Security cooperation, counterterrorism, and EU–North Africa cross-border security relations, a legal perspective

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RESEARCH ARTICLE

Security cooperation, counter-terrorism and EU – North Africa cross border security relations, a legal perspective.

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The EU is clearly in the process of developing an external dimension to the Area of Freedom Security and Justice. This paper focuses on ex. Police and Judicial Co-operation in Criminal Matters provisions. These developments pose specific legal basis issues for the EU, given its complex EU –member state legal relationship, and the inter-institutional balance, all reflected in the treaty framework post-Lisbon. New Court of Justice rulings are now emerging which will assist in this issue. Equally the approach to be taken in developing these relationships will be crucial. This paper proposes the adoption of an Onuf style constructivism in order to best capture the reality of the process that is developing, and has developed for the ex.PJCCM measures internally. This then needs to be allied with a constitutionalism model to ensure a balanced development of all three aspects of the Area of Freedom, Security and Justice.

Keywords: AFSJ, North Africa, competence, constructivism, constitutionalism.

A. Introduction

A lot of current research is focusing on the issue of borders. Borders are often not, either where they would traditionally be expected to be placed, nor are necessarily policed in a traditional manner. Smith has classified borders as being "geopolitical, institutional/legal, transactional and cultural boundaries", (Smith, cited in Zeilinger 2012, p.70). There is a possibility for a multiplicity of varieties of borders, between countries or territories with good working relationships. This paper will focus on the relationships across the institutional/ legal borders of the EU with its southern

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periphery. It will address the evolving area of the external relationship of the EU in the Area of Freedom Security and Justice (AFSJ), in particular in ex. Police and Judicial Cooperation in Criminal Matters (PJCCM).

The EU has been clearly tasked with engaging with its neighbours in not just CFSP but also AFSJ measures. The EU's external relations in law enforcement and counter-terrorism have been developing in the last number of years. The subject matter of this paper operates at the intersection of three principal policy documents of the EU, the EU's Internal Security Strategy, the European Union's Counter-terrorism strategy, and the Strategy for the External Dimension of JHA. Operating in the background is the EU's Security Strategy, (Council of the European Union 2005a). The EU sees that it cannot operate in isolation from the rest of the world, particularly in the AFSJ (Rijken 2011, p.210), leading to what den Boer refers to as "a security continuum" (den Boer 2011, p.341). The EU seeks to engage with third countries in solving its transnational problems, and addressing the objectives set in its internal security strategy, (Zeilinger 2012, p.64).

The overarching policy document currently being used is the EU's Strategy for the External Dimension of the JHA. The key thematic priorities are set out as being "terrorism, organised crime, corruption and drugs and to the challenge of managing migration flows," (paragraph 1). Relations with third countries are to develop partnerships including "strengthening the rule of law, and promoting the respect for human rights and international obligations," (paragraph 1). Some of the countries which the EU would be entering into partnership with would be in more need of assistance and reconstruction than the North African states, with which the EU has

some fairly advanced legal agreements. The details of these relationships with individual neighbouring third states, with the exception of Russia,[2] are to be found in the Euro-Med agreements and the European Neighbourhood Policy (ENP) action plans. However relationships differ from one partner country to another. For example Algeria has become a member of the Euro-Mediterranean Partnership, but so far has declined the offer of the ENP arrangements. Libya is currently not a member of either process. The EU's Strategy for the External Dimension of Justice and Home Affairs (JHA) also talks about the important relationship between JHA, the CFSP, the European Security and Defence Policy (ESDP), which would be military in focus. While EU military interventions are not normally be expected to be used in the context of North Africa, there is recognition in this document that EU police and judicial expertise will be "essential to the rebuilding and transformation of weak law enforcement institutions and courts systems." Countries with less weak systems, or systems in transition, might also benefit from some assistance, as long as, in the North African context, proposals respected the varying Islamic outlooks reflected in their legal systems.

The external relations of the EU have "been conceptualised in the academic literature as 'external governance'", which in the context of the AFSJ has been referred to as the "projection of EU rules beyond EU borders" (Lavenex 2011, p.119). Using "transgovernmental and intergovernmental channels of cooperation", with a focus on "operational cooperation" and "the extensive use of horizontal network

[2] The EU – Russia relations are mediated through the four Common Spaces programme, agreed at the St Petersburg Summit in May 2003. Two of those spaces are relevant to the subject matter of this paper, the common space of freedom, security & justice and the space of co-operation in the field of external security.

activities among law enforcement authorities and other relevant Member States' agencies in the cooperation," (Lavenex 2011, p.120). These developments within the EU lend themselves to an Onuf style Constructivist analysis (Kubáklová 1998). Constructivism as a tool of analysis developed in the 1990s, emerging from International Relations theory, but is increasingly being used in legal analysis. Located between rationalists and interpretivists, constructivists examined not so much objects, but the meaning that attributed to those objects, with social constructs or understandings informing how meaning is so attributed, (Cristol). As constructivism was developed in the field of International Relations it examined the meanings that societies, or states attributed to international treaties or other arrangements.

