problem for the Partner States as well as the EU. In a similar way, by facilitating technical cooperation such as improving the standards of North African passports (discussed at the EuroMed Ministerial Meeting on Migration in November 2007) the EU is emphasising a partnership approach, but with the goal of ensuring that Partner States play a role in preventing migrants from reaching the territory of the EU. Frontex, as an agency charged with tasks

relating to the EU's external border, is keen to stress that as an agency it is responsible for coordination of measures of border 'management', not 'control' which has more repressive overtones.<sup>107</sup>

Nevertheless, offering inducements in return for repressive measures, whether or not they are couched in such language, does not involve a positive spirit of a partnership of equals as the EuroMed documentation (particularly at the multilateral level) suggests. A system of governance with strong central actors in the form of the EU institutions and Member States brings back the imbalance in the partnership identified in chapter four. In using the multilateral and bilateral elements of EuroMed in order to fulfil security goals, and therefore the aims of the CFSP found in the TEU, the usefulness of the Barcelona Process is maintained in the eyes of the EU institutions and also the Member States. This would explain the UK's enthusiasm for extra-territorial processing centres, which by their nature, would be located far from UK soil. With such (non-Mediterranean EU) states seeing the potential for EuroMed as a means of confronting these external threats, the achievement of successful solutions or effective coordination is more probable where concurrent national interests within the collective framework can be mobilised.

The mix of approaches once again does not signal a partnership of equals in EuroMed, but neither does it preclude a system of governance from existing. By increasing EU action in the external sphere through the CFSP, Member States have used non-the CFSP provisions to create an external dimension which draws on their experience in the multilateral frame of the CFSP. Foreign policy has thus become expressed in other policies and has even led to 'hard' law in the form of readmission agreements, which have proliferated. This contributes to a system of governance in EuroMed, though with the bilateral aspects more

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<sup>107</sup> Interview with Frontex Officer (Warsaw, March 2008).

significant in this respect than the multilateral. The EU's interests in engaging the EuroMed Partner States in migration management, and particularly irregular migration management, are clear, and far from the joint ownership of the process the EuroMed declarations would suggest. As the above analysis demonstrates, 'partnership' carries positive connotations in a similar way to many uses of 'governance', yet using these terms can mask other interests and means to fulfil 'traditional' foreign policy goals. If the Mediterranean Partner States can also succeed in making their voices and interests heard within EuroMed, leading to a better, joint system of governance in EuroMed, then migration may be one field where cooperation could be possible.

## **Chapter 7: Conclusion - Governance and the Common Foreign and Security Policy**

'Governance' has become a fashionable term in recent years and academic literature on the subject has proliferated. This thesis has raised important questions about the nature of the foreign policy of the EU and asked whether the CFSP can be seen in terms of a system of governance, and what this signifies in understanding the legal effects of the CFSP beyond the Treaty-based instruments.

Recalling that 'governance' has become attractive in that it fits the multilevel nature of legal and political orders of nations states, and aspects of international relations, there is little doubt that it is applicable to the European Union, with its complex institutional framework, considerable powers, and wide-ranging competences which have extended into many areas during the course of European integration. The CFSP, however, appears to be rather resistant to the language of 'governance', since it has been almost universally characterised since its creation in 1992 as an 'intergovernmental' forum which does not create the type of legal effects and outputs that are common to the Community legal order. The only instances where 'governance' has been used by scholars or policy-makers in relation to the CFSP is where 'good governance' is found as an aim: but this usually relates to the promotion of (democratic) governance in third states, rather than to the characteristics of the CFSP itself. This use of 'governance' is one of the meanings identified in chapter one and implies positive associations with the term, even when 'good' is not affixed.

Underlining the 'pillar' structure and 'otherness' of the CFSP within the constitutional order of the EU has seemingly kept the CFSP immune (or protected) from the spillover processes which have occurred in other areas of EU policy-making. New governance and new modes of governance

have not been discussed in relation to the CFSP because, as explained in chapter two, the CFSP is too often seen as the sole preserve of the Council, with no place for other EU institutions, including agencies, or private actors such as NGOs or civil society. This stems from the view that the CFSP respects the place of foreign policy at the core of the sovereignty and identity of the Member States, a view often underlined by some Member States when the CFSP comes under discussion during Treaty reforms. By consequence, despite its *sui generis* nature, the CFSP nevertheless appears to work within the paradigm of a foreign policy as a diplomatic exercise where states are the principle actors.