Onuf developed a strand of constructivism which advocated that "constructivism is a universal experience" (Kubáklová 1998: p.72), and one that we cannot avoid, as we are located within one type of society or another. Therefore Onuf's constructivism applies "not simply to the level of states, but to humans in any dimension of their social activity, international relations being merely one, albeit an extremely important one, among many", (Kubáklová 1998: p.72).Whether this mutual construction of understanding has happened at either the individual, following Onuf's approach, or institutional level, both being highly relevant in the construction of a completely new way of cross-border law enforcement provisions, in particular.

In areas where there was no pre-existing legal and practice framework, such as in ex. PJCCM matters, when practitioners are asked to build a new legal and practice jurisdiction they necessarily bring their own socialised understandings of how to, for example, conduct law enforcement operations, and through interaction with their

counterparts from other jurisdictions, negotiate a shared understanding as to how a transnational law enforcement operation is to work. It is the human beings at the interface between the relevant jurisdictions who have "constructed" a new social reality. The activities of the Police Working Group on Terrorism and TREVI are cases in point, as was the original construction of the Europol Drugs Unit, which started operating before its underpinning legislation was enacted, and which eventually became Europol. As stated by Lavenex, "Communication and transparency through institutionalised interaction are … crucial for the evolution of trust," trust being "central to cooperation in the sensitive matters of JHA," (Lavenex 2011, p.122).

However, reflecting the fact that the AFSJ covers not just security provisions, but also freedom and justice, external developments with Euro-Med countries in cross border law enforcement and justice issues may well run a risk in engaging with countries who do not share the basic underlying principles, which underpin all of the EU legal and law enforcement structures, namely a shared understanding of the tripartite division of power, the rule of law, an independent judiciary, and a basic understanding of human rights. This has been pointed out by Cardwell, who refers to the "double-edged nature of the EU's engagement with the Mediterranean partners, especially post 9/11," with the drive to "secure cooperation on crime and terrorism despite the Barcelona Process" emphasis on "encouraging reform" (Cardwell 2009, p.137). It does have to be pointed out that the Barcelona signatories, in the context of the Euro-Mediterranean agreements, undertook, under the heading of "political and security partnership" to "refrain from interference in a partner's internal affairs", while at the same time to "strengthen co-operation in combating terrorism," (Hakura 1997, p.342/4).

The Onuf's constructivist approach, of the constant making sense of the world, and negotiating that understanding greatly assists the development of structures from new, in particular when a number of new initiatives are still on the drawing board, but will not assist in the protection of individual rights, which require a more concrete, and less fungible understanding of standards and norms. This relationship between the preceding constructivist model, and a need for it to be balanced by, certainly from the internal, and to a certain extent external, AFSJ perspective, constitutionalism, may well lead to a reflexive relationship, with the constitutionalisation of standards and norms by the courts, in particular in the post Lisbon legal framework, may lead to further construction of shared understandings of what is to operate within the EU's AFSJ. Nevertheless there is a need for the constitutionalisation of the AFSJ to now come to the fore, internal to the EU, and externally when engaging, in particular with partner counties "which lack the liberal democratic tradition that underpins these policies in liberal democracies", (Lavenex 2011, p.120). Mac Amhlaigh takes and interesting approach to the term of constitutionalism, referring to it as "as a forum for contestation regarding the values of the political community, where reasonable disagreement is articulated and debated," (Mac Amhlaigh 2011, p.29) . It is arguable that at the level of the EU this contestation and debate is only now really getting started. In relations with third countries it would be important to ensure that this contestation does not undermine the standards and rights which have been developed, or are developing at the EU level, and those which have deep roots in the legal systems of the different EU member states. Some academics have already approached the AFSJ "as part of the constitutional authority of the EU", (Gibbs 2011, p.83), although Gibb's argument, writing in 2011, is that "there is a "precarious" balance

"between an instrumental and a constitutional understanding of the public goods of freedom, security and justice", (Gibbs 2011, p.61). In the context of the AFSJ, Howard Gibbs has stated that constitutionalism sets "the challenge to consider … relational ways of living as a political community" rather than "seeking a stable, or fixed, definition of constitutionalism", (Gibbs 2011, p.xiv). This is clearly a challenge for the developing EU, particularly in the context of the AFSJ, to include its external relations, many of whose themes go to the core of political life, and the construction of the societies of the EU's member states.

B. The EU's legal capacity to act

A legal analysis of the EU's capacity to act in external AFSJ provisions is necessary, before examining how exactly the EU should act in this area. At first glance external relations of the EU would appear to fall within the Common Foreign and Security Policy (CFSP), with any agreements likely to be entered into by the EU in the matters related to the Area of Freedom Security and Justice (AFSJ) being by way of an association agreement provided by Article 217 TFEU. However the CFSP chapter in the TEU provides separately for the Union to conclude agreements with one or more States or international organisations, under Article 37 TEU. More generally, and not restricted to the CFSP chapter of the TEU, Article 8 TEU provides that the EU will maintain "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".

Article 8 TEU implies “a separate kind of status for neighbouring States, rather than merely a field of external action,” (Cremona 2008, p.50). Academics are asking whether these “agreements with the neighbours” are to be “seen as part of Union foreign policy or as something different,” (Dashwood and Maresceau 2008, p.50). Equally it could be asked if the concept of “neighbours” only applies to participants in the ENP, or whether it also extends to our neighbours when they participate in the EuroMed policy. One argument being made for treating the “neighbours” differently is that it enhances “the ability of the Union to fine-tune its relationships with key groups of third countries,” (Dashwood and Maresceau 2008, p.50). However, as Cremona points out, “this is outweighed by the lack of clarity as to what exactly the differences entail,” which is added to by the increasing variety of potential legal bases for enactment of EU laws and negotiation of external agreements, which can now “be found in different places in the Treaties,” (Cremona 2008, p.50). It is arguable that agreements with the neighbours could be closer than those provided for by the CFSP, and the Article 37 TEU provisions. In addition non-CFSP chapter agreements, or even agreements which develop further on an association agreement provided by Article 217 TFEU could be provided for under Article 8 TEU. A ruling from the CJEU is however required to bring clarity to this issue. Article 24 TEU is clear that the CFSP will “cover all areas of foreign policy”, so would include Article 8 TEU relationships, however it might be argued that Article 8 TEU relationships are a sub-set, but more developed type of relationship, which may involve more detailed and advanced provisions than would be typical under association agreements under Article 217 TFEU.

Looking outward from the EU, academics find that the EU's substantive external relations "are often difficult to place in [a] precise and accurate legal framework," (Dashwood and Maresceau 2008, p.6). There is a lack of an explicit reference in the new legal framework to the external relations of the AFSJ, which Cremona points out, is "surprising", and "might have been expected given its importance" (Cremona 2008, p.49). Article 21 TEU deals with the general provisions in the Union's external action. However, a reading of Article 21 TEU itself will not assist in deciding the legal base for an external action, leading "to a greater emphasis on the content of a measure," (Dashwood and Maresceau 2008). Particularly problematic are those "relations that have been developed with countries in the EU's proximity," (Dashwood and Maresceau 2008, p.6), such as the EU's relations with North Africa. It is necessary, therefore, to examine recent case law in external relations generally, in order to extrapolate a hypothesis which could be used in the context of the legal relationships related to the AFSJ with our immediate neighbours.

The issue of the CJEU's jurisdiction in the context of the CFSP was recently revisited in the Case C-658/11 *European Parliament* v. *Council* (re Mauritius agreement), with the Court pointing out that "in principle" it did not have jurisdiction relating to the CFSP "or with respect to acts adopted on the basis of those provisions" (Judgment: paragraph 69). However, in cases where agreements are adopted on the basis of a CFSP provision, such as Article 37 TEU, in the case of Mauritius, but that the procedural legal basis was based on Article 218 TFEU (Judgment: paragraph 71), the CJEU had a role in ensuring "the interpretation and application of the Treaties and the law is observed" (Judgment: paragraph 70). Separately, Article 40 TEU provides that the CFSP "shall not affect the application of the procedures and extent of the

powers of the institutions" under the TFEU, and the TFEU provisions shall not affect the operation of the CFSP, leading Cremona to discuss the "Chinese wall" which has now been erected between the CFSP and the other Union policies, both "internal and external", with the intention of protecting "both sides" (Cremona 2008, p.45). In establishing the legal basis for Euro-Med agreements, it is important to note that Euro-Med agreements cover a number of different policy areas, such as trade and security. The legal balance in these "cross-pillar" agreements has now shifted, with the pre-Lisbon preference for the first pillar the EC under Article 47 EU, (Case C-91/05; *Commission* v *Council* (re SALW), paragraph 29) now being more of an even balance between the EU and the CFSP, under Article 40 TEU.

The external development of the AFSJ is dependent on the internal provisions and the competence of the EU to operate in this area, under the pre-Lisbon doctrine of implied parallel powers for the then EC. There have been lengthy legal academic debates on the exact legal relationship between the EU, or its predecessor, the EC, and its own member states, (Craig 2004, p.330). Writing during the drafting of the failed EU Constitution, Craig pointed out that what is now the EU only has attributed competence, namely that "it can only operate within the powers granted to it by the Member States", (Craig 2004, p.324). This provision is provided for, post Lisbon, in Article 4.1 TEU, which expressly states that "competences not conferred upon the Union in the Treaties remain with the Member States." Article 5 TEU goes on to elaborate the principle of conferral, stating at Article 5.2 that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." This is an important point in

the context of this paper, as there have been clear examples of excluding "certain fields of action from Union competence" which has been "particularly prevalent in the field of security", (Mitsilegas 2010, 461).Those Area of Freedom, Security and Justice competences which have been transferred to the EU are subject to the principles of subsidiarity and proportionality (Article 5.1 TFEU) as the AFSJ is an area of shared competence between the EU and the member states (Article 4.2j TFEU). Subsidiarity is governed by Article 5.3 TEU, which provides that the

> "Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

National parliaments, post Lisbon, have a role in defending this principle of subsidiarity, (Protocol no. 2, Article 6).