The institutional constructivist framework of legal analysis was developed in chapter three as a means to understand how the CFSP works and how and why characterising it as a 'system of governance' aids our comprehension of it. This analytical framework is suited to seeking out the (legal) effects of the CFSP as a system of governance and in accounting for how these effects can be felt in policy areas which do not formally come within the legal competence of the Treaty-based provisions of the CFSP. Applying this framework reveals that the CFSP becomes much more important as a *legal* policy because of the input it has into the emergence of (legal) institutions and norms. This final chapter draws together the research on the CFSP, EuroMed and migration law and policy and uses the theoretical framework to link together the findings in terms of how this explains the workings of the CFSP. In doing so, this chapter offers answers to the research questions posed in the introduction and which help to test the hypothesis. Further avenues for research which could build on the insights made in this thesis are suggested.

### **Migration and the EuroMed system of governance**

The analysis of EU migration law and policy and its interaction with EuroMed has demonstrated how the synergy between an issue generally



perceived as 'internal' and an expression of foreign policy can be understood. Since migration, broadly defined, had little or no express place in discussion in either the CFSP or EuroMed in the early to mid-1990s, the key is to explain how migration has come to the forefront of EuroMed, as exemplified by its elevation to the status of fourth 'basket' of EuroMed in 2005.

Returning to the institutional framework of EuroMed, the analysis in chapter four demonstrated that there are multilateral, bilateral and unilateral features of the system of governance in EuroMed. The analysis of the development of migration law and policy revealed that it has come to be in an increasingly prominent place on the agenda of the institutions at the EU level as well as those of the Member States. Measures and policy-making in migration at the EU level has begun to exhibit the kind of instruments one would expect to see in a national context, such as border control mechanisms. This suggests that the nature of migration law and policy-making has gradually shifted beyond the measures one might expect to be found within an international organisation.

Tracing the interaction between migration and EuroMed reveals that the appearance of discussion of migration with the institutional framework of EuroMed was not the product of a 'grand design' of a formal proposal to orientate EuroMed towards discussion of this issue but rather an incremental *process*. The interaction between EuroMed and migration has been demonstrated as two-way. EuroMed has developed because of the greater emphasis on migration, which makes it an appropriate means for discussion or cooperation, and the migration agenda has been moved forward because of the embedding of certain 'goals' within the system of governance. Furthermore, the analysis demonstrated that migration (and in particular, irregular migration) is not merely an issue for discussion within EuroMed but one which can lead to cooperation projects and 'hard' legal instruments, such as readmission agreements. Readmission agreements are a good demonstration of how the different dimensions to

EuroMed operate: their importance is underlined in the multilateral frames (particularly within the EuroMed Ministerial Conference) but their actual agreement is conducted bilaterally within the Association Agreements and the ENP Action Plans. Readmission agreements are legal institutions, but are dealt with on a bilateral basis: this is a preferable means for the Commission and Council, which can negotiate with each Partner State individually and tie any inducements to obligations within the Agreement or Action Plan. The practice of reaffirming the importance of the conclusion of bilateral readmission agreements in both the EU's general policies (including the Global Approach to Migration) and within the framework of EuroMed can, according to the theoretical approach adopted here, be seen as a legal institution in its own right.

It is true that the Union has concluded, or is in the process of concluding, readmission agreements with states outside EuroMed. It is not suggested that the Mediterranean partners are unique in this respect. However, the sustained emphasis visible from documents emerging from the EU institutions on the need for readmission agreements with *all* Partner States help the argument that these legal instruments form part of a strategy by the EU to make the external borders 'thicker' whilst using the language of 'partnership'. The logic follows that if readmission agreements are concluded with all neighbouring states, there will be no 'gap' around the Mediterranean rim for potential migrants to use and avoid being returned easily. This goes some way in explaining why the EU is keen to conclude an agreement with Libya, which may otherwise become an increasingly attractive departure point for potential migrants attempting to reach Europe.

The comprehensive search for blanket readmission agreements with all Southern neighbours has the effect of creating a system of governance within EuroMed strongly based around the EU institutions as the central actors, who are able to employ the language of partnership whilst pursuing their own (security based) goals. It could also be suggested that

discussion of migration issues is a natural consequence of the proximity of the Mediterranean Partner States and the EU and its Member States. However, this does not explain why migration measures have moved from the 'internal' sphere of governance towards the 'external' sphere. It can also be seen that a more elaborate framework for dealing with migration issues at the EU level was an integral part of the eventual integration of migration in EuroMed. Without this legislative framework in place following the Tampere Conclusions, it is likely that migration policy in the external, EuroMed context would have remained at the abstract level which would have made the emergence of legal institutions more difficult to identify. Applying the theoretical approach to the specific interaction between migration issues and EuroMed helps to explain how the issue has come to the forefront. Central to EuroMed are the consistent references in the documentation to joint ownership and the non-static nature of the Barcelona Process. Chapter four identified that 'true' ownership of EuroMed by the EU and non-EU partners is not borne out by the institutional practices, and that the EU institutions and Member States have been more successful than the Partner States in guiding the direction of the Barcelona Process. Yet, by emphasising the 'partnership' aspects of EuroMed, the identification of a problem (irregular migrants reaching the EU by clandestine means across the Mediterranean Sea) is presented as a common problem for the EuroMed participants which merits a common approach.