In the context of ex. PJCCM provisions, the subject matter of this paper, Article 4.2 TEU which provides that Union will respect member's "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." This is reinforced by Article 72 TFEU which provides that the EU

> "will not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

This writer would argue that the Article 72 TFEU restrictions on interfering in the internal maintenance of law and order and the safeguarding of internal security of an EU member state will also limit the impact that EU external AFSJ provisions vis à vis the maintenance of law and order and the safeguarding of the internal security of a third country. Equally relations with third countries could not indirectly affect the internal security of any or even all of the EU member states. Internal security in this context is understood to mean standard law enforcement functions.

Also Article 73 TFEU provides that it is "open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate" to deal with issues of national security. While a facility is available for the sharing of intelligence, through IntCen, which has replaced SitCen, it was "meant to produce intelligence that no national agency is willing to produce", (den Boer 2011, p.359). IntCen is answerable to the External Action Service, with the intelligence being processed being "far more external and strategic dimension in its intelligence-gathering efforts than, for instance, Europol," (den Boer 2011, p.359). There is also not a requirement on national intelligence services, where they exist, and they do not exist in all EU member states, to use this facility. In addition intelligence produced as this level is provided for "EU decision makers

at strategic" rather than the operational level, (den Boer 2011, p.359). Staffing of SitCen was reported by den Boer as being predominantly military, with some police. National intelligence operatives were not staffing SitCen. Engagement at this level for national intelligence services, under EU law, is voluntary. Military intelligence services, which are often separate from national security services, are more likely to be involved at this EU level, within the intergovernmental CFSP legal framework. In engaging with North African countries in the context of, say counter-terrorism, drugs trafficking or organised crime, national law enforcement services, or Europol will have to conduct their own operational focused intelligence analyses.

There is also a debate as to the exact meaning of "internal security" and "national security". Different countries will see their security threats differently, and will react differently if they think the threat is one of, for example, organised crime, foreign espionage, or a military threat. As stated by Mitsilegas, "the Treaty refers to national security and internal security, viewed primarily from a national perspective," (Mitsilegas 2010, p.461). Mitsilegas refers to the UK approach which sees the two terms as being distinct, with internal security being a matter of traditional law enforcement activities, and illegal immigration. He speculates that national security would cover "military and/or intelligence action," and goes on to call for clarification of these issues now that the Lisbon Treaty is in force, (Mitsilegas 2010, p.461). It is possible that this clarification will not be forthcoming, as different countries will view different threats in different ways, with these views changing to meet evolving and developing threats.

The issue of which legal basis to be used by the EU in developing its external aspects of the AFSJ, as opposed to exclusively or predominantly provisions based on the CFSP need to be examined. Different treaty provisions allow for different external activities, and prescribe different internal institutional procedures. As stated by the Court in Case C-130/10; *European Parliament* v. *Council* (*Kadi*), (paragraph 80), "it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure". This sentiment has often been repeated in CJEU cases. In addition, AG Bot, in his opinion in *Kadi* (Opinion, paragraph 56), "The choice of the legal basis or a European Union measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure".

In the first of three recent cases on external competence of the EU, post Lisbon, the *Kadi* case pointed out, at paragraph 27 of the ruling, that Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, and Protocol (No 22) on the position of Denmark further complicates the issue of competence in respect of the external relations of the EU in the AFSJ, requiring the UK, Ireland and Denmark to expressly opt in to any provisions in order to be bound by that provision. The *Kadi* case legal argument revolved around the choice of either Article 75 TFEU or Article 215 TFEU in the limited context of financial sanctions against an individual in a counter-terrorism financing case. The CJEU ruled (paragraph 64) that Article 43(1) TEU "makes it clear that all the tasks covered by the common security and defence policy 'may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories'". Equally the EU has competence to act in external AFSJ

provisions more generally, with policing and justice provisions featuring in Case C-658/11; *European Parliament* v. *Council* (re Mauritius agreement) and repatriation of illegal immigrants featuring in Case C-377/12; *Commission* v. *Council* (re Philippines agreement), in light of the provisions of Article 21.2 TEU which provides that the EU "shall work for a high degree of cooperation in all fields of international relations in order to" *inter alia*, "safeguard its values, fundamental interests, security, independence and integrity". The focus therefore would appear to be narrower in the context of the AFSJ, generally requiring the protection of the EU's interests, while safeguarding third countries' interests in the context of counter-terrorism is permitted under CJEU ruling in *Kadi*, above. Given that the EU is required to balance security with freedom and justice in the AFSJ, it is worth noting that the CJEU in *Kadi* (paragraph 83) stated that "it is to be noted that the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union." The two articles in question in that case, (Judgment: paragraph 83) Article 75 TFEU and Article 215(3) TFEU, both included "necessary provisions on legal safeguards."

The *Kadi* case addressed the legal basis of measures imposing financial sanctions against Kadi in a counter-terrorism context. While Article 215 TFEU expressly refers to "financial relations with one or more countries" and Article 75 TFEU referred to "financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities", this point was ignored in the final ruling. Rather the fact that Kadi was placed on a UN list, pursuant to Security Council Resolution 1390/2002, which was followed by the EU by Common Position 2002/402 on behalf of the CFSP, and then Regulation 881/2002 was the key point.

The internal measures against Kadi were taken as a result of external CFSP commitments to the UN Security Council. As the procedures under Article 75 TFEU and Article 215 TFEU are different, with Article 75 TFEU requiring the involvement of both the European Parliament and the Council, and Article 215 TFEU being the Council only, acting by a qualified majority voting procedure, then, following Case C-300/89; *Commission* v. *Council* (Titanium dioxide), "recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other", (Judgment: paragraph 45). A choice therefore had to be made between these two articles, with the Court stating that "restrictive measures relating to terrorism….must be adopted under the FEU Treaty following a CFSP decision further to a Security Council Resolution, Article 215 TFEU is the only possible legal basis". (Judgment: paragraph 27).

The Philippines case was the first of two 2014 rulings to emerge from the CJEU, with the Mauritius ruling following within the same month. The Philippines case involved a conflict between the Common Commercial Policy (Article 207 TFEU) and the Development Policy, (Article 209 TFEU). The CJEU held in the Philippines case (Judgment: paragraph 34) that if a measure had a "twofold purpose," with one dominant and other subservient, then the measures can be "founded on a single legal basis, namely, that required by the main or predominant purpose or component". However, if the two measures "are inseparably linked" and of equal weight, then "the measure must be founded on the various corresponding legal basis." However, if the two legal bases "are incompatible with each other", "then recourse of a dual legal basis is not possible" (*Kadi* judgment: paragraph 45).

This is an important issue in the context of the AFSJ, as internally, judicial co-operation in criminal matters, under Article 82 TFEU uses the ordinary legislative procedure, involving both the Council and the European Parliament. However this procedure can be suspended under Article 82.3 if an EU member states is of the view that the draft directive "would affect fundamental aspects of its criminal justice system" with the matter being referred to the European Council for resolution. The matter can then be referred back by the European Council for completion following the ordinary legislative procedure, or the matter could proceed following measures for enhanced cooperation if at least nine member states still want to proceed. Article 86 TFEU, however, deploys the special legislative procedure for the establishment of the European Public Prosecutors Office, a matter which is unlikely to affect the external relations of the EU in the AFSJ. The ordinary legislative procedure is also dominant for police cooperation under Article 87 TFEU. However, in an area which is likely to affect the external aspects of the AFSJ, operational cooperation between authorities is to be established by the Council, acting unanimously, after consulting the European Parliament, under Article 87.3 TFEU. The special legislative procedure, with the Council acting unanimously, after consulting the European Parliament, appears again in Article 89 TFEU, when judicial staff (Article 82 TFEU), or police, to include "customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences" (Article 87 TFEU) are operating "in the territory of another Member State in liaison and in agreement with the authorities of that State". The possibilities for dual legal basis for even a specialised external AFSJ agreement, not including development co-operation, focusing just on police and judicial cooperation, therefore reduce quite considerably. Specialised external agreements, relying on just one treaty basis, will have to be entered into.

The Philippines case went on to say (Judgment: paragraph 44), that "even if a measure contributes to the economic and social development of developing countries, it does not fall within development cooperation policy [which can be legislated for under Article 209 TFEU] "if it has as its main purpose the implementation of another policy" such as the AFSJ. In this particular case the CJEU held that (paragraph 59), the "provisions… relating to readmission of nationals" etc. did "not contain obligations so extensive" that they were considered even as secondary or indirectly related to the main purposes of the agreement. There was a reference to readmission of nationals, but no detail as to how this was to be done. A follow up agreement was required to put this provision into effect (Judgment: paragraph 58). This author would argue that such a subsequent, specialised agreement might well be entered into pursuant to Article 8 TEU, if that article is to be given any specific significance within the post-Lisbon treaty framework.