The explanations provided by applying the theoretical approach here are twofold. First, the institutions which have been created within EuroMed allow for an *opportunity* to put forward an issue for discussion which can be taken advantage of by (some of) the members of the institution. Second, a logic of appropriateness arises which can be seen by the discussion of EuroMed-wide cooperation frameworks for dealing with (irregular) migration: if the institution is seen as influencing the behaviour of the members, then it becomes appropriate to raise the issue

within this context. Hence, cooperation and negotiation within EuroMed as a legal institution make it an operational entity too, capable of producing legal effects. Since it has been shown that the EU institutions and Member States are primarily responsible for setting the agenda in EuroMed, it appears that the institutional frameworks are used as a means by which the Partner States can be ‘tested’ insofar as what they are likely to accept. The highly politicised nature of migration between the EU (frequently accused of becoming a ‘fortress’) and third states means that in using institutional fora in this way, the EU actors must carefully balance the search for fulfilment of ‘internal’ goals with measures likely to be acceptable to the Partner States.

The link with foreign and security policy goals that the EU institutions and Member States are attempting to pursue within EuroMed therefore becomes more visible. If an issue is not deemed ‘appropriate’ then the logic will not be followed, unless circumstances change or another factor (such as a strong inducement) arises. For example, it appears that in the multilateral dimensions to EuroMed, it is not appropriate for the EU or an EU Member State to suggest creating extra-territorial reception centres in the Mediterranean, since there are strong indications that this would not conform to the norms of the institution as the Partner States are unlikely to accept that cooperation is possible on this issue. If it is going to be raised as a point for discussion, it is likely to be on a bilateral basis and shielded from the multilateral institutions within the system of governance of EuroMed. Similarly, in the reverse scenario, a Partner State may raise the issue of visa facilitation if they believe that within the institutional framework this could have an effect on the EU side. With the dominance of the EU actors within EuroMed, raising such an issue may be appropriate but would not necessarily lead to the emergence of an agreement which realises the aims of the Partner State in question. Given the dominance of EuroMed by the EU-side, the question may then be asked as to why the Partner States participate at all

if it is unlikely that they will succeed in influencing the agendas of the common institutions. This however highlights the nature of a system of governance as a thicker set of rules and practices than bilateral relationships alone: migration may be a key priority for the EU, but the Partner States' interest in EuroMed may be found here and in other areas: the emphasis in the multilateral EuroMed conclusions on the creation of the Free Trade Area suggests that economic motivations are key. Furthermore, this also helps to explain why the EU institutions have not always been successful in seeking cooperation agreements with Partner States and why the Association Agreements have taken as long to conclude, in some cases, as the first decade of the Barcelona Process.

The link between migration and security also helps to explain how the links between migration, EuroMed and foreign policy become more visible. Institutions adapt to changing circumstances, and post-9/11 there was a more express attempt in EuroMed documents to link irregular migration from the Partner States with issues of security, even though this was shown not to originate from both sides equally, but the EU side only. Here again, migration and security was framed in a way which made it appear to be a joint concern. Irregular migration is the primary link made with security, but even regular migration is linked in EU documents: the European Pact on Immigration notes that a workable visa policy is required for the 'security' of the EU *and* its partners. There is little doubt that 9/11 has prompted an emphasis on security discussions in most states and internationally. The presence within the TEU of the goal of the CFSP 'to strengthen the security of the Union in all ways',<sup>1</sup> coupled with the introduction of external borders as a focus in the Treaty of Amsterdam reveals the tendency of the EU to view EuroMed as an external sphere of governance. It is a means by which both security and migration goals can be pursued, as exemplified by the pursuit of 'thicker borders' to secure the

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<sup>1</sup> Article 11(1) TEU.