Of the three recent cases, Case C-658/11; *European Parliament* v. *Council* (re Mauritius agreement) had the most substantive AFSJ related measures. This, in addition to the usual development cooperation provisions, also had justice, policing and EUNAVFOR related provisions. The CJEU referred expressly, (Judgment: paragraph 52), to Article 218 TFEU, which is to be seen as providing the "single procedure of general application" with provisions on both the negotiation and conclusion of agreements "which the European Union is competent to conclude in the fields of its activity, including the CFSP, expect where the Treaties lay down special procedures". As stated in the Mauritius case (Judgment: paragraph 72), "Article 218 TFEU is of general application" and is "intended to apply … to all international

agreements negotiated and concluded by the European Union is all fields of activity, including the CFSP, which, unlike other fields, is not subject to any special procedure". Special procedures are provided in the treaties for the Common Commercial Policy (Article 207 TFEU), Development Policy (Article 208 TFEU) and Economic, Financial and Technical Cooperation with third countries (Article 212 TFEU).

Important here is that the EU has competence to act in certain areas of the AFSJ, and within certain constraints, as referred to earlier. As pointed out by the CJEU, Article 218 TFEU provides for three types of procedures, with the CJEU in the Mauritius case stating (Judgment: paragraph 55), "that distinction is designed to reflect externally the division of powers between institutions that applies internally." Either the measure is exclusively or principally a common foreign and security policy measure, which an detailed AFSJ measure would not be, or the Council will adopt the measure after obtaining the consent of the European Parliament, for specific types of agreements, (Article 218.6.a TFEU). These include association agreements under Article 217 TFEU. These could cover measures which internal to the EU would use the ordinary legislative procedure. It would be possible to also have a general reference to measures which would need a special legislative procedure, as in the Philippines case, but the more detailed provisions would have to be in a later agreement, which would have to respect the special legislative procedure. That later, more detailed AFSJ agreement would need to follow the third option in Article 218.6.b. with the Council operating "after consulting the European Parliament". It is to be noted that the Article 218.6.b. option would normally have the Council acting by a qualified majority (Article 218.8.) however the provision itself provides that the

Council “shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act”. The issue of the possibility of having to refer a matter to the European Council to be resolved is not covered, leading this writer to recommend that any problematic external provisions should first have been legislated for internally. In addition the UK, Irish and Danish opt out provisions under their various AFSJ protocols would have to be addressed in the context of related external AFSJ provisions. The internal shared competences, subsidiarity and treaty limitations on the AFSJ would also have to be reflected in any external provisions with third countries or organisations.

C. Security strategies

The Strategy for the External Dimension of JHA, for its part, speaks of an increasingly interconnected world, with the need for the EU to make JHA issues a central priority in its dealing with third countries (paragraph 1). It speaks of the need to “respond to the security threats of terrorism, organised crime, corruption and drugs and to the challenge of managing migration flows”. This needs to be done in the context of “strengthening the rule of law, and promoting the respect for human rights and international obligations” (paragraph 1). The external JHA strategy does say that JHA issues are not “dealt with as consistently as they might be” (paragraph 13).

While the various UN treaties on organised crime, drug trafficking, and the protocol to the Palermo Convention on human trafficking would provide a shared

understanding of these crimes with North African states, there is no such UN treaty on terrorism. The EU's definition on terrorism, set out in Council Framework Decision 2002/475/JHA, would have to be used in external relations of the EU with regard to any external counter-terrorism activity. Its reception as a definition will have to be examined in the North African jurisdictions. The EU hopes that the Mediterranean countries will adopt and implement laws in line with the Euro-Mediterranean Code of Conduct on Countering Terrorism 2005. This was drafted by British diplomats after the Council of Ministers of Justice of the Arab League drafted a Convention on Terrorism in 1998 which was internationally criticized due to the vagueness of their definitions. This code defines terrorism as a common threat for EuroMed citizens, (Wolff 2010, p.145). The code requires members to "exchange information on a voluntary basis on terrorists and their support networks", requiring members to work bilaterally to develop effective and operational co-operation, (EEAS 2005, p.1). Denying a safe haven for terrorists and refusing them asylum is required, as is the sharing of best practices and expertise, to include technical assistance, (EEAS 2005). Regional commercial agreements, such as the Agidir Agreement 2001 are testament to the fact that the North African countries are more than capable of making their own arrangements in their own geographic space, independent of both the EU and the EU's other ENP/ Euro-Med partners, if necessary. The Euro-Med code of conduct emphasises the need to, *inter alia*, promote good governance and human rights, and to promote respect for all religions and intercultural understanding, (EEAS 2005, p.2). There are a number of minority groups in the North African countries which would benefit from the adoption of these principles. These statements are also in line of the EU's own anti-radicalisation programmes (Commission 2005). The code expressly

states that its members will "reject any attempts to associate terrorism with any nation, culture or religion," (EEAS 2005, p.2).

In addition to relations with the EU, it is worth noting that many North African states still maintain close historical ties with individual EU member states. In particular "France has historically maintained close relations with the intelligence services of North African countries," (Wolff 2010, p.148) with the Madrid bombing in 2004 leading to an increase in Spanish-Moroccan cooperation, (Wolff 2010, p.149). It would be expected that these bi-lateral relations would continue. Post the Arab Spring, there is a potential for regional understandings, and cooperation to develop, in particular in North Africa, to the mutual benefit of all in the region.

D. Relations with the North African countries

In examining the development of the external dimension of the AFSJ using the constructivism and constitutional perspectives, it is important to note that various North African countries have requested that the EU focus on the issue of drugs trafficking. Commentators have been asking if the EU "has the leverage" to "incite these countries to cooperate on controversial issues", (Lavenex 2011, p.120). A shared interest in tackling a particular crime area, will lead to "strong incentives for adaptation" (Lavenex 2011, p.122) in the absence of the traditional carrot of EU membership. In contrast with Lavenex, this author would argue that the JHA *acquis* covers both "the rule of law and respect for human rights," (Lavenex 2011, p.123),

with the CJEU in *Kadi* (paragraph 83) (as referred to above) stating that "it is to be noted that the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union." The development of a multi-layered practitioner and policy maker's framework through "networked governance", while developing any new area of operation, using Onuf style constructivism, all parties still have to operate within their own legal frameworks, to include, for example, those binding individual drug trafficking officers which operate within informal drugs trafficking networks, and the laws which bind EU's own agencies, Europol and Frontex. An EU based drugs trafficking officer will have little interest in a transnational law enforcement operation involving drugs and organised crime if a safe conviction is not obtainable in some EU member state. Equally he or she is prescribed by relevant practice manuals as to how to operate, either within a particular EU policing framework or legal jurisdiction, or when acting on behalf of an EU agency. Equally, the opening of negotiations will have to be approved through legal provisions at EU - North African state level, which should set out the parameters for the negotiations, and any finalised agreements would have to be similarly concluded. These are all opportunities to ensure that there is a proper balance maintained between security and freedom and justice provisions. These approaches and the underlying legal and operational frameworks will inform an Onuf style constructivism in relevant "networked governance" arrangements. As Lavenex has said herself "trust is unlikely to grow if the basic institutional preconditions guaranteeing the respect for common values are not in place," (Lavenex 2011, p.122). Nevertheless, Cardwell's observation that "constructivists claim that social realities only exist by human agreement through intersubjective understanding, and are therefore susceptible to change," (Cardwell

2009, p.75), needs to be avoided when it comes to EU due process and fundamental rights, when engaging with third countries, or any attempt to forum shop, with the preference being to operate or litigate in a jurisdiction merely because it has lower fundamental or due process standards. The traditional constructivist approach to the development of EU law enforcement and security strategies is now encountering, within the EU, an increasing constitutionalisation of the EU legal framework, highlighting significant legal tensions. As Nuotio has pointed out, criminal law, "is replete with values and ideologies, which are had to avoid wherever and however the field is addressed," (Nuotio 2011, p.332). These values and ideologies are not yet fixed at the EU level, even before we consider the EU's legal relationships with third countries, with the basic principles of the EU, set out in particular in the EU Charter, but also in the ECHR and the shared constitutional traditions of the EU member state, still needing to be robustly built into the EU AFSJ legal framework.

None of the North African states have either operational or strategic agreements with Europol, although successful cross-border law enforcement operations have been conducted. Europol was authorised to open negotiations with Morocco as far back as 2000, (Council Decision of 27 March 2000), none of the other North African countries having got that far. However no agreement, either strategic or operational, has so far been signed with either Morocco, or any other county in North Africa. The Europol Review 2011 does refer to the launching of an online platform for experts on "North Africa and Middle East Uprising" (page 24). The European Judicial Network-crime (EJN) seems to be maintaining a broader range of network contacts than either Europol or Eurojust, maintaining networks with both the Platform

of Judicial cooperation from the Sahel Countries, which includes Mauritania,[3] the Moroccan network of international judicial cooperation, which deals with both civil and criminal matters, and the EuroMed Justice III project. This is all part of a general global trend to develop regional judicial networks in order to combat serious transnational crime, the fruits of which still have to be established.

The EuroMed Justice III project, which is running from 2011-2014, is focusing on supporting the development of the partners' capacity and backing the modernisation of justice, including an improved access to justice. The EuroMed Police III, also running from 2011 to 2014,[4] is focusing on enhanced cooperation on counter-terrorism, THB, money laundering, drug trafficking, financial crimes, weapons trafficking, to include CBRN,[5] cyber-crime and new forms of criminal offences. The general political framework seems now to be sufficiently in place to lead to greater law enforcement practitioner engagement with most of the North African countries, with the first conference of the General Directors of Police and Security forces of EU and ENPI South countries held in Madrid (Spain) on the 11 July 2012, on the topic of "Fight against Drug-Trafficking and Money-Laundering", with all of the beneficiaries, with the exception of Tunisia, sending delegates to the meeting. Europol, Interpol and CEPOL were also present as were delegations form 20 of the EU's 27 member states.