EU's territory. 9/11 also contributed to the EU's ability to link migration with security, which justifies placing it high on the institutional agendas in the EuroMed system of governance as a 'common concern' for all participants. The externalisation of migration policy which has occurred (and which was examined at the end of chapter five) is in evidence in the CFSP too. That is to say, the 'goals' to be fulfilled in the CFSP as laid down in the Treaty and in the Common Strategy for the Mediterranean<sup>2</sup> are moved from the intergovernmental frame provided for in the TEU towards supranational governance. This externalisation process of such a core-state issue of migration control has been explained by the attractiveness for Member States of bypassing domestic 'humanitarian policy frames'. A similar effect can be revealed here: deepened cooperation with EuroMed Partner States allows for the possibility of discussion of migration control mechanisms which can be concluded on a bilateral basis.

The social reality of EuroMed is, despite the stated importance of multilateralism as the basis for the 'partnership' between EU and non-EU members, constructed on the basis of legal obligations which function in a more bilateral setting. This bypasses the fora in which migration cooperation might be more difficult to pursue and enables the actors in the EU to act as the strong 'centre' within the system of governance in EuroMed. Following the same logic explains why internal migration measures in the EU has been externalised and 'shifted up and out' despite the perceived place of migration policy at the heart of state sovereignty: the multilateral institutions of EuroMed are avoided so as to tie Partner States more stringently within bilateral agreements in order to ensure, as far as possible, cooperation. The same could also be said for practical issues in cooperation by Frontex.

In this respect, migration exemplifies the translation of the values in the CFSP into social practices, which can result in 'hard' legal effects.

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<sup>2</sup> Council Common Strategy (CFSP) 2000/458 on the Mediterranean Region [2000] OJ L183.

Values are not limited to those contained in the Treaty, but also include certain values associated with ‘traditional’ foreign policies (that is, of nation states) including the role of foreign policy as a means to deal with outsiders ‘at arm’s length’. The growing importance of migration issues within the context of the EU neighbourhood has allowed EuroMed to gain in salience amongst EU Member States that do not border the Mediterranean but see the relevance for national interests pursued through the prism of the EU institutions. With this pursuit of thicker borders and discussion of other externalised forms of migration control, such as extra-territorial processing centres, the link with the CFSP is reaffirmed, both in terms of its general aims and values and the Common Strategy for the Mediterranean.

### **Practice and Institutional Development in EuroMed**

The theoretical framework pointed to the importance of norms and institutions arising from the social practices within the CFSP in understanding how the policy works. The Euro-Mediterranean Partnership provides a rich source of emerging norms and institutions which shed light on how logics of appropriateness characterise the CFSP. It is worth recalling that EuroMed was not created by a legal instrument of the CFSP. There was no specific legal basis for the launch of the Barcelona Process, and because of its wide-ranging nature, has generally been characterised as a ‘cross-pillar’ project. This is also true for the ENP. The Mediterranean was the subject of the third Common Strategy concluded under the CFSP following the Treaty of Amsterdam which created this instrument; but this was in 2000, five years after the initial Barcelona Declaration. It has been suggested that the reason why EuroMed was not created under the CFSP was that it would have meant a rather narrower institutional and policy framework than was the case with the three EuroMed ‘baskets’. It should also be recalled that the initial advantage for

the Partner States to be involved with the EU was the creation of trade benefits through a Euro-Mediterranean Free Trade Area to be completed by 2010.

EuroMed can also be characterised as an institution and, in parallel, a collection of distinct institutions. EuroMed fulfils the criteria of an institution as established by March and Olsen: it is a relatively stable collection of practices and rules defining appropriate behaviour. EuroMed can be said to be *relatively* stable. The Barcelona Process has been continuously disrupted by the destabilising effects of events in the Middle East, but it has nevertheless continued without losing the participation of any Partner States, and indeed growing to include new members in late 2007 and June 2008. Where boycotts have taken place, such as the absence of Lebanon and Syria at the EuroMed Ministerial Conference in 2001 in protest at the presence of Israel in the context of renewed tension in the Middle East, this was of a temporary nature only and did not result in the disintegration of EuroMed. Partner States are minded that EuroMed continues to offer the potential for cooperation if the wider political situation allows for it. EuroMed does not have all the physical assets of an institution, such as a permanent secretariat, but this is not necessary for it to be characterised as an institution according to March and Olsen's definition.

As well as being an institution in its own right, the constituent parts of EuroMed can also be classed both as individual institutions and as a set of institutions within which practices and rules have developed which influence the members. These include the general ministerial conferences, the bilateral meetings between the Council and each Partner States pursuant to the Association Agreements, and non-governmental bodies, such as the EuroMed Civil Forum and the Anna Lindh Foundation. The latter two have gained the physical presences of institutions (i.e. headquarters in Paris and Alexandria respectively) and the former are institutions because of the regular meetings which have been held with



increasing frequency. The *social* reality of EuroMed is evident in the increasing number of contacts within an institutionalised setting. The Ministerial meeting on Migration in late 2007 is evidence of a desire to discuss important issues for the members within this institutionalised setting, but which was not present in the original text of Barcelona. As well as making these meetings and contact identifiable as institutions, taken together they constitute operational entities which contribute to EuroMed being a *socially constructed* institution.

The research in chapter four, however, shows that the best example here of institutional development is the Euro-Mediterranean Parliamentary Assembly. There was only a limited mention of Parliamentary dialogue within the Barcelona Declaration, but it has evolved into a permanent feature of the Barcelona Process, with rules of procedures, committee frameworks and wide-ranging resolutions passed on the wider direction that EuroMed should take. It has also been instrumental in the creation of the Anna Lindh Foundation for the Dialogue of Cultures, which was similarly not foreseen in the original Barcelona Declaration. As an institution, it has undergone processes of change, both with the formal sense (the adoption of rules of procedure) and also the informal: the subject-matter discussed by the Parliamentarians avoids the overly contentious issue of the Middle East Peace Process and instead focuses attention on the cultural aspects of the Barcelona Process where it appears that their contribution could be felt the most. This is especially true in the committee-based work of the EMPA. The development of the EMPA demonstrates how processes of learning exist and operate within institutions, by taking advantage of opportunities and bypassing threats which could destabilise or destroy the institutions. Whilst the frequent troubles in the Middle East would suggest that, being the only multilateral forum involving the participation of Israel, the Palestinian Authority and neighbouring states, EuroMed would be halted. In fact the process of institutionalisation in EuroMed

(and more specifically the EMPA) has gone in the opposite direction. It has also shown resistance to being replaced or sidelined in the more recent ENP, which at one point was envisaged as a successor to EuroMed but instead is 'complementary' to it. This demonstrates how institutions gain salience, resilience and can eventually extend influence in processes of wider change in identities and values.

This institutional framework allows EuroMed to also be characterised as a system of governance. However, as stated in the final part of chapter four, this system is differentiated from the system of governance in the EU because of the presence of stronger central actors able to set the agenda of the multilateral, bilateral and unilateral dimensions to the system of EuroMed governance. This reinforces the assertion that the means by which the CFSP works in practice is fundamentally different from the traditional foreign policy of a state: EuroMed is a means by which the goals of the CFSP can be fulfilled through processes of institutionalisation, which play to the Union's strengths. The close correlation between the documents from the Council and the EuroMed Ministerial Conference conclusions testify to the existence of this link, in addition to those in the field of migration. This institutionalising effect brings in the Partner States into a system of governance which is dominated by the EU institutions and Member States. This in turn allows for the pursuit of the CFSP goals which, given the emphasis post-Amsterdam on external borders, brings in the importance of migration within EuroMed. Hence, migration as an 'internal' issue within the scope of the Justice and Home Affairs/Freedom, Security and Justice comes into contact with the aims of the CFSP. Using an external sphere of governance, such as EuroMed, enables us to see a more traditional exercise and purpose of 'traditional' foreign policy: keeping outsiders at arm's length, in order to satisfy the 'internal' goals of creating and maintaining an area of Freedom, Security and Justice for the EU.

Legal institutions, such as the Association Agreements, are therefore used to shape the behaviour of the actors involved. Since institutional constructivism treats law as a tool capable of changing identities, aims and preferences, both the multilateral and bilateral institutions in EuroMed can be seen as catalysts for change. The research in chapter four demonstrated that the Association Agreements are not merely used to complete the technical arrangements of an eventual free trade area in the Mediterranean, but also to embody values (such as the promotion of human rights in the Partner States) and secure cooperation in other areas, such as in migration.

The logics of appropriateness within EuroMed can be seen through the respective multilateral, bilateral and unilateral dimensions of the Barcelona Process. Logics of appropriateness are important because of the light they shed on the EU's values, which in turn shape the institutions. These can be the values laid down in the Treaty, both in the title on the CFSP in the TEU and in the general preamble, but they can also be hidden from view. The multilateral institutions in EuroMed, including the Ministerial Conferences, EMPA and EuroMed Civil Forum frequently allude to the values which the EU says that it wishes to promote in the EuroMed region. As demonstrated in chapter four, this is not so much the product of shared values between the EU, its Member States and the Partner States, but because of an institutional framework dominated by the EU institutions and Member States that are in a position to exercise greater control over the norms which emerge from the Barcelona Process. Logics of appropriateness therefore arise which define appropriate behaviour: in order for the Barcelona Process to continue, values including commitments to democracy, the rule of law and free trade which are based on 'partnership' approaches are continuously reaffirmed. This commits the Partner States to cooperate and suggests that the EU will have to make concessions or offer incentives in order to secure this cooperation.