[3] Documents for which are available on the UNDOC web site, under legal tools - international cooperation networks.
[4] The beneficiaries of Euromed Police III are the People's Democratic Republic of Algeria, the Arab Republic of Egypt, Israel, the Kingdom of Jordan, Lebanon, (suspended, the Syrian Arab Republic), the Kingdom of Morocco, the Palestinian Authority and the Republic of Tunisia.
[5] Chemical, Biological, Nuclear and Radiological attack.

One example of interesting developments in the area of both police and judicial cooperation is with Tunisia. In addition to participating in EuroMed II-Police, the Tunisian Ministry of Interior has been working with the International Organisation for Francophones, to obtain French experts for the training of police, to deal with the elections and to secure tourist areas, (Commission 2012). It is therefore reasonable to expect that this Tunisian-French cooperation will develop further in the future. In the area of criminal justice, the EU issued a list of recommendations in June 2011, in order to improve judicial cooperation to include Tunisia joining the CoE Convention on the Transfer of Sentenced Persons, of convention of 1983 (Commission 2012, p.12). The report anticipates the development of an action programme which is being developed by the EU in conjunction with the Tunisian authorities. A cooperation unit has been set up between Tunisia, Eurojust and 8 EU member states, to deal with the recovery of assets transferred abroad by the Ben Ali family. Further work, in conjunction with the World Bank, is anticipated in the recovery of the Ben Ali frozen assets, (Commission 2012, p.13).

Regional cross border law enforcement initiatives, outside Interpol, are less common. However in the EU's external neighbourhood, both the South East European Law Enforcement Centre (SELEC)[6] and the Central Asian Regional

[6] Whose membership comprises Albania, Bosnia & Herzegovina, Bulgaria, Croatia, Greece, Hungary, FRY Macedonia, Moldova, Montenegro, Romania, Serbia, Slovenia and Turkey.

Information and Coordination Centre (CARICC),[7] in Kazakhstan, provide models for possible developments in North Africa.[8]

E. Conclusions

There is clearly a drive to develop external AFSJ relations with North African countries for operational reasons. If this process is to develop it is necessary to pin down exactly where the competences for these developments are provided for in the EU treaties, and to what extent the EU is actually vested with competence to act vis à vis its legal relationships with its own member states. Some clarity on these points are beginning to emerge with recent CJEU case law. In addition, it is necessary to develop the correct methodological approach to the development of these relationships if they are to be effective, not just from a law enforcement practitioner perspective, but also from a law and justice perspective. It is for this reason that a multi-layered law enforcement practitioner led "networked governance" model, which appears to correctly reflect what is actually happening on the ground, but embedded in the legal and justice frameworks of the EU and its member states represent the best approach for progress. This author would argue that adopting an Onuf style constructivism, allied to a constitutionalisation approach would provide the most effective analytical framework, both for understanding the processes in play, and

[7] Whose membership comprises Azerbaijan, Kazakhstan, Kyrgyz Republic, Russian Federation, Tajikistan, Turkmenistan and Uzbekistan.
[8] For a further discussion on the SELEC and CARICC and their relationships with the EU see O'Neill 2013.

ensuring that the final result of these developments are acceptable within the EU legal and justice framework.

Given that the traditional carrot for the adoption of the EU *acquis*, membership of the EU is not on offer to the North African states, developments are much more likely in areas of direct interest to the North African states, namely drug trafficking, where openness to EU operational standards and norms is much more likely. Even within the EU drugs trafficking was the first developed, with Europol originally called the European Drugs Unit. As the level of trust and mutual understanding developed in the EU, member states were prepared to develop into other areas. It was only post 9/11 that the EU member states themselves were prepared to countenance any cross border cooperation in the area of counter-terrorism. It is to be presumed that effective cooperation with and between North African states will follow along the same path. There is a need for the North African countries to see tangible benefits arising in their relationship with the EU.

This author is of the view that aiming to effectively cooperate in the area of counter-terrorism, in particular cross border law enforcement operations, a subject matter in which the EU itself has limited capacity vis à vis its own member states, before a level of trust and understanding has developed in areas such as drugs trafficking, is, in the view of this author, approaching the problem from the wrong direction. It is to be hoped that traditional bi-lateral relationships between individual North African states, and individual EU member states will address any cross border counter-terrorism issues that will arise in practice in the meantime. The Spanish Minister of the Interior is already talking about facilitating "the development of

multidisciplinary investigation teams with third States," (Rubalcaba 2011, p.19). Tackling the transnational drug trafficking route from North Africa into Spain would be an interesting first cross-border law enforcement project. The correct legal framework and methodological approach needs to be in place in order to ensure that these opportunities are properly developed, for the benefit of EU internal security, and the AFSJ in general, as well as for the benefit of the relevant North African state.

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