There has been an express will to include all the states in the Mediterranean region, but only if states agree to the terms of the Barcelona Declaration. The Commission and Council have been keen to point to the desirability of Libyan membership of the Barcelona Process, but only if Libya accepts the Barcelona *acquis*. The *acquis* is not defined in a manner comparable to the *acquis* required in EU enlargements processes, but the constructivist insights used here demonstrate that the values (strongly based on the values the EU wishes to promote in the region) form the backbone of this *acquis*, but under the guise of ‘partnership’. The social practices revealed via the multilateral and bilateral dimensions to the Barcelona Process differ: on the multilateral level, documentation from the EuroMed institutions emphasises the stated goals of increasing prosperity through economic development and the rights of individuals. At the bilateral level, the EU institutions pursue different goals, depending on the Partner State involved. This explains why some Association Agreements took a great deal longer to conclude than others and why there are marked differences in the content of the Agreements and Action Plans. The widening of the participants in EuroMed, who in the case of Albania and Mauritania, requested membership rather than *vice versa* demonstrates that they perceive some benefit to be gained from membership. This could be down to specific individual interests but it is also because the ‘partnership’ approaches suggest that EuroMed is an emerging system of governance in the Mediterranean in which the Partner States have a role to play.

Despite the economic focus of EuroMed in the initial Barcelona Declaration, it is contended here that the launch of the Barcelona Process would not have been possible if it were not for the creation of the CFSP in 1992. Previous frameworks for engagement with the Mediterranean states had failed, and whilst the Barcelona Process has often not been characterised as a success it has nevertheless continued to exist for over 10 years and it likely to continue to do so in the light of the emphasis on

its relaunch during the French EU Presidency in 2008. Given the stated aims of the CFSP in the TEU,<sup>3</sup> EuroMed clearly serves to fulfil these aims, in terms of material goals (including in migration) and also in the promotion of values such as democratic reforms. EuroMed is therefore an example of the EU's 'normative power', but the ability of the EU to pursue control or repressive measures means that 'normative' should not necessarily carry the positive associations which are also associated with 'governance'.

The existence of a system of governance in EuroMed does not depend on practical or visible 'outputs' for it to exist in the sense of, for example, establishing concrete projects which help overcome the divisions between the participating states in the Middle East. EuroMed has been criticised for its lack of material outputs and overall lack of (visible) progress towards meeting its stated goals. But it is argued here that by using the theoretical approach, which upgrades the importance of ideas, values and identities in institutions, it is possible to see EuroMed as a gradual confidence-building measure between the EU and the Partner States. The fact that it has continued to exist in a region where some of the world's most complex and divisive problems exist cannot be ignored. EuroMed can be accurately described as a *socially constructed* institution as well as a *legal* institution, and both these facts contribute to it emerging as a system of governance. The upgrading of the importance of ideas, values and identities explains the eventual building of practical forms of cooperation. One of the key achievements of EuroMed is that it has incrementally developed and, even more importantly, done so with the continued participation of *all* the Partner States, including Israel and its neighbours. In the context of the destabilising and complex effects of the Middle East conflict, this is an achievement which should not be understated. In light of this, the constructivist insights in the theoretical

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<sup>3</sup> Article 11 TEU

approach help to demonstrate that the principles of cooperation and shared values have emerged in EuroMed, but strictly on a long-term basis. The relaunch of EuroMed as the Barcelona Process: Union of the Mediterranean is notable for underscoring practical cooperation between the participants. This would not have been possible in 1995 at the outset of the Barcelona Process, but it is increasingly so in the more sophisticated system of governance that has since developed.

### **Conclusion: the Common Foreign and Security Policy as a System of Governance**

Recognising the emergence of EuroMed as a system of governance leads to more generalised conclusions on how the CFSP works in practice beyond the Treaty-based competences, which test the hypothesis posed in this thesis. That the CFSP and other external policies of the Union are not hermetically sealed from each other is not new. The contribution of this thesis is to demonstrate, however, that the relationship between the CFSP, as a system of governance, and other institutionalised forms of governance is closer than previously thought. The Euro-Mediterranean Partnership and the issue of migration law and policy within it help to clarify these relationships.

The CFSP is a policy defined by the Treaty-based competences of the EU, with specific instruments and actors endowed with capabilities to act, but it is also clearly an 'institution' capable of falling within March and Olsen's definition. It is a stable collection of practices as well as rules, which define appropriate behaviour in specific situations. Guides to the standards of appropriate behaviour are found in Treaty articles such as Article 16 TEU, which obliges Member State to inform and consult each other within the Council 'on any matter of foreign and security policy of general interest'. Guides are also found through the practices which have arisen during the lifetime of the CFSP, such as the habitual issuing of

Declarations on matters of importance by the Council Presidency.

March and Olsen's definition also points to the importance of values. The presence of shared values in the CFSP as an institution is visible in the Treaty-defined aims of the CFSP (for example, the objectives to strengthen the security of the Union, to promote international cooperation and to develop and consolidate democracy). Values are also seen in the emphasis on multilateralism, partnership and regional integration in the context of the Mediterranean case-study, such as the support for the Agadir Agreement on free trade between the Partner States. This can be understood as akin to the values in the CFSP which become shared by states joining the Union as they align themselves with the CFSP Declarations prior to Membership.

Through a combination of the Treaty dispositions and their practical expression, the CFSP can therefore be readily identified as an 'institution'. This is not merely a label, because as an institution the CFSP is 'living' and capable of creating logics of appropriateness, which influence behaviour and result in the creation of (legal) institutions. It is also important to state that the CFSP is not simply the product of the sum of interests of the Member States within the Council. It is not necessary for the practices associated with the CFSP to have legal characteristics that formally bind the Member States since the defining characteristics are the constraints on behaviour. This research demonstrates that these logics of appropriateness can have effects outside the realm of the CFSP as an institution, but move into other policy areas.

To address the central hypothesis, given that the CFSP can be characterised as a system of governance the relationship between the CFSP and the governance of the EU and its external sphere becomes clearer. The CFSP is an institution which uses the Treaty-based instruments at its disposal, but the theoretical approach here shows that its 'outputs' are not limited to this. It was stated above that EuroMed was not created by the CFSP although it formed part of the EU's strategy for

the Mediterranean laid down in a Common Strategy five years after the Barcelona Declaration. Why was this the case? One answer is that the initial goals sought in EuroMed were 'economic', i.e. the establishment of a Free Trade Area, which rely on the competences and experiences of the EU institutions (in particular the Commission) which have a less formal role in the CFSP. The explanation here, however, is that EuroMed only became possible because of the existence of an outward-looking policy on the part of the EU operating with a single institutional framework. The limitations of the CFSP and the intergovernmental nature of its provisions are usually blamed for the inability of the EU Member States in the Council to act collectively, but making the link between the CFSP and EuroMed demonstrates that the EU has succeeded in pursuing its foreign policy goals through the establishment of a system of governance in the Mediterranean region. Recalling that the Council has repeatedly called for the integration of migration goals into foreign policy, it appears that the CFSP has had the effect of creating the opportunity for consideration of foreign policy issues within a multilateral frame over a long-term period. As such, the CFSP becomes more readily identifiable as an integral part of the constitutional order of the EU and not merely a supplement to the 'hard' legal effects capable of being produced through the first 'pillar' alone.

As EuroMed is identified here as an expression of the foreign policy of the EU, this then leads to the wider issue of why the CFSP provisions have remained intergovernmental in character and resistant to supranationalism, in contrast to other areas (such as migration law and policy) which are similarly close to core state sovereignty. The answer offered here is in understanding how the relationship between the CFSP and other policies with an external dimension works in practice. By bypassing the legal instruments available in the CFSP and the intergovernmental processes associated with them, and instead using other instruments with different legal bases (or, in the case of EuroMed,



no specific basis) the Member States who resist placing the CFSP within the same formal legal framework as the Community can claim that 'real' foreign policy remains with them and national sovereignty is protected. Therefore, EU foreign policy in practice can be seen as much closer to the operation of the rest of the EU's policies than is suggested by either the Treaty provisions or the discourse of the Member States.

The legal institutions emerging from the migration law and policy framework at the EU level would not have been possible without the CFSP. The CFSP has created a multilateral frame within which the Member States have become used to dialogue and consultation with each other, and which has become more than a simple mechanism for issuing Declarations. It has become a 'living institution' and a fully constituent part of the EU's legal order. Consequently, the CFSP cannot be seen as an ineffective policy which does not produce practical effects, but one which is expressed via links with other policy areas within the system of governance of the EU which are not readily visible through traditional legal analysis. Were it not for the CFSP providing a multilateral frame for discussion of foreign policy issues and an institutionalised framework for cooperation, it would not have been possible to begin the process of institutionalisation in EuroMed and pursue the stated goals in the Mediterranean, which have increasingly focussed on migration. The interaction between systems of governance in the CFSP, EuroMed and the EU more generally become blurred. As such, the CFSP becomes much more important as a legal policy because of the input it has into the emergence of (legal) institutions and norms.

The nature of 'governance' is also revealed to differ from the common conception of a term which embodies positive associations of democratic principles and the values of the EU as a 'normative power', but can instead carry connotations of a means by which repressive or controlling measures can be pursued. Characterising the CFSP as a system of governance allows scholars, including legal scholars, to see its effects

beyond the competence-based instruments of the Treaty and through the identified links with other EU policy-areas.

On the basis of these findings, future research possibilities in this area could investigate the links between the CFSP and other developing EU law and policy areas in terms of how institutional norms are internalised by the participants. For example, democracy promotion and development within the context of the institutional framework of the Cotonou Convention would be interesting because of the diverse nature of the third states involved and the varying extents to which security issues play a role in these relationships. Security issues relating to the environment, and specifically challenges and threats posed by climate change, are emerging within foreign policies at national and EU levels and there are potential avenues for exploring how these issues relate to existing political and economic relations with third countries, in particular with developing countries. Research could also attempt to understand how and under what conditions systems of governance can emerge within the external sphere in the absence of the elaborate institutional framework developed in EuroMed. This would be a worthwhile task in taking forward the research undertaken in this thesis by attempting to explain further how the CFSP's effects can be felt beyond the instruments laid down in the Treaty. To do so could lead to a better understanding of the nature of the EU's constitutional order and its place in the world of international relations.

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## **Interviews**

Research interviews were conducted with the individuals listed below. Interviews with staff of the Council and Frontex were conducted on a semi-structured basis: a list of questions was sent in advance and served as a platform for discussion of related issues. The lists of questions are provided on the following pages. The other interviews were open-ended discussions of relevant issues. Personal notes were taken by hand for the purposes of recording information. Officials of the EU institutions agreed to be interviewed on the basis of anonymity.

Mr E. McMillan-Scott MEP, Vice-President of the European Parliament (Bradford, 30 March 2007)

Strategic Development Officer, Frontex (Warsaw, 4 March 2008)

Official of the Council, EuroMed section (Brussels, 19 September 2008)

Official of the Council, Policy Unit of the High Representative (Brussels, 19 September 2008)

Official of the European Parliament, DG External Policies (Brussels, 19 September 2008)

## **Questions to the Council**

- The Barcelona Process began in 1995 and recently brought in new, full participants (Albania and Mauritania). Is there a reason why these countries, which also have Western Balkans and ACP relations with the EU, are now integrated in the Barcelona Process?
- Similarly, the Barcelona Process: Union for the Mediterranean has widened participation even further (Croatia, Bosnia etc). Was this because there was significant demand on the part of the partner states to join the Barcelona Process? Do you see any likely consequences on the Barcelona Process with an enlarged membership?
- How has the European Neighbourhood Policy affected the Barcelona Process? Could the ENP and Barcelona Process be understood as pursuing the same goals, or do they work in completely different ways? Could the Barcelona Process and ENP eventually move closer together or even merge?
- A CFSP Common Strategy for the Mediterranean was adopted in 2000 and later renewed, but is now no longer in force. Is there a particular reason why a further renewal of the Common Strategy was not sought?
- The issue of migration seemed not to be too prominent in the text of the Barcelona Process, but it is now a priority areas alongside the three 'baskets'. Has discussion of migration (in its many forms) been brought to the forefront by both the EU side and the partner states?
- Finally, EuroMed has often been criticised for lacking in progress since 1995. However, since no partner state has even left the Process, and neither ENP nor the Mediterranean Union formally replaced it, should the Barcelona Process be seen as a successful means of engaging all partner states (especially Israel and its neighbours) within an institutional framework led by the EU?

## **Questions to Frontex**

- How much emphasis is placed within the work of Frontex on securing the cooperation of third states?
- Does this cooperation focus on the technical level, i.e. with the law enforcement agencies of the third countries envisaged by such cooperation?
- How have third countries (in particular those in the Mediterranean space) reacted to requests for cooperation, and have there been any political difficulties associated with seeking such cooperation?
- Has Frontex begun to seek cooperation from the third countries in similar terms, or is a case-by-case basis still the dominant approach?
- Have the third countries in question made any specific requests to the EU in order to cooperate with the activities of Frontex?
- With regard to the measures taken to combat illegal migration in the Mediterranean (e.g. Hera, Deniz), what role has the cooperation of the third states involved played in the success of the project?
- Although Frontex is a relatively new agency, has there been an increased emphasis on tackling the various aspects associated with border security, such as illegal migration, and has this changed both over time and towards the different geographical border spaces of the EU?

